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# CASES

ON

# THE LAW OF CONTRACTS

BY

GEORGE P. COSTIGAN, Jr.

[Professor of Law in Northwestern University

CHICAGO

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1921

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# PREFACE

Textbooks on contracts are many and voluminous and cover a wide field, while casebooks are relatively few and in scope must be kept well within old and rather narrow lines. In this casebook the general topics treated are shown by the chapter headings, which are of the simplest kind, and, as far as is possible, intentionally avoid controversial problems of terminology and classification. In one section heading, however, the traditional but inaccurate phrase "Impossibility of Performance" is used as still preferable to "Frustration" or "Hardship" or some other new word or phrase. The topics treated are those which American teachers of the subject have been accustomed to consider essential to the course on contracts.

It will be noted that in this casebook sealed contracts are dealt with first. That is historically the proper procedure and it is believed that it is so pedagogically. The material is relatively small and there seems to be no reason why the curiosity of students about sealed contracts should not be satisfied at the start. On the other hand, the statute of frauds cases are much better dealt with after the subject of conditions has been covered, and preferably after illegal contracts have been discussed, so in this collection they appear just before the cases on the discharge of contracts. For convenience in teaching, the statute of frauds cases could just as well have been placed after those on the discharge of contracts, but as they could also come just as well before the latter, the logical arrangement of the book prevailed. The material is believed, however, to be so arranged that teachers who prefer a different order of topics may readily change the order in the assignment of lessons.

An effort has been made to supply in each chapter an orderly development of topics. Except in Chapter VII, section headings have been omitted both because they aid the student undesirably and narrow too much his interest in a given case and because they tend to compel the placing of some cases at points inimical to the natural development of topics. At the end of the volume, however, an index is furnished to enable ready reference to particular contents.

Emphasis is laid in this casebook on the historical side of the subject, even though more than two-thirds of the principal cases are American. As an aid in the development of the history of contracts, a few important quoted passages on historical points are furnished from the writings of leading legal scholars. The quotations do not appear in an appendix,

but are in the text at logically appropriate places. They are put there with no expectation that they will be assigned for class discussion and, occasionally, with no expectation that the student, when he first comes across them in their logically proper places, will be able to understand them, but in the hope that the student will get enough out of them on his first encounter to arouse his interest and curiosity to a point which will lead to his ultimate mastery of them and to his further acquaintance with the works of the writers quoted. Buried in an appendix, the passages quoted would be more likely to be slighted.

Throughout the preparation of this casebook the fact that it is primarily an aid to the acquisition by students of a reasonable amount of knowledge about the law of contracts and of power in dealing with its problems has been kept in mind. It is a teaching medium, and not a textbook disguised as a casebook. The footnotes were planned, therefore, to furnish supplementary source material and problems for class discussion, as well as to give information to students as to the state of the authorities, and supply them with references to law magazine articles and monographic notes. It is assumed that Williston on Contracts and the new edition of Page on Contracts will be consulted for the detailed authorities on any point. A table of magazine articles referred to by the editor is supplied just following the table of cases.

In conclusion the editor wishes to acknowledge the courtesy of the West Publishing Co. in placing at his service its Reporter System cases, and to thank all others who have facilitated the accomplishment of his plans for the book.

Northwestern University,
June 1, 1921.

GEORGE P. COSTIGAN, JR.

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# CASES ON THE LAW OF CONTRACTS

## HISTORICAL INTRODUCTION.

### THE HISTORY OF CONTRACTS IN ENGLISH LAW.

Edward Jenks, *A Short History of English Law*, pp. 132-140.[1] It has previously been pointed out in this book, in more than one passage, that one of the most striking lessons to be learned from a study of legal history is, that ideas which to us now seem absolutely distinct, and even opposed, are found originally to have been blended in a common stock, from which they have subsequently split off by a process of specialization. No better example of this truth could be found than in the history of Contract and Tort. To us, these two institutions seem wholly distinct; separate books are written about them, and Acts of Parliament treat them as mutually exclusive. We regard an action of Contract as an action to prevent or compensate for a breach of a promise; an action of Tort as an action to punish or compensate for a wrong, such as assault or defamation, which has not any necessary connection with a promise. An ordinary defense to an action of Contract is, in effect: "I did not promise." What should we think if a defendant in an action for libel defended himself on the ground that he had not promised not to libel the plaintiff? It is true that, occasionally, a case arises which causes some difficulty;[2] and it would hardly be possible to throw a more effective apple of discord into a company of lawyers, than by starting a discussion on the question whether Detinue was an action of Contract or of Tort. But we are apt to regard these difficulties as inseparable from any legal classification; whereas a little knowledge of history would enable us to trace them to their true source. As a matter of historical

[1] Appreciation is expressed of the courtesy of the author of this passage and of Little, Brown & Co., in permitting so extended a quotation to be inserted here. The footnotes to the passage are those of the author quoted.

On the history of contracts in the common law see Pollock on Contracts, 8 ed., pp. 140-153; Holdsworth's History of English Law, Vol. III, pp. 329-349; Street's Foundations of Legal Liability, Vol. II, pp. 1-57.

See also James Barr Ames, History of Parol Contracts Prior to Assumpsit, 8 H. L. R. 252, Essays in Anglo-American Legal History, Vol. III, p. 204, Lectures on Legal History, pp. 122-128; James Barr Ames, History of Assumpsit, 2 H. L. R. 1, 53, Essays in Anglo-American Legal History, Vol. III, p. 259, Lectures on Legal History, pp. 129-171; John W. Salmond, History of Contract, Essays in Anglo-American Legal History, Vol. III, p. 320.

[2] E. g. Bryant v. Herbert (1878) 3 C. P. D. 389; Du Pasquier v. Cadbury, [1903] 1 K. B. 104.

fact, the simple contract and the ordinary tort spring from the same stock; and the wonder would be if they did not, in some points, betray signs of their common origin.

We have seen that, in the previous period, [1066-1272], the only remedy of a general nature for anything like what we understand by a contract, was the Action of Debt.[3] This action was, at first, in truth, an action to recover a specific object; usually a movable, because actions to recover land were conducted by other and more elaborate machinery. By Bracton's time, as we have seen, it had specialized into two forms, the Writ of Debt, strictly, in which a fixed sum of money was sought to be recovered, and the Writ of Detinue, in which a specific chattel was the object pursued.

In the period we are now discussing, [1272-1660], the Writ of Debt speedily lost its original character as an action to recover money lent or bailed, and was applicable to any case in which the plaintiff sought to recover a fixed sum of money, due to him on grounds which the law considered to be adequate. Thus, for example, if a tenant failed to pay his rent (though he had not expressly covenanted to do so),[4] if a sheriff[5] or the Warden of the Fleet,[6] allowed a debtor to escape, if a sum was found due from a debtor on account stated,[7] all these were liable to an Action of Debt. In some cases, e. g. the case of rent, there had, no doubt, been something very like a contract; where the action of Debt was brought on a bond, we should consider it strictly contractual. Still, the old rule of Glanville, that in an Action for Debt the King's Courts would not enforce a mere "private agreement," held good throughout the whole history of the Action of Debt; and so that action can only be held to have contributed in a very minor degree to the development of the law of Contract. Moreover, it rapidly became unpopular in this period, owing to the fact that unless the plaintiff could show exceptionally good proof of his claim, e. g., a sealed charter, the defendant could get off by "waging his law." It was, therefore, in spite of the provisions of the Statute of Westminster the Second,[8] very unsuitable for use against executors; and in fact, it could not be brought against them in cases in which their testator, had he lived, would have been entitled to "wage his law."

The Action of Detinue, as we have said,[9] lay where a specific chattel belonging to the plaintiff was in the hands of the defendant, who refused to give it up. But it behooved the plaintiff to be cautious in stating in what manner he alleged the chattel to have come into the defendant's hands. He had to be careful to avoid "words of felony," i. e., anything that might sound like a charge of theft or robbery; for, if he did not, he laid himself open to being met by the argument that his proper procedure was an "appeal of larceny," upon which he was obliged to offer battle. So it appears to have been the practice in the early Writs of Detinue for the plaintiff to allege (what was, no doubt, in many cases, the strict truth), that he had himself "bailed" or delivered the chattel to the defendant in the first

[3] *Ante*, pp. 56-58.

[4] 8 Anne (1709) c. 14, s. 4. (This statute merely extended the liability to tenant for life. The tenant for years was liable at common law.)

[5] Statute of Westminster II (13 Ed. I, st. I (1285) c. 11).

[6] 1 Ric. II (1377) c. 12. (The sheriff or warden was liable for the sum owed by the debtor.)

[7] 5 Hen. IV (1403) c. 8.

[8] *Ante*, [Edward Jenks, *A Short History of English Law*,] p. 64.

[9] *Ante*, p. 57.

instance. Thus the form of action known as "Detinue *sur bailment*" became the orthodox form; and thus Detinue appeared to be an action founded on contract.[10] For a voluntary delivery or bailment of a chattel, accepted by the defendant, is something very like an agreement, from which a promise to return the chattel can well be implied. Nevertheless, the promise is only implied; and it is very doubtful whether, to the mind of Glanville or Bracton, Detinue was really regarded as a contractual action. In the middle of the fourteenth century,[11] the plaintiff was allowed to substitute for the allegation of bailment the wider allegation that the goods "came to the hands" (*devenerunt ad manus*) of the defendant, without saying how; and thus the Action of Detinue lost whatever contractual character it may once have had. How it acquired its tortious character, we shall see later on. At any rate, there was no possibility of a general theory of contract developing out of the Action of Detinue.

A third possible source of contract at the beginning of the period was the Action of Covenant, about which, unfortunately, we know very little. We have seen[12] that Glanville treats a deed or charter as one of the *causae* or grounds of Debt; and it is very significant that Debt and not Covenant remained the proper form of action on a common money bond until quite late in this period.[13] This curious fact may be accounted for by assuming (as we are warranted in doing) that in early times the sealed bond was looked upon rather as the symbol than as the ground of the debtor's liability; in other words that the debtor was regarded as the object pledged, or bound,[14] the document being given as a security for his return to captivity if he failed to pay the debt. Nevertheless, the language of Glanville, that, if the defendant acknowledges the genuineness of the charter, he is bound to warrant its terms, and to observe the compact expressed in it, points to the fact that, even in the twelfth century, the sealed charter was assuming a wider form than the mere acknowledgment of a debt. Indeed, we know independently that at least two very important transactions, viz. a lease for years and an agreement to levy a Fine, were being made by deed before the end of the thirteenth century. But both these were rather in the nature of "covenants real" than personal contracts; and the remedy for breach of them seems to have been more in the nature of specific performance than a money compensation.[15]

Nevertheless, it is clear that, before the end of the fourteenth century, the writ of Covenant enabled an action to be brought for "unliquidated damages" on breach of any of the terms of a sealed instrument. And this rule has prevailed to the present day; giving us our "specialty" or "formal" contract, which includes any lawful promise made under seal.

By far the greater number of contracts entered into in ordinary life are,

10 This is the view taken by the late Professor Ames, whose brilliant studies of the history of Contract and Tort are reprinted in Select Essays in Anglo-American Legal History, Vol. III, pp. 259-319, 417-445. But the difficulties of trying to build a theory of contract on bailment are well illustrated by the famous case of Coggs v. Bernard (1703), 2 Ld. Raym. 909.

11 Wagworth v. Halyday, Y. B. 29 Edw. III (1355) fo. 38b.

12 *Ante*, p. 66.

13 Thus, in 1584 (Anon. 3 Leon. 119) it was doubted if covenant lay on a specialty promise to pay a fixed sum.

14 The word points to the original physical bondage of the debtor. Early legal history is full of such cases.

15 6 Ed. I (1278) c. 11 (1) "recover by Writ of Covenant."

however, not embodied in sealed documents. They are either contained in ordinary correspondence or mere written memoranda, or they are made solely by word of mouth or conduct. These are all now, by English Law, termed "simple" or "parol" contracts; and our problem is, to discover how they obtained a foot-hold in the common law, despite the attitude of the King's Courts so clearly stated by Glanville. To do this, we must turn aside entirely from the realm of Debt and Covenant, and enter what seems, at first sight, a very unlikely quarter.

Apparently, the inventiveness of the Chancellor and judges in the matter of making new writs had come to an end in the latter half of the thirteenth century. At any rate, there were complaints in Parliament of suitors being turned away empty-handed because there was no writ to suit their cases. Accordingly, the great Statute of Westminster the Second[16] sought to provide a remedy by enacting that "whensoever from henceforth it shall fortune in the Chancery, that in one case a writ is found, and in like case falling under like law, and requiring like remedy, is found none, the Clerks of the Chancery shall agree in making a writ" (and if they don't there is to be an appeal to Parliament).

This enactment, though it appears only at the end of a chapter on special cases, seems to have been taken as a general authority for the expansion of legal remedies; and under it were formed many new writs on the analogy of the older writs found in the Register. These new writs were all grouped together under the name of *"Case"*; apparently from the words used in the Statute of Westminster the Second—*in consimili casu*. Another feature common to them all was, that each was framed on the model of a specific older writ; enlarging its scope by omitting one or more of the technical requirements of the older document.

One of the first, if not the very first model made use of for this purpose was the famous Writ of Trespass, which, as we have seen[17] had been introduced into the Register at the end of the preceding period, and which speedily became very popular. The gist of the Writ of Trespass was an allegation that the defendant had, "with force and arms," (*vi et armis*) and "against the peace of our Lord the King," (*contra pacem domini regis*) interfered with the plaintiff's possession of his body, land, or goods. No doubt at first the "force and arms" were taken seriously; but the writ speedily came to cover every interference with possession, however trifling and accidental. Nevertheless, the Courts held fast to the technical point, that, to amount to a trespass, there must have been interference with the plaintiff's possession by some voluntary act of the defendant, his servants or his cattle.

It speedily came to be perceived, however, that there were many circumstances in which the plaintiff had suffered serious loss by the defendant's action, though the latter had not, technically, been guilty of trespass. Thus, in the middle of the fourteenth century, a Humber ferryman so overloaded his boat, that the plaintiff's horse, which was on board, was drowned.[18] There was no trespass; because the plaintiff had voluntarily parted with the possession of his horse when he put him on the defendant's boat. Similarly, when a smith lamed a horse entrusted to him to be shod,[19] or a leech so

[16] 13 Edw. 1 St. 1 (1275) c. 24 (2).
[17] *Ante*, pp. 52-54.
[18] Y. B. 22 Ass. (1348) 94, Pl. 41.
[19] Y. B. 46 Edw. III (1372) fo. 19, pl. 19.

negligently did his cure, that the horse died,[20] or a surgeon mismanaged the plaintiff's hand which he undertook to cure.[21] In all these cases, though there was no trespass, there was actual *malfeasance* or wrongdoing in respect of a physical object by the defendant, from which the plaintiff suffered loss; and so the analogous action of "Case," or "Trespass on the Case," [22] was allowed. For some time, the action was restricted to cases in which the defendant pursued a "common calling"—i. e. that of a smith, or ferryman, or surgeon, in which he was bound to attend all comers. But, by the middle of the fifteenth century, for the general "holding out" implied in the *assumption* of a common calling, the alternative of a "special assumption," or undertaking might be pleaded. One or the other was necessary.[23] And so we find the allegations: *assumpsit super se, emprist sur lui, manucepit,* and other forms, appearing in the Writs of Case. Now these allegations do not, perhaps, necessarily imply promises; but they are very near it. Perhaps if we say that a man "takes upon himself" to do a thing, we do not necessarily allege that he promises to do it. But what if we say "he undertakes" to do it? The difference is not great. Still, in Trespass on the Case, the stress was laid on the physical damage, rather than on the breach of undertaking.

Half a century after the full recognition of the Trespass class of cases, we find another model followed, viz., the Writ of Deceit. The old Writ of Deceit was very technical; it could, practically, only be used where the defendant had been guilty of trickery in legal proceedings in the King's Courts.[24] But, before the end of the first half of the fifteenth century, we get two cases, at least, in which the plaintiff was allowed to recover, because, although there had been no physical damage to the plaintiff or his goods, he had suffered loss by the deliberate fraud of the defendant in breaking his undertaking. In Somerton's case, three times reported,[25] and so, presumably, regarded as of great interest, the defendant had been employed by the plaintiff to buy a manor, and had persuaded some one else to buy it over the plaintiff's head. In a slightly later case,[26] the defendant had agreed to sell the plaintiff a manor, and subsequently enfeoffed a third person. In each case the plaintiff suffered damage, though not of a physical kind. The second case is called a "Bill of Deceit"; but, as it was brought in the King's Bench, this probably only meant that the fiction of the marshal's custody was employed.[27] Any way, these two cases bring us a step nearer to a law of contract. We may call them the Deceit or *misfeasance* cases.

Lastly, we come to the *non-feasance* group. Here the sole ground of alleged liability is the failure to fulfil a promise; and, when this group is established, we have clearly a law of simple contract. Unfortunately at this stage, another and more obscure question arises.

So early as the year 1424, we find a case which looks very much like one of mere non-feasance. It was an action against a mill-maker for failing to

[20] Y. B. 43 Edw. III (1369) fo. 33, pl. 38.

[21] Y. B. 48 Edw. III (1374) fo. 6, pl. 11.

[22] The proper title is: "Action on the Case in the Nature of Trespass." But the form in the text is the more usual.

[23] Y. B. 19 Hen. VI (1441) fo. 49, pl. 5. Per Paston J.

[24] Fitzherbert, *Natura Brevium*, 95 E.

[25] Y. B. 11 Hen. VI (1433) fo. 18 pl. 10; fo. 24, pl. 1; fo. 55, pl. 26.

[26] Y. B. 20 Hen. VI (1442) fo. 34, pl. 4.

[27] Post, p. 171.

build a mill according to his promise.[28] The action seems to have been allowed, with some hesitation. Professor Ames strongly urges that this and a slightly later case to the same effect[29] were premature freaks, due to the idiosyncrasy of a particular judge, and that it is not till the very end of the sixteenth century, that we get a definite legal recognition of the truth that a man may be just as much harmed by his neighbor's mere non-fulfillment of his promise, as by his active fraud or deceit.[30] But by this time it had been perceived, that to allow an action to be brought for the non-fulfillment of any promise would be to open the door too wide; and accordingly we find, that only those promises were actionable which had been given in return for some recompense received by the promisor, or some detriment suffered by the promisee.

This is the famous doctrine of *"consideration,"* without which no simple contract is valid. How it exactly arose, we do not know. The writer suggests that it is a compound doctrine, of which the positive side (recompense or benefit to the promisor) is a reflection from the original character of the older action of Debt, while the negative side (detriment to the promisee) is merely a slight antedating of the damage which was necessary to support an action of "Case." The action of Debt, as we have seen, was, originally, an action to recover something of the plaintiffs which had been bailed to the defendant (*quid pro quo*). Strictly speaking, the damage to the plaintiff should have been that which he suffered by breach of the defendant's promise; but it is not difficult to see how this requirement could be changed into damage suffered in exchange for the promise. Whatever be the explanation, the doctrine itself was clearly known by the beginning of the sixteenth century; for it was made the basis of an elaborate discussion in the *Dialogues between a Doctor of Divinity and a Student of the Laws of England,* published in 1523, and attributed to St. Germain. The parties are debating the respective merits of the Canon and English Laws; and they come into sharp conflict over the theory of the simple contract. The Doctor wishes to make the enforceability of a contract depend on the occasion on which it was made, and the intention of the promisor.[31] This is the old doctrine of *causae,* with a new touch of casuistry added. The Student maintains the doctrine of English Law; though, oddly enough, he does not, in that place, employ the word "consideration." *Ex nudo pacto non oritur actio,* he alleges, with a triumphant quotation from the Institutes; but then he goes on to explain, that a "nude contract" is one made without any "recompense" appointed for it—an explanation which would have sounded strange to a Roman lawyer. It is the Doctor who uses the word "consideration" in the chapter; and, with him, it obviously means merely "motive" or "object" in which sense it is also adopted by the Student in another passage,[32] when he says that the "consideration" of the Statute of Fines was to ensure the certainty of titles. But the word had become appropriate to the new doctrine by the middle of the sixteenth century, and appears in the Reports shortly afterwards.[33] By that time, it was admitted that the consideration to support a simple

[28] Y. B. 3 Hen. VI (1424) fo. 36, pl. 33.
[29] Y. B. 14 Hen. VI (1435) fo. 18, pl. 58.
[30] Select Essays in Anglo American Legal History, III, 270.
[31] Dialogues II, cap. 25.
[32] Dialogues I, cap. 26.
[33] Jocelyn v. Skelton (1558), Benloe, 57; Gill v. Harewood (1587), 1 Leon. 61.

promise might itself be a promise;[34] and so the purely executory contract became a recognized institution. After that, it was not difficult to clear away the surviving vestiges of its origin, and allow it to appear as a substantive and distinct institution. In 1520,[35] the Court had allowed *Assumpsit* to be brought against executors, in spite of the fact that it was then, in form, clearly an action of Tort; but this decision had been scoffed at by Fitzherbert.[36] In 1557,[37] however, and again in 1611,[38] the Court allowed Assumpsit against executors, and thus removed a substantial grievance; for, as has been pointed out, Debt could not be maintained against them where the deceased could have "waged his law." Finally, it was resolved in Slade's Case,[39] that "every contract executory imports in itself an assumpsit"; and thus the necessity of suing in Debt[40] which let in the "wager of law," was abolished, practically in all cases. This case gave rise to the well-known sub-division of contractual actions into *indebitatus assumpsit* (where the defendant was really liable apart from express promise, e. g. for rent), and *special assumpsit*, where the promise was the true cause of action. Thus freed entirely from its early restrictions, the Action of Assumpsit took its place in the legal armoury as the typical action of contract; though, as we have seen, it was, historically, an action founded on a tort. Thus it became possible, also, to classify personal actions into actions of Contract and actions of Tort.

[34] Peske v. Redman (1555) Dyer, 113. The point was discussed in Wichals v. Johns (1599), Cro. Eliz. 703.

[35] Cleymond v. Vincent, Y. B. 12 Hen. VIII, fo. 11, pl. 3.

[36] Y. B. 27 Hen. VIII (1535) fo. 23, pl. 21.

[37] Norwood v. Read, Plowd. 180.

[38] Pinchon's Case, 9 Rep. 86b.

[39] (1603) 4 Rep. 92b.

[40] This necessity was not merely due to the absence of an express promise, but also to the old theory that a man who had a "higher" remedy, might not resort to a lower.

## CHAPTER I.

### SEALED CONTRACTS.[1]

James Barr Ames, *Lectures on Legal History,* pp. 98-99.[2] When the Germans became familiar with Roman civilization it was natural to put the terms of the agreement into a written document, which was passed to the creditor along with the *wadia* [pledge]; and in time the *wadia* itself was omitted. This document, adding the requirement of a seal to make it formal, is the English covenant.

The earliest covenants we find in the books seem to touch the land.[3] The earliest instance of a covenant not relating to land is of the time of Edward III.[4] The earliest covenants were regarded as grants, and suit could not be brought on the covenant itself. So a covenant to stand seised was a grant, and executed itself. The same is true of a covenant for the payment of money; it was a grant of the money and executed itself. For failure to pay the money, debt would lie.[5] Afterwards an action of covenant was allowed, so that today there is an option.

A seal was always essential. It was considered, formerly, of much greater importance than now. Glanville says that if the defendant admits that a seal upon the instrument is his seal, but denies the execution of the instrument, he is, nevertheless, bound, for he must set it down to his own carelessness that he could not keep his seal. The case supposed would arise where the seal had been lost or stolen. There is a case to this effect in the time of John.[6] The doctrine was somewhat qualified by the time of Bracton.[7] He seems to think that a covenantor would not be liable unless it was by his negligence that the matter occurred, as by leaving the seal in the possession of his bailiff or his wife.[8] In the time of Edward I[9] is a case on the same principle, being a petition to the King that a certain seal that had been lost should no longer have validity. In Riley's Memorial of London[10] it is said that public cry was made that A. had lost his seal and

1 On seals at the common law and by statute, see 3 Bench & Bar (N. S.) 25: Frederick E. Crane, The Magic of the Private Seal, 15 Col. L. Rev. 24; R. C. Backus, The Origin and Use of Private Seals Under The Common Law, 51 Am. L. Rev. 369; Edward H. Decker, The Case of the Sealed Instrument in Illinois, 1 Ill. Law Bull., 65, 138. As to formal contracts which preceded contracts under seal, see Harold D. Hazeltine, The Formal Contract of Early English Law, 10 Col. L. Rev. 608; Robert L. Henry, Jr., Forms of Anglo-Saxon Contracts and Their Sanction, 15 Mich. L. Rev. 552, 639.

2 The notes to this passage are those of the author quoted.

3 Y. B. 20 & 21 Ed. I 494, 496.

4 Y. B. 4 Ed. III, 57, 71; Y. B. 7 Ed. III, 65, 67.

5 Chawner v. Bowes, Godb. 217.

6 Abb. pl. 55, col. 2, R. 4 (8 John).

7 Bract. 396b.

8 This is the doctrine of the well-known case on bills and notes of Young v. Grote.

9 Abb. pl. 284, col. 2 R. 7 (19 Ed. I).

10 Page 45 (29 Ed. I).

that he would no longer be bound by the same. Riley[11] also gives an account of making a new seal for the city of London, and it is stated, as if it was important, that the old seal was broken with due formality. Of course this doctrine has left no trace in modern times.

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John H. Wigmore, *A Treatise on the System of Evidence in Trials at Common Law,* Vol. IV, § 2426, p. 3414. The rise of the seal brings a new era for written documents, not merely by furnishing them with a means of authenticating genuineness, but also by rendering them indisputable as to the terms of the transaction and thus dispensing with the summoning of witnesses. The vogue of the seal and of the transaction-witness wax and wane, the one relatively to the other. This legal value of the seal was the result of a practice working from above downwards, from the King to the people at large. It is involved, in the beginning, with the Germanic principle that the King's word is undisputable. Who gives him the lie, forfeits life. The King's seal to a document makes the truth of the document incontestable. This leads, along another line, to the modern doctrine of the verity of judicial records. * * * For private men's documents, its significance is that the indisputability of a document sealed by the King marked it with an extraordinary quality, much to be sought after. As the habitual use of the seal extends downwards, its valuable attributes go with it. First, a few counts and bishops acquire seals; and then their courtesies are sought in lending the impress and guarantee of their seal to some document of an inferior person, as serving him in future instead of witnesses. Finally the ordinary freeman comes usually to have a seal; and his seal too makes a document indisputable—at least, by himself. This extension of the seal begins in the 1000s, and is completed by the 1200s.

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John Cordy Jeaffreson, *A Book About Lawyers,* (1867 ed.) Vol. I, pp. 21, 23-24. In days when writing was an art almost entirely confined to religious persons, sealing was a far more important and efficacious means of testifying the genuineness of documents than it is at present. * * *

In estimating the security given by seals, the reader must bear in mind that the forger of deeds in older time had not overcome all difficulties, when he had surreptitiously obtained a seal. The mere act of sealing was by no means the simple matter that it is now-a-days. To place the seal on fit labels rightly placed; and in all respects to make the fictitious deed an accurate imitation of the intended deeds to which the particular seal of a particular great man was applied, were no trifling feats of dexterity, ere scriveners had congregated into fraternities, and law-stationers had been called into existence. To get a supply of suitable wax was an undertaking by no means easy in accomplishment. Sealing wax was not to be bought by the pound or stick in every street of feudal London. *Cire d'Espagne*—sealing wax akin to the bright, vermillion compound now in use—was not invented till the middle of the sixteenth century. William Howe assures his readers that "the earliest letter known to have been sealed with it was written from London, August 3, 1554, to Heingrave Philip Francis von

[11] Page 447 (4 Rich. II).

Daun, by his agent in England, Gerrand Herman," and long after that date the manufacture of sealing wax was a secret known to comparatively few persons. In feudal England there were divers adhesive compounds used for sealing. Every keeper of an official seal had his own recipe for wax. Sometimes the wax was white; sometimes it was yellow; occasionally it was tinged with vegetable dyes; most frequently it was a mess bearing much resemblance to the dirt pies of little children. But its combination was a mystery to the vulgar; and no man could safely counterfeit a seal impression who had not at command a stock of particular sealing earth or paste, or wax. Eyes powerless to detect the falsity of a forger's handwriting, could see at a glance whether his wax was of the right colour. Moreover, the practice of attesting private deeds by public or well-known seals gave to transactions a publicity which was the most valuable sort of attestation. A simple knight could not obtain the impression of his feudal chieftain's seal without a formal request, and a full statement of the business in hand. The wealthy burgher, who obtained permission to affix a municipal seal to a private parchment, proclaimed the transaction which occasioned the request. The thriving freeholder who was allowed the use of his lord's graven device, had first sought for the privilege openly. *"Quia sigillum meum plurimis est incognitum"* were the words introduced into the clause of attestation; and the words show that publicity was his object. And to attain that object the seal was pressed in open court, in the presence of many witnesses.

Indeed the process of sealing was so much more respected than the act of signing, that in some countries the practice of sealing was alone employed; and in England the seal was long regarded as that which imparted validity to a deed, whilst signature was held to be a needless ceremony.

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## PILLOW, PLAINTIFF IN ERROR, *v.* ROBERTS.

**(Supreme Court of the United States, 1851. 13 How. 472, 14 L. Ed. 228.)**

GRIER, J.[12] Roberts, the defendant in error, was plaintiff below, in an action of ejectment for 160 acres of land. * * * On the trial the plaintiff below gave in evidence a patent for the land in dispute, from the United States to Zimri V. Henry, dated May 7th, 1835; and then offered a deed from said Henry to himself dated November 10th, 1849. This deed purported to be acknowledged before the clerk of the Circuit Court of Walworth County, in the State of Wisconsin, and was objected to, * * * 3dly. Because the seal of the Circuit Court authenticating the acknowledgment was an impression stamped on paper, and not "on wax, wafer, or any other adhesive or tenacious substance." * * * [The objections were overruled.]

Formerly wax was the most convenient, and the only material used to receive and retain the impression of a seal. Hence it was said: *"Sigillum est cera impressa; quia cera, sine impressione, non est sigillum."* But this is not an allegation, that an impression without wax is not a seal. And for this reason courts have held that an impression made on wafers or other

[12] Parts of the opinion are omitted.

adhesive substance capable of receiving an impression, will come within the definition of *cera impressa*. If, then, wax be construed to be merely a general term including within it any substance capable of receiving and retaining the impression of a seal, we cannot perceive why paper, if it have that capacity, should not as well be included in the category. The simple and powerful machine, now used to impress public seals, does not require any soft or adhesive substance to receive or retain their impression. The impression made by such a power on paper is as well defined, as durable, and less likely to be destroyed or defaced by vermin, accident, or intention, than that made on wax. It is the seal which authenticates, and not the substance on which it is impressed; and where the court can recognize its identity, they should not be called upon to analyze the material which exhibits it. In Arkansas, the presence of wax is not necessary to give validity to a seal; and the fact that the public officer in Wisconsin had not thought proper to use it, was sufficient to raise the presumption that such was the law or custom in Wisconsin till the contrary was proved. It is time that such objections to the validity of seals should cease. The court did not err, therefore, in overruling the objections to the deed offered by the plaintiff.

* * *

[But, for other reasons,]

*Judgment reversed.*[13]

[13] "Though wax and wafer are most frequently spoken of as the material of seals, yet other things were used. The bulls of the Pope were sealed with lead or gold. Jac. Law Dict., *Seals*. And in our state, as well as elsewhere, seals were very commonly impressions made upon pieces of paper annexed by a wafer, gum or paste, to the instrument sealed, or two such pieces of paper were secured to each other, and to tapes passing through the paper, or parchment of the instrument by wafer or other adhesive substance, and the impression made upon one of these pieces of paper.

"It seems to us, then, that there is nothing necessary to constitute a seal but some material of a suitable character to receive an impression, and an impression bearing the character of a seal upon it. Where wax or a paper annexed by wafer, were fixed to an instrument in the place of a seal, and with the apparent intention that they should be seals, the court would not look curiously to discover the impression made upon it; but where there was nothing but the impression made upon the paper to indicate that there was a seal, the court would not regard anything as a seal but such a clear and manifest impression as left no doubt as to its purpose.

"The cases of Warren v. Lynch, 5 Johns. 239; Bank v. Gray, 2 Hill 227, and Bank v. Haight, 3 Hill 493, are inconsistent with these views: the two latter holding directly that a mere impression on the paper is 'not a seal.'" Bell, J., in Allen v. Sullivan R. R. Co., 32 N. H. 446, 450-451 (1855).

In Hendee v. Pinkerton, 14 Allen (Mass.) 381, 388 (1867), in speaking of the mortgage before him which bore an impression of the seal of the corporation mortgagor stamped upon and into the substance of the paper itself, Foster, J., said: "In the present instance we have a durable impression upon a tenacious substance made for the express purpose of solemn authentication. And after our own courts have allowed wafers instead of wax, and paper with gum or mucilage instead of wafers, there seems little reason why we should

## JONES & TEMPLE *v.* LOGWOOD.

(Court of Appeals of Virginia, 1791. 1 Wash. 42.)

This was an action of debt upon a bond—plea payment. At the trial the plaintiff offered a writing to the jury as evidence in support of the declaration, to which there was no seal but a scroll; and the court permitting this writing to go to the jury, the defendants excepted.

The President [Pendleton].[14] It is important that the court should settle a question so interesting to the community as the following: whether a scroll used as a seal, constituted a good bond before the act of 1788 or whether to make it a seal, wax or something capable of impression, and impressed, was necessary. Acts of Parliament in England, and acts of Assembly in this country, frequently speak of seals; but none of them define what shall constitute a seal. Nor is there an adjudged case recollected, which determines that a seal must be necessarily something impressed on wax. To consider it upon the reason of the thing; a seal is required to give solemnity to the act; and I cannot perceive a difference,

hesitate also to allow the sufficiency of an impression of a corporate seal on the paper itself."

In Pease v. Lawson, 33 Mo. 35 (1862), one question was whether a letter of attorney which recited that it was sealed, really was sealed. It appeared on inspection that there was no scrawl by way of seal made with pen or pencil, but there was a small round piece of paper, cut into scallops on the edges, attached to the end of the name, the usual place for a seal, with a wafer, but no impression made thereon. Dryden, J., for the court said:

"In this case it is not pretended the statutory mode [of a 'scrawl by way of seal'] was adopted; so, that, unless what was done comes up to the common law standard, the letter of attorney is not a sealed instrument in the sense of the law. Does it, then, reach this standard? The point of the objection is that no *impression* was made on the wafer, and so, although everything else had happened necessary to a valid sealing, yet the want of this crowning requisite was fatal. Now, as in the days of the greatest strictness, the common law prescribed no particular instrument with which to make the impression, nor fixed the breadth or length or depth it should be made, and as the execution of the paper was attended with the usual circumstances of deliberation, and as it was manifestly intended as a sealed instrument, and as the scalloped paper, when applied to the wafer and caused to adhere, must from a physical necessity have made an impression, we feel warranted, for the effectuation of the clear intention of the parties, in regarding the scalloped paper a sufficient instrument, and the impression made by it to cause cohesion, a sufficient impression to comply with the requirement of the law."

In Bowen v. Lazalere, 44 Mo. 382 (1869), where "the only sealing" of a power of attorney was that "opposite the signature in the usual place of a seal, a small piece of colored paper in the form of a seal was attached and made to adhere by the application and use of mucilage," the fact that mucilage was used instead of a wafer was held not to differentiate the case from Pease v. Lawson, *supra*, and accordingly the power of attorney was held to be under seal.

[14] The statement of facts is abbreviated and parts of the opinion are omitted.

in point of solemnity, between the act of impressing wax and that of making a scroll.

Public corporate bodies have a known and fixed seal; and it is necessary that their acts should be under that common seal. In that instance an impression may be necessary, to shew that the act has been done in their corporate capacity.

But what is the private seal of an individual? Does an impression furnish any criterion by which to decide whether it be his seal or not? It is true that some few gentlemen have seals which impress their family coats of arms; some have such as impress the initials of their names; but these are rare indeed when compared with the great body of the community who have no seals, and who use such as are placed on the writing for them, and make them their own by acknowledging them to be such. In truth and reality then, it is unimportant whether this adoption be of wax or a scroll. Lord Coke in his 2nd Institute, in a commentary upon a statute which speaks of a seal, says "a seal is wax with an impression." But there is neither an act of Parliament nor an adjudged case to bind the court.[15] It was his opinion only, founded probably on the practice of the day, and if that gives a binding rule, we may, by going further back, discover a period of

[15] "President Pendleton, in the case of Jones and Temple v. Logwood, 1 Wash. Rep. 42, which was cited upon the argument, said that he did not know of any adjudged case that determines that a seal must necessarily be something impressed on wax; and he seemed to think that there was nothing but Lord Coke's opinion to govern the question. He certainly could not have examined this point with his usual diligence. The ancient authorities are explicit, that a seal does, in legal contemplation, mean an impression upon wax. 'It is not requisite,' according to Perkins (§ 134), 'that there be for every grantor who is named in the deed a several piece of wax, for one piece of wax may serve for all the grantors if every one put his seal upon the same piece of wax.' And Brooke (tit. Faits, 30 and 17) uses the same language. In Lightfoot and Butler's Case, which was in the Exchequer, 29 Eliz. (2 Leon. 21) the Barons were equally explicit as to the essence of a seal, though they did not all concur upon the point, as stated in Perkins. One of them said that twenty men may seal with one seal upon one piece of wax only, and that should serve for them all, if they all laid their hands upon the seal; but the other two Barons held that though they might all seal a deed with one seal, yet it must be upon several pieces of wax. Indeed this point, that the seal was an impression upon wax, seems to be necessarily assumed and taken for granted in several other passages which might be cited from Perkins and Brooke, and also in Selden's Notes to Fortescue (De Laud. p. 72); and the nature of a seal is no more a matter of doubt in the old English law than it is that a deed must be written upon paper or parchment, and not upon wood or stone. Nor has the common law ever been altered in Westminster Hall upon this subject, for in the late case of Adam v. Keer, 1 Bos. & Puller, 360, it was made a question whether a bond executed in Jamaica, with a scrawl of the pen, according to the custom of that island, should operate as such in England, even upon the strength of that usage." Kent, C. J., in Warren v. Lynch, 5 Johns. 239, 246, 247 (1810).

time when the impression was made with the eye tooth. There was some utility in that custom, since the tooth impressed was the man's own, and furnished a test in case of forgery.[16] But both are founded on the usage of the times. Scrolls have been long substituted for seals in this country. The party acknowledges the scroll to be his seal, and as such this court will consider it. If there had been a positive law to bind the court, we must have obeyed it, however inconvenient; but since none is shewn or recollected, we will not make a precedent which would not only let loose great numbers of individuals from their engagements, but all or most of the executors, administrators, guardians and perhaps public collectors, from the force of their bonds; a decision which would dishonor government; relax public and private security, and convulse the state.

The late act, if it operates, is conclusive; if it does not, it is at least a legislative construction of the law in general; agreeable to, and adding strength to, that of the court. On this point there is no error. * * *

*Judgment affirmed.*[17]

[16] "But this reason, however applicable in Virginia in 1791, does not hold true in this epoch of dentistry, when no man's tooth is his own, but teeth, like almost everything else, are artificial." Lumpkin, J., in Lowe v. Morris, 13 Ga. 147, 154 (1853). See also Brackenridge, J., in Alexander v. Jameson, 5 Bin. (Pa.) 238, 244 (1812).

[17] "He was a bold fellow who first in these colonies, and particularly in Pennsylvania, in time whereof the memory of man runneth not to the contrary, substituted the appearance of a seal by the circumflex of a pen, which has been sanctioned by usage and the adjudication of the courts, as equipollent with a stamp containing some effigies or inscriptions on stone or metal." Brackenridge, J., in Alexander v. Jameson, 5 Bin. (Pa.) 238, 244-245 (1812).

In Hendee v. Pinkerton, 14 Allen 381, 388 (1867) Foster, J., said: "If we should pronounce every scroll a seal, we should speedily be called upon to take the next step of pronouncing every flourish to be a scroll, and nothing would remain of the ancient formality of sealing."

"Is there any more solemnity in a bit of wafer than in a scroll made with a pen? The feeling of solemnity, if any, attending the execution of a sealed instrument, arises from a sense of the effect of the instrument, and not from the symbol used to characterize it as a sealed instrument; and as to the remark of the Court [Kent, C. J., in Warren v. Lynch, 5 Johns. (N. Y.) 239], that to adopt a scroll for a seal would be to abolish all distinction between writings sealed and writings not sealed, I apprehend, with great respect, it was not well considered." Halsted, C., in Corrigan v. Trenton Delaware Falls Co., 1 Halst. Ch. 52 (1845).

In Appeal of William Hacker, Trustee, 121 Pa. St. 192, (1888) the question was whether a power required to be exercised by the donee of the power "by writing under hand and seal in nature of a last will and testament" was exercised by a will which ended: "In witness whereof I have hereunto set my hand and seal. Ellen Waln —", Clark, J., said:

"Was the will of Ellen Waln under seal? * * * A seal is not necessarily of any particular form or figure; when not of wax it is usually made in the form of a scroll, but the letters 'L. S.' or the word 'Seal,' inclosed in brackets, or in some other design, are in frequent use. It may, however, consist of the outline without any enclosure; it may have a dark ground or a light one; it

## LANGLEY *v.* OWENS.

(Supreme Court of Florida, Division A, 1906. 52 Fla. 302, 42 So. 457, 11 Ann. Cas. 247.)

WHITFIELD, J.[18] The declaration, filed January 20, 1905, in the Circuit Court for Escambia county in this cause, is as follows: "The plaintiff, T. E. Owens, by his attorney, sues the defendant, Frank Langley, for that prior to the institution of this suit, on the 11th day of May, A. D. 1893, the defendant by his three promissory notes under seal, which notes are attached hereto and are hereby made a part hereof, promised to pay to the firm of Weinberg & Hays the sum of $97.37 thirty days after date, and the sum of $100 sixty days after date, and the sum of $100 ninety days after date; that the said payees thereafter for a valuable consideration indorsed the said notes and delivered them to the plaintiff; that the defendant has not paid said notes, or any part thereof, though often requested so to do. Wherefore plaintiff sues and claims damages in the sum of six hundred dollars."

Attached to the declaration are three notes, similarly executed, one of which is as follows:

"97.37. Tampa, Fla., May 11th, 1893.

"Thirty days after date I promise to pay to the order of Weinberg & Hays

may be in the form of a circle, an ellipse, or a scroll, or it may be irregular in form; it may be a simple dash or flourish of the pen: Long v. Ramsey, 1 S. & R. 72. Its precise form cannot be defined; that, in each case, will depend wholly upon the taste or fancy of the person who makes it.

"The mere fact that in the testimonium clause the testatrix states that she has affixed her hand and seal, is insufficient to constitute the instrument a writing under seal, if in fact there be no seal; but if there be any mark or impression which might reasonably be taken for a seal, this statement of the testatrix will certainly afford the strongest evidence that the mark was so intended. * * *

"Whether or not any mark or impression shall be held to be a seal, depends wholly upon the intention of the party executing the instrument, as exhibited on the face of the paper itself. The dash which follows the signature in this case, it must be conceded, is not in the usual or ordinary form of a seal, but as no particular form is prescribed by law, we think that upon a consideration of the plain requirements of the writing creating the power, and of the manifest purpose and effort of the testatrix to execute that power, in the manner designated, and her avowed purpose to affix a seal, together with the presence of a mark or flourish of the pen, which may be taken as such, we are justified in assuming that the mark was made and intended for a seal, and that the writing is in this respect in compliance with the donor's directions. It is said that the same or a similar mark is found in other parts of the will, used for punctuation, and that this is a circumstance evidencing a different intention of the testatrix. But if the testatrix did use a mark in this form indifferently for a comma, a colon, or a period, what good reason is there for supposing she did not also use it for a seal?"

[18] Parts of the opinion are omitted.

ninety-seven & 37/100 dollars at Gulf National Bank. Value received.
"No. ————. Due ————.

"Frank Langley. (L. S.)"

The defendant presented a plea that "the said promissory notes the declaration described were not under seal, and that the above cause of action thereon did not accrue within five years before this suit." The plaintiff demurred to this plea on the grounds (1) that it appears from the record that the instrument sued on is a specialty and is not barred in five years; (2) that the said plea does not set forth any defense to the cause of action herein." This demurrer being sustained, the defendant by leave of court filed [second, third and fourth pleas to which plaintiff also demurred] * * *.

The demurrers to the second, third, and fourth pleas were sustained, and, the defendant failing to plead further, final judgment for the plaintiff was entered, and the defendant on writ of error here assigns as error the orders sustaining the demurrers to the several pleas. * * *

In support of the assignments of error it is urged here that the notes as executed should not be regarded as being under seal, and that, if it be presumed that the maker adopted as his seal the letters inclosed in brackets, as shown in the notes, such presumption can be rebutted. The argument is that the device used is not in fact either a scroll or a scrawl, but it only indicates the place where the seal should be put, if used; that the device is ambiguous, is not plainly designated as a seal, and it does not appear that the maker had the particular device in mind when signing the notes; and that since promissory notes do not require a seal, and as there is no reference to the seal in the body of the notes, it should not be conclusively presumed that the maker of the notes intended to adopt and use the device as his seal, so as to make the notes in law sealed instruments.

It is not contended that the defendant did not in fact adopt and use the character or device, "(L. S.)," as it appears to the right of his signature in the notes, but that he did not adopt and intend it as a seal.

Where there is no dispute as to the character or device used in the execution of a written instrument, it is for the court to determine whether the device as used constitutes a seal. See Beardsley v. Knight, 4 Vt. 471; Jacksonville, M. P. Ry. & Nav. Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515.

Chapter 4148, p. 72, Acts of 1893, which took effect April 28, 1903, provides: "That a scrawl or scroll, printed or written, affixed as a seal to any written instrument shall be as effectual as a seal. That all written instruments heretofore or hereafter made with a scrawl or scroll, printed or written, affixed as a seal are declared to be sealed instruments, and shall be construed and received in evidence as such in all the courts of this state."[19] Under this statute a scrawl or scroll, affixed as a seal to the

[19] Local statutes should be consulted as to what constitutes a seal.

signature of the maker of a promissory note, is as effectual as a seal, and when such scrawl or scroll, printed or written, appears affixed to the maker's signature in the place usually occupied by the seal, it is, in the absence of anything in the note to the contrary, and in the absence of fraud, sufficient to give it effect as a seal. See Hudson v. Poindexter, 42 Miss. 304; Barnard v. Gantz, 140 N. Y. 249, 35 N. E. 430; Hacker's Appeal, 121 Pa. 192, 15 Atl. 500, 1 L. R. A. 861.

In 1841, under the statute then in force here, which provides that "a scrawl affixed as a seal to any instrument shall be as effectual as a seal," this court, in the case of Comerford v. Cobb, 2 Fla. 418, text 423, held that a promise in writing to pay money in which the device or character, "[ ]," with the word "Seal" included therein, appears opposite the signature of the maker, in the usual place for the seal, but with no reference to it in the body of the writing, was in law "a sealed instrument, and was so intended by the parties at the time of its execution." In that case the word "Seal" was in the brackets, and it is urged that such word, so used, indicated an intention to make the note a sealed instrument, and that in this case the letters "L. S.," appearing in the marks "[ ]," do not indicate an intention to use the device as a seal.

If the device or character, "[ ]," is of itself a scrawl, as it was called in Comerford v. Cobb, 2 Fla. 418, text 420, and in Bacon v. Green, 36 Fla. 325, text 336, 18 South. 870, then the device or character, "( )," must also be a scrawl; and if the latter device or character is of itself a scrawl, certainly it is none the less so when the letters "L. S." are contained within it. If the word "Seal" contained within the scrawl, "[ ]" or "( )," is evidence that the scrawl was affixed as a seal, the letters "L. S.," which are in common use in the making of sealed instruments, when they appear within a scrawl opposite the signature of the maker of the notes, are certainly evidence of the purpose for which the scrawl was used; and, as nothing to the contrary appears by the notes, it must be presumed that the maker of the notes so used the device as his seal. While a seal was not necessary in making a promissory note, the party had a right to make the promise by a sealed instrument, and by the manner of its use the device or character, "(L. S.)," was really and in effect affixed as a seal to the notes, and they were thereby in law made sealed instruments.

The act of 1893 does not require that the use of the seal, or of a scrawl or scroll as a seal, shall be referred to in the instrument,[20] nor that any par-

[20] "For whether an instrument be a specialty must always be determined by the fact whether the party affixed a seal; not upon the assertion of the obligor, in the body of the instrument or by the form of the attestation." Archer, J., in Trasher v. Everhart, 3 G. & J. 234, 246 (1831). See Taylor v. Glaser, 2 S. & R. 502, 504 (1816). The jurisdictions differ in regard to this matter, some requiring a recitation that the instrument is sealed and others not, and a few requiring the recitation in the case of a scrawl but not in the case of a common law seal. See 19 Ann. Cas. 674, note; 1 A. R. C. 184, note.

ticular scrawl or scroll shall be used. The only requirement is that a scrawl or scroll, printed or written, be affixed as a seal, to make the writing a sealed instrument. The character or device, "(L. S.)," printed or written, as it appears in the usual place for the seal, opposite the signature of the maker of the notes, is not ambiguous, since it has a definite legal meaning and effect when so used. It does not merely indicate the place where the seal should be put, because, when it is so used, the statute makes it as effectual as a seal; but it is a plainly designated scrawl or scroll affixed as a seal, within the meaning of the act of 1893 above quoted. See Comerford v. Cobb, 2 Fla. 418; Giles v. Mauldin, 7 Rich. Law (S. C.) 11; Williams v. Starr, 5 Wis. 534; Hudson v. Poindexter, 42 Miss. 304; Lorah v. Nissley, 156 Pa. 239, 27 Atl. 242; Muckleroy v. Bethany, 23 Tex. 163; Osborn v. Kistler, 35 Ohio St. 99. See, also, Sanders v. Ransom, 37 Fla. 457, 20 South. 530.

The demurrer to the first plea was properly sustained. * * *

The notes are in law sealed instruments, and pleas which in effect admit the execution of the notes as alleged in the declaration, but aver that it was not intended that they should be executed as sealed instruments are demurrable. * * *

*Judgment affirmed.*[21]

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## Re SMITH.

## OSWELL *v.* SHEPHERD.

(Court of Appeal, 1892. 67 L. T. Rep. (N. S.) 64.)

LINDLEY, L. J.[22] In this case we are asked to say that the document in question was sealed at the time of its execution. It is a bond, and it was

Since a corporate seal does not necessarily show that the instrument is sealed, it has been held that if the instrument bearing the corporate seal does not purport to be sealed it is a simple contract. Smith v. Woman's Medical College, 110 Md. 441 (1909). But see Grand Lodge, etc., v. State Bank of Florida, (Fla.), 84 So. 528 (1920), where the contrary position is taken on the ground that since the corporation need not affix its seal to any instrument not required to be under seal its use of a seal, nothing to the contrary appearing, evidences a purpose to have a sealed instrument.

[21] In Jackson v. Security Mut. Life Ins. Co., 233 Ill. 161 (1908) the word "Seal", which was on a release when the signature was placed before it, was held to be a seal under a statute authorizing a scrawl to be affixed by way of seal. In that case there was a bracket about the word seal and it was disputed whether the bracket was there at the time of signature or was placed there later, but the court disregarded the bracket.

On "Seal" as a sufficient seal, see 11 Ann. Cas. 1110, note. On "L. S." as a sufficient seal, see 11 Ann. Cas. 250, note. On the definition and requisites of a seal, see 1 A. R. C. 181, note. See also 1 Am. L. Rev. 638.

[22] The statement of facts and a part of the opinion of Kay, L. J. are omitted.

prepared by a solicitor, and was copied by his clerk, or by a law stationer. It is stamped as a bond and intended to be executed as a bond, but it does not bear on the face of it any trace of a seal. The lady who executed it has signed it, and it bears the words "sealed with my seal," and the attestation clause states that the bond was "signed, sealed and delivered" by the obligor. But those words are not in the handwriting of the person who signed, but in the handwriting of the law stationer. It is quite obvious that the bond, when copied was sent to Mrs. Smith, who signed it. Now, the attesting witness has not been called to give evidence as to whether the bond was sealed or not, and there is absolutely nothing to show that it was actually sealed. It seems to me perfectly impossible for us to say that the document was sealed. We have been pressed with authorities, but authorities are not of use on a question such as this. We think therefore that the appeal must be dismissed with costs.

BOWEN, L. J. I am of the same opinion. A seal need not consist of wax nor of wafer. It may be a mark affixed to the document. As was said by Byles, J. in the case which has been referred to of Re Sandilands, (24 L. T. Rep. n. s. 273; L. Rep. 6 C. P. 411, 413) the sealing of a deed may be done by the end of a ruler or anything else. So long as it takes the place of a seal, that will do. But the difficulty of this case is that there is not a scintilla of evidence that the bond was in fact sealed. It is true that there is a signature to the bond by the obligor, and there are the words "sealed with my seal." But that is perfectly consistent with this, that the person, though about to affix the seal, omitted actually to do so. The attesting witness has not been called to give evidence as to whether the bond was sealed or not. In this case the document ought to have been sealed and has not been sealed. We have been pressed with the authority of Re Sandilands, *ubi supra,* but it seems to me that that case is distinguishable from the present. And, as Lindley, L. J. said in the later case of The National Provincial Bank of England v. Jackson (55 L. T. Rep. N. S. 458; 33 Ch. Div. 1, 14), Re Sandilands, *ubi supra,* was a "good-natured decision, in which I am not sure that I could have concurred." In Re Sandilands, a deed was sent out to Melbourne under a special commission for execution and acknowledgment by certain married women. When sent out the deed had pieces of green ribbon attached to the places where the seals should be, but no wax or other material to receive the impression, and it was returned to this country in the same state, but in all other respects duly executed. The attestation clause states that the deed was "sealed, signed and delivered," one of the attesting witnesses being the Mayor of Melbourne, and two of the commissioners certified that the married women had produced the deed before them and "acknowledged the same to be their respective acts and deeds." In these circumstances the court held that there was sufficient *prima facie* evidence that the deed was sealed to warrant the court in allowing it to be received and filed with the other documents by the proper officer, under 3 & 4 Will. 4 c. 74. It seemed to me that Re Sandilands was an ex-

ceptional case, and that the decision there depended upon the particular facts of that case. It does not justify the court, whenever a document is produced before it, which, though bearing no seal, purports to have been sealed, in assuming that it has actually been sealed. I cannot see my way to assuming that fact in the present case, and I agree that the appeal should be dismissed with costs.

KAY, L. J. * * * It is said that it is possible that any impression that may have been made may have disappeared in the lapse of time which has occurred since the bond was executed. But I do not think that such was the case. Authorities have been cited which show that the courts have gone very far in treating documents as having been duly sealed which should be executed as deeds, and have inferred that there was due fulfillment of that requirement. Under certain circumstances, and in very old documents, it might be said that the seal may have disappeared. The older the document becomes, the more likely it is that that which was a seal has in the lapse of time disappeared. But here there is no trace of anything like a seal. Indeed, there is no space opposite the name of the obligor where a seal might have been put. I confess that, in furtherance of the intention of the obligor, I should be glad to say that the document was duly sealed. But, before one can say that, one must exhaust all the evidence on the point which could be adduced. The witness who attested the signature of the obligor has not been called, so that we are unable to learn what she has to say on the subject. Counsel says that it is admitted that the signature of the obligor is genuine, and therefore that it is unnecessary to prove the signature. But has the person who claims under the bond exhausted all the evidence? At least the witness who attested the bond ought to have been called. As that has not been done it seems to me against all reason to ask the court to give this document the effect it would have had if it had been properly sealed. I think, therefore, that this appeal should be dismissed with costs.

*Appeal dismissed.*[23]

[23] In National Provincial Bank v. Jackson, 33 Ch. D. 1, (1886), cited in the principal case, Cotton, L. J. said: "Although these instruments are expressed to be signed, sealed and delivered in the presence of the attesting witness * * * there is no trace of any seal, but merely the piece of ribbon for the usual purpose of keeping the wax on the parchment. * * * It is true that if the finger be pressed upon the ribbon that may amount to sealing, but no such inference can be drawn here where the attesting witness who has given evidence recollects nothing of the sort and when Jackson, [the solicitor grantor, a brother of the grantees,] had already committed one fraud in the matter and perhaps then intended another. The question is merely one of fact, and * * * the conclusion I come to is that the instruments never were sealed."

## EAMES *v.* PRESTON.

(Supreme Court of Illinois, 1858. 20 Ill. 389.)

CATON, C. J.[24] This was an action of assumpsit brought against Eames, Burlingame and Gray, upon a note thus executed, "Eames, Gray & Co. [ ]," and the only question is, whether assumpsit can be maintained on this note. If this be a sealed instrument, then assumpsit cannot be maintained upon it (1 Chit. Pl., title Assumpsit, p. 99), and this would seem to settle the question, for this is certainly an instrument under seal. If the member of the firm who executed the note had authority under seal to add the seals of all, then the seal attached is the seal of all; if he had not, then it is his seal only. In any event it is, as to him, a sealed instrument. If, as to the others, it is a simple instrument, that would not remove his seal. If one party executes an instrument and attaches his seal, and others afterwards sign it silently without attaching seals, they are presumed to adopt the seal of the first, and as to all, it is a sealed instrument.[25] If, however, the first sign without a seal, and the others add seals to their names, without the direction or consent of the first, then he cannot be presumed to adopt their seals as his, and it continues, as to him, a simple instrument, as it was when he first executed it.[26] Nor would this prevent

[24] The statement of facts is omitted.

[25] "In Davis v. Burton, 3 Scam. 41, 36 Am. Dec. 511, it was held that where a bond or sealed instrument purports, on its face, to be sealed by all the signers, and there are several seals attached, but not so many as there are names, the court will presume that each signer has adopted some one of the seals already attached. To the same effect is Ryan v. Cooke, 172 Ill. 302, 50 N. E. 213. See, also, Eames v. Preston, 20 Ill. 389. The recital of the seal is not essential. If the instrument be actually sealed, it will operate as such without the recital, and the general rule is that, if there is no seal at the end, the instrument will not be held to be a specialty, although the parties in the body of the writing make mention of a seal. 2 Bouvier's Law Dic. (Rawle's Rev.) p. 1020; 9 Am. & Eng. Ency. of Law (2d Ed.) p. 147, and cases cited." Carter, J., in Jackson v. Security Mut. Life Ins. Co., 233 Ill. 161, 166-167 (1908).

"In Stabler v. Cowman, 7 G. & J. 284, where a contract in writing was entered into between two parties intended to be signed and sealed by both, but which was signed and sealed by one only, and signed by the other but not sealed, it was held that both were bound, but in different forms; that while it was the covenant of the former, it was merely the parol contract of the latter, and an action of assumpsit against him was sustained." Bartol, C. J., in Western Md. R. Co. v. Overendorff, 37 Md. 328, 334-335 (1872). See also Pearl Hominy Co. v. Linthicum, 112 Md. 27 (1910).

"It is true that one piece of wax may serve as a seal for several persons, if each of them impresses it himself, or one for all, by proper authority, or in the presence of all, as was held in Ball v. Dunsterville, 4 T. R. 313, following Lord Lovelace's Case, W Jones, 268, but then it must appear by the deed and profess to be the seal of each, whereas here the seal appears by the deed, and professes to be, the seal not of individuals, but of a corporation." Lord Denman, C. J., in Cooch v. Goodman, 2 Q. B. 580, 598 (1842).

[26] "It is to be observed, however, that the question is whether the instrument

it from being a sealed instrument as to those who deliberately attached their seals. As to one of the makers of this note, it was a sealed instrument, and assumpsit could not be maintained upon it.[87]

The judgment must be reversed.

*Judgment reversed.*

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## PARKS *v.* HAZLERIGG.

**(Supreme Court of Indiana, 1845. 7 Blackford, 536, 43 Am. Dec. 106.)**

SULLIVAN, J. This was an action of debt on an appeal-bond. The plaintiff declared against Hazlerigg, Kizer, Russell, and Dugan; for that the defendants, on, etc., at, etc., by their certain writing obligatory sealed with their seals, etc. acknowledged themselves to be held and firmly bound, etc. On *oyer* it appeared that the above defendants were named in the bond as obligors. There were four seals affixed to the bond, but it was signed only by Hazlerigg, Russell, and Dugan. Opposite to the fourth seal there was no signature. Demurrer to the declaration and judgment for the defendants.

This case presents the simple question, whether it is necessary to the validity of a bond, which has been sealed by the obligor, that it be signed by him also.

At common law, signing was not necessary to the validity of a deed. 2

was sealed when it was delivered. If the first signer, therefore, delivered the instrument, or authorized its delivery, after a seal had to his knowledge been attached by subsequent parties, there seems as much reason to infer an adoption of the seal from recitals in the instrument as if the unsealed signature were the last on the instrument." 1 Williston on Contracts, pp. 417-418 § 208.

On adoption of seal of another, see 1 A. R. C. 189, note.

[87] If the obligation was joint and some obligors sealed and others did not, debt was the appropriate common law action against all, if the amount recoverable was liquidated. Oldman v. Hunt, 4 Humph. (Tenn.) 332, (1843); Rankin v. Roler, 8 Gratt. (Va.) 63 (1851).

In Oldham v. Hunt, 4 Humph. (Tenn.) 331, 332 (1843) Reese, J. said that an instrument worded as a promissory note, sealed by one defendant but not sealed by the other, could be recovered upon in debt. He said: "The contract and liability of the defendants was joint and they can be sued jointly thereon, although one of them creates against himself evidence of a higher and more enduring character than does the other. The simple contract of the one does not merge, in such case, in the obligation of the other. Each continues liable to the plaintiff, and the paper writing is the common *vinculum* which makes that liability a joint one." See also Rankin v. Roller, 8 Gratt. (Va.) 63 (1851), where the court said that in the one action of debt each defendant would be entitled to make any defense which he might make in a separate action. The court in Rankin v. Roller refused to decide whether several actions could be brought, one on a simple contract and one on a sealed contract.

On the nature and effect of an instrument sealed by some but not by all of parties executing it, see 20 Ann. Cas. 1327, note.

Blacks. Comm. 305-306. Cromwell v. Grunsden, 2 Salk. 462. To this point it is not necessary to multiply authorities. It has been intimated that since the Statute of Frauds and Perjuries, signing, as well as sealing, is necessary, 2 Blacks. Comm., *supra;* but the better opinion seems to be, that the statute has made no alteration in this respect, since it applies only to mere agreements and not to deeds. 1 Shepp. Touch., by Preston, 56, note 24; Hurlstone on Bonds, 8. "Signing," says Gresley, in his Equity Evidence, p. 121, in speaking of the execution of a deed, "is not ordinarily essential, but it is always as well to prove it as a regular part of the transaction. Besides, it assists the other parts of the proof of execution, for the circumstance that the party has written his name opposite to the seal, on an instrument bearing on its face a declaration that it was sealed by him, is *prima facie* evidence of sealing and delivery." The common law, therefore, remains unchanged, and signing was not essential to the validity of the bond declared on in this case. If the plaintiff can prove that Kizer, with the other defendants, sealed the bond, the proof will support the declaration, which is in the usual form. The court erred in sustaining the demurrer.

*Per Curiam.* The judgment is reversed with costs. Cause remanded, etc.[28]

[28] See Jeffery v. Underwood, 1 Ark. 108, 112-113 (1838).

But as to conveyances of real estate, it is sometimes said, as by Carter, J., in Osby v. Reynolds, 260 Ill. 576, 581 (1913): "Under the common law a deed, to be binding, must be signed, sealed and delivered by the parties." And a statute may make it so. Local statutes should be consulted.

Signing is of course of practical importance.

"The signing of a deed is now the material part of the execution; the seal has become a mere form, and a written or ink seal, as it is called, is good." By the court in McDill's Lessee v. McDill, 1 Dall. (Pa.) 63 (1782).

If the clear intention of the parties is that a release shall not be effective until signed, such intention will prevail. Ambler v. Whipple, 20 Wall. (U. S.) 546 (1874).

If there is a signature, there is authority to the effect that the sealing has to be a separate act.

"It was the fact that the obligor did two independent acts, first that of signing, and secondly, that of sealing, that in theory of the law gave so much more solemnity to the contract, and imparted so much greater deliberation, and therefore entitled it to be enforced without any proof of a particular consideration or recital that it was for value received * * *." Dewey, J., in Bates v. Boston & N. Y. C. R. Co., 10 Allen (Mass.) 251, 254 (1865). Yet the first act, as affixing the seal, might be done by the printer even under that doctrine. Royal Bank of Liverpool v. Grand Junction R. R. & Depot Co., 100 Mass. 444 (1868).

## TUPPER and others *v.* FOULKES.

(Court of Common Pleas, 1861. 9 C. B. (N. S.) 797.)

This was an action brought to recover from the defendant his proportion of certain expenses which had been incurred by the plaintiffs as trustees under a deed of arrangement entered into between one Richard Clements and his creditors, of whom the defendant was one.

The defendant pleaded, amongs other pleas, *non est factum*. Verdict for the plaintiff. Rule *nisi* for new trial.

WILLIAMS, J.† * * * The deed having been executed by the son in his own name, thus,—"John William Foulkes for Thomas Foulkes,"—it was brought into a room in which the defendant was, and, the deed being shewn to him, he was asked whether his son had authority to execute it for him and whether he adopted the signature, and the defendant answered that his son had authority and that he adopted the deed as his; and there was proof that he subsequently acted as if the deed was a valid deed. This clearly amounted to a second delivery. It has long been established that to constitute a delivery, it is not necessary that the party should take the document in his hand and say, "I deliver this as my act and deed." Anything to shew that he treated the deed as his deed is enough. Several cases are put in Sheppard's Touchstone, 8th Ed. p. 58, mostly taken from Lord Coke; amongst others,—"If the deed be sealed and lying in a window or on a table, and I use these or the like words, 'there it is; take it as my deed,' this is a good delivery, and doth perfect the deed; for, as the deed may be delivered by words, without deeds, so may it also be delivered by deeds, without words." Here it is plain upon the evidence that the deed being in the room and already sealed, and his name being affixed to it, the defendant in effect says "I recognize that as my deed." The case of Hundson v. Revet, 5 Bingh. 368, 2 M. & P. 663, as recognized by Lord Wensleydale in Hibblewhite v. M'Morine, 6 M. & W. 200, shews that there was abundant evidence to prove the affirmative of the issue.

*Rule discharged.*[89]

† The statement of facts is abbreviated. The opinions of Erle C. J., and of Willes and Keating, JJ., are omitted, as is part of the opinion of Williams, J.

[89] "In Bryan v. Wash, 2 Gilm. 557, it was held that no particular form is necessary to constitute a delivery. It may be by acts without words, or by words without acts, or by both [acts and words. Byars v. Spencer, 101 Ill. 429, 423]. Anything which clearly manifests the intention of the grantor and the person to whom it is delivered, that the deed shall presently become operative and effectual, that the grantor loses all control over it, and that by it the grantee is to become possessed of the estate constitutes a sufficient delivery." Craig, C. J., in Benneson v. Aiken, 102 Ill. 284, 287 (1882).

In Storey v. Storey, 214 Fed. 973, 975 (1914), Baker, Circuit Judge, said of the delivery of promissory notes:

"Delivery is a composite act. There must be both a manual transfer, actual or constructive, and an operation of minds intending to enter into the contract. In the ages-old strife for predominance between objective or external and subjective or internal measurements of conduct, evolution has been away from

## BUTLER and BAKER'S CASE.

(Court of King's Bench, 1591. 3 Coke, 25a, 26b.)

* * * If A makes an obligation to B and delivers it to C to the use of B, this is the deed of A presently; but if C offers it to B, there B may refuse it *in pais,* and thereby the obligation will lose its force[30] (but perhaps

symbolism toward the inner truth. And in the law of commercial paper, between the original parties, the *animus contrahendi* has become the predominant element."

In Bogie v. Bogie, 35 Wis. 659, 667 (1874) Ryan, C. J., in speaking of delivery of a deed of conveyance said that the authorities "establish that there is no set ritual of delivery; that when a deed is executed, and the minds of the parties to it meet, expressly or tacitly, in the purpose to give it present effect, the deed is validly delivered; and that such meeting of minds may be gathered from acts or signs, words or silence, in multitudinous variety of circumstances."

Here may appropriately be noted Professor Williston's statement that "One may guess that study of the civil law was responsible for the substitution of the subjective test of that law for the objective standard of the common law." 1 Williston on Contracts, p. 423, n.

For various views on the delivery of insurance policies, see article by Edwin W. Patterson, The Delivery of a Life Insurance Policy, 33 Harv. L. Rev. 198.

[30] Compare Taylor v. Sanford, 108 Tex. 340 (1917), where title under a deed was held to vest in the grantee where the grantor had it recorded and mailed it to the grantee though the grantee did not learn of its existence, let alone receive and accept it, until after the grantor's death. See notes on delivery of deed to third person, or record, or delivery for record, by grantor in 54 L. R. A. 865, 38 L. R. A. (N. S.) 941, and note on deposit of deed in mail as a delivery in 5 A. L. R. 1664.

In Marqusee v. Hartford Fire Ins. Co., 198 Fed. 475 (1912), one who purported to act as agent for the owner, but who was in fact without authority, took out a fire insurance policy on the owner's property, and it was held that the owner could ratify the insurance contract and hold the company, though the ratification came after the property was destroyed and after the owner knew of such destruction, the insurance company not having cancelled the insurance.

In Adams v. Adams, 21 Wall. (U. S.) 185 (1874), Hunt, J., for the court said: "Although a trustee may never have heard of the deed [to him as trustee], the title vests in him, subject to a disclaimer on his part. Such disclaimer will not, however, defeat the conveyance as a transfer of the equitable interest to a third person," (p. 192), i. e., will not defeat it as to the equitable interest created by the conveyance in the *cestui que trust.* See Mallott v. Wilson, [1903] 2 Ch. 494.

"The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over, saying: "I deliver this as my deed;" but any other words or acts that sufficiently show that it was intended to be finally executed will do as well. And it is clear on the authorities, as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, may, before he even knows of it; though, of course, if he has not previously assented to the making of the deed the obligee may refuse it." Blackburn, J., in Xenos v. Wickham, L. R. 2 H. L. Cas. 296, 312 (1866), citing Butler and Baker's Case, reported *supra.*

"It is true that judges have said with more solemnity than I think the occasion warranted, that no one can have an estate thrust upon him against his

in such case A in an action brought on this obligation cannot plead *non est factum,* because it was once his deed). * * *

will, and that consequently a delivery of a deed to a stranger, for the use of the grantee, is of no effect until assented to by the latter. How much weight this argument is entitled to may be judged of by the fact that estates are every day thrust upon people by last will and testament; and it would certainly sound somewhat novel to say that the devises were of no effect until assented to by the devisees. If a father should die testate, devising an estate to his daughter, and the latter should afterwards die without a knowledge of the will, it would hardly be contended that the devise became void for want of acceptance, and that the heirs of the devisee must lose the estate. Neither will it be denied that equitable estates are every day thrust upon people by deeds or assignments, made in trust for their benefit, nor will it be said that such beneficiaries take nothing until they assent. Add to these the estates that are thrust upon people by the statute of descent, and we begin to estimate the value of the argument that a man shall not be made a property holder against his will, and that courts should be astute to shield him from such a wrong.

"It is certainly true, as a general rule, that acceptance, by the grantee, is necessary to constitute a good delivery, for a man may refuse even a gift. * * * But where the grant is a pure, unqualified gift, I think the true rule is that the presumption of acceptance can be rebutted only by proof of dissent; and it matters not that the grantee never knew of the conveyance, for as his assent is presumed from its beneficial character, the presumption can be overthrown only by proof that he did know of and rejected it. If this is not so, how can a deed be made to an infant of such tender years as to be incapable of assent? Is it the law that if a father make a deed or gift to his infant child, and deliver it to the recorder to be recorded for the use of the child, and to vest the estate in it, the deed is of no effect until the child grow to years of intelligence and give its consent? May the estate, in the meantime, be taken for the subsequently contracted debts of the father, or will the statute of limitations begin to run in favor of a trespasser upon the idea that the title remains in the adult? Or will the conveyance entirely fail, if either grantor or grantee die before the latter assent I do not so understand the law. In such a case, the acceptance of the grantee is a presumption of law arising from the beneficial nature of the grant, and not a mere presumption of an actual acceptance. And for the same reason that the law makes the presumption, it does not allow it to be disproved by anything short of actual dissent." Thurman, C. J., in Lessee of John Mitchell v. Ryan, 3 Oh. St. 377, 386-388 (1854).

"The importance of a deed was due originally to the rule of evidence that a party was bound by all statements and promises therein contained. The theory that mutual assent had any connection with the making of a deed was unknown to the common law. The requirement of delivery, originally unnecessary, was added in order to make the deed what it purported to be, the act and deed of the party bound by it. The theory that acceptance is necessary ignores the historical development of the contract under seal as a formal contract dependent solely upon its execution for its validity." Harriman on Contracts, 2 ed. § 83.

In Baxter v. Baxter, 44 N. C. 341, 342 (1853) Battle, J., said: "A deed may be delivered to a stranger for the use of the grantee, or bargainee, and as it may be to his advantage his acceptance of it will be presumed until the contrary appears; but as it may also be to his prejudice, or whether to his prejudice or not, he is not bound to accept it; he may disagree to it, and then it will become inoperative. * * * The principle is the same where a deed is

KINGSBURY, an infant, by his next friend, *v.* BURNSIDE, et al.

(Supreme Court of Illinois, 1871. 58 Ill. 310, 11 Am. Rep. 67.)

MCALLISTER, J.[31] The first point which claims the consideration of the court is, whether the deed from Buckner and wife to Henry W. Kingsbury was ever so far legally executed as to become operative. It was signed, sealed and acknowledged at Louisville, Ky., May 15th, 1861, in the absence, and without the knowledge or assent of Kingsbury; then sent to Chicago, by Buckner to Mitchell, a stranger to the transaction, not authorized by the grantee to receive it, but with the simple direction from Buckner to have it recorded. It was placed on file on the 17th of May, and there remained until after the death of Kingsbury, occurring in Sept., 1862. There is no evidence that Kingsbury ever had it in his possession, or even saw it, but it is quite conclusive the other way.

"It is necessary to the validity of a deed that there be a grantee willing to accept it. It is a contract, a parting with property by the grantor, and an acceptance thereof by the grantee." Jackson v. Bodle, 20 Johns. R. 184.

In Jackson v. Dunlap, 1 Johns. Cases, 114, the court said: "It is also essential to the legal operation of a deed that the grantee assents to receive it. It can not be imposed on him and there can be no delivery without acceptance."

This rule is expressly recognized in Herbert v. Herbert, Breese, 278, where the court * * * [however, makes a statement which, taken literally] imports that when a deed is made to one without authority, and is delivered to a stranger for the use of him for whom it is so made, with a declaration by the grantor to that effect, then there is a delivery which makes the deed operative, whether the grantee assent or accept it or not. If this be so, it therefore follows, that although a deed be a contract, as was said by Spencer, Chief Justice, in Jackson v. Bodle, *supra*, that is, a parting with property by the grantor and an acceptance thereof by the grantee, yet such contract may be completed by the acts and words of the grantor alone, without the assent of the grantee. Suppose it to be one from which the grantee derives no benefit, but it subjects him to a duty, the performance of a trust, can he be obligated to the performance of such trust by the mere act of delivery and declaration of purpose by the grantor to an unauthorized stranger.[32] If it be said that such act and words may bind

made to two persons, and delivered to one without the knowledge of the other. The latter may, upon being informed of it, disagree to it, and the deed as to him will be void. Whether his share will, upon such a disagreement, accrue to the other grantee, or will return to the grantor it is not necessary for us to decide."

[31] The statement of facts and portions of the opinions are omitted.

[32] Where the deed contains a covenant on behalf of the grantee, as to assume and pay a mortgage, the covenant is not binding on the grantee in the absence of knowledge and assent by him. Blass v. Terry, 156 N. Y. 122 (1898). On the form of action against such a grantee in a jurisdiction where the form of action is of importance, see note 48, p. 40, *post*.

the grantor, though perhaps not the grantee, then we have an instance of a contract where only one of the parties to it is bound, without any condition to that effect contained in it—where the grantor is estopped by deed and the grantee not estopped. * * *

Suppose the stranger to whom the delivery is made, offer the deed to the grantee, and this is his first knowledge of it, has he no option? May he not refuse to accept it? Would tender to the grantee and refusal, be equivalent to acceptance? * * *

That a deed takes effect only from the time of delivery, with a few exceptions, where the necessities of the case require the application of the doctrine of relation, there can be no doubt. Was the act of sending it to Mitchell a delivery? He was a stranger and had no authority from the grantee to receive it. There was no declaration that it was delivered to him for the grantee's use; nor was it delivered as an escrow. But it was sent merely to have it filed for record. He was, therefore, a mere medium through which it was to pass to the hands of the recorder. The act was no more of a delivery, in the legal sense, than placing it in the possession of the carrier, to be conveyed from Louisville to Chicago—than if Buckner had taken it himself to the recorder to be recorded. In Herbert v. Herbert, *supra*, it was expressly held, under the circumstances of that case, that "the act of recording a deed cannot amount to a delivery, when there does not appear an assent or knowledge by the grantee, of the act."[33] There not only does not appear any assent, or knowledge on the part of Henry W. Kingsbury, of the act of recording the deed, but the want of both as clearly appears as any fact in the case. On the 17th of May, therefore, when the deed was recorded, it was not so far legally executed as to become operative. * * *

There can be no doubt, that up to the time of Buckner and the grantee meeting in July, the deed had not become operative. Although the grantors had parted with the personal possession of it, by leaving it with the recorder, still they could, at any time, have reclaimed and cancelled it, with no other effect than that, perhaps, of casting a cloud upon their title, by its being recorded. The question to which we are directly brought is, therefore, whether, while the deed was so in the hands of the recorder, it was competent for the parties to effectuate a delivery and make the deed operative, by mere words alone, without any manual or personal possession of the deed by the grantee, or a previously authorized agent? * * * If a grantor, with or without any previous arrangement with the grantee, sign, seal and acknowledge a deed, place it in the hands of the register to be recorded, notify the grantee of the act, and he assent to receive it, by words only, this would be a good delivery, though the grantee die before taking it into his actual possession; because the assent is the principal element,

[33] There are cases *contra*. See Cloud v. Calhoun, 10 Rich. Eq. (S. C.) 358 (1858); Adams v. Adams, 21 Wall. (U. S.) 185 (1874).

and taking the deed into possession is not indispensable, but only evidence of assent and acceptance. We think, therefore, that when Buckner notified Kingsbury, in July, of the making of the deed, the latter by his reply, assented to receive it, and that this view is confirmed by his subsequent acts and declarations. The deed, then, for the first time became operative.[24]

But by the very words which made it operative was created a trust by

[24] "To render a deed operative to pass title, there must be not only a delivery of the deed by the grantor, but also an acceptance thereof by the grantee. The acceptance of the conveyance by the grantee is as essential as the delivery by the grantor and where the acceptance is not proven, and the facts do not justify the presumption of law that the grantee has accepted, the title does not pass. * * * In respect to a grantee who is not under legal disability * * * no such presumption [of acceptance] will arise so long as the grantee is ignorant of the conveyance." Baker, J., in Moore v. Flynn, 135 Ill. 74, 79-80 (1890).

"It is well settled in this commonwealth that the delivery of a deed is not complete and effectual without an acceptance by the grantee, or by some one authorized to represent him, or who assumes to represent him, and whose act of acceptance is afterwards ratified." Knowlton, J., in Meigs v. Dexter, 172 Mass. 217, 218 (1898).

"All agree that neither the grantor nor the stranger who consents to receive and hold the deed can, by their acts, bind the grantee, and that the latter may, on receiving notice of it, repudiate it altogether. If the title vests in the grantee at once, it must, of course, vest according to the terms of the conveyance and in the case of an absolute conveyance, he would have an absolute title. If after delivery to the stranger, and before notice to the grantee a creditor of the latter should fasten upon the property by execution or attachment, no reason can be given why he could not hold it. If it is the property of the grantee, it follows, as of course, that the creditor would have this right, and that he would at once acquire a lien to the extent of his demand. Suppose after this is done, that the grantee, on receiving notice, refuses to accept the conveyance, what becomes of the property? Does the refusal unbind and set the property free from the seizure of the creditors and remit the title at once back to the grantor? Or does the intendment of Justice Ventris [in Thompson v. Leach, 2 Vent. 198 (1691)] step in, in behalf of the creditor as well, and say, because the grant is presumed beneficial to the grantee, and he might, at some future period, accept it, that therefore he shall be deemed to have accepted it before the seizure, and at a time when he was utterly ignorant of it, and thus enable the creditor to withhold the property from the grantor? * * * I leave them [these questions] to be replied to by those who maintain that the title to property, real or personal, may, without words written or spoken, or other act of transfer, be thus mysteriously passed and repassed between parties by contract. I deny that it may be. It seems to me very plain that it does not pass in fact until the grantee has actually consented to receive it; and, as of course, that it remains with the grantor who is unable, without such consent, to vest it in the grantee. No other conclusion is consistent with the doctrine that a grant is a contract, and that the assent of the grantee is necessary to give it validity." Dixon, C. J., in Welch v. Sackett, 12 Wis. 243, 289-290 (1860). But deeds of conveyance as such are not contracts, though in warranties, assumptions of indebtedness, etc., they may contain contracts. The problem of what constitutes delivery seems to be the same for sealed contracts as for deeds of conveyance, not because deeds are contracts but probably because for a long time they were regarded as being contracts.

contract, which, if manifested and proved by some writing signed by the grantee, as required by the statute of frauds, is valid. * * * The late Henry W. Kingsbury was, as this case shows, not only a trustee of the property, for his sister, but he was an honest trustee. By the last act of his life, in this respect, he designed to, and did, admit the existence of the trust and endeavored to execute it. Immediately after his death his widow, one of the defendants, in a letter to the mother of her deceased husband, recognized and admitted the trust, so far as she was concerned, in the most express terms, and seemed distressed at the suggestion of any obstacle to its immediate execution. * * * The trust being sufficiently manifested and proved by writings, signed by the party who was, by law, enabled to declare it, must be executed.

* * * *Decree* [*dismissing cross-bill to declare a trust*] ***reversed.***

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## HUBBARD *v.* GREELEY et al.

**(Supreme Judicial Court of Maine, 1892. 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511.)**

Action by Joshua G. Hubbard against Everard H. Greeley and others. Judgment for plaintiff.

WALTON, J.[35] Whether the grantee named in a deed delivered as an escrow, who has wrongfully obtained it, and put it on record, can convey a good title to a *bona fide* purchaser, is a question in relation to which the authorities are in conflict. * * *

But * * * the authorities all agree that a deed cannot be delivered directly to the grantee himself, or to his agent or attorney, to be held as an escrow; that, if such a delivery is made, the law will give effect to the deed immediately, and according to its terms, divested of all oral conditions. The reason is obvious. An escrow is a deed delivered to a stranger, to be delivered by him to the grantee upon the performance of some condition, or the happening of some contingency, and the deed takes effect only upon the second delivery. Till then, the title remains in the grantor. And if the delivery is in the first instance directly to the grantee, and he retains the possession of it, there can be no second delivery, and the deed must take effect on account of the first delivery, or it can never take effect at all. And if it takes effect at all, it must be according to its written terms. Oral conditions cannot be annexed to it. It will therefore be seen that a delivery to the grantee himself is utterly inconsistent with the idea of an escrow. And it is perfectly well settled, by all the authorities, ancient and modern, that an attempt to thus deliver a deed as an escrow cannot be successful; that in all cases where such deliveries are made the deeds take effect immediately and according to their terms, divested of all oral conditions.

[35] Portions of the opinon are omitted.

And it is equally well settled that, if the delivery is to one who is acting at the time as an agent or attorney of the grantee, the effect is the same. In Worrall v. Munn, 5 N. Y. 229, the delivery was to an agent of the grantee; and in Duncan v. Pope, 47 Ga. 445, the delivery was to the attorneys of the grantee; and it was held in both cases that the deeds took effect immediately, divested of all oral conditions.

And the same principle has been extended to official bonds. Ordinary of New Jersey v. Thatcher, 41 N. J. Law, 403; State v. Peck, 53 Me. 284.

* * *

It is easy to see, said the court in Miller v. Fletcher, 27 Grat. 403, that the most solemn obligations given for the payment of money would be of little value as securities, if they might, at a future day, be defeated by parol proof of conditions annexed to their delivery, and not performed; and that a doctrine of this kind would, perhaps, be still more mischievous, if applied to deeds of real estate; that, if such a doctrine should prevail, the title of the grantee would be liable to be defeated at any time by evidence of nonperformed parol conditions annexed to the delivery of the deed; and that in such cases there would be no safeguards against perjury or the mistakes of "slippery memory," and all titles would be as unstable as sand upon the seashore.[36]

The principal contention in the present case is whether one of the deeds through which the defendants have derived their title was legally delivered. The deed is from George E. Seavey and Nathaniel H. Clark to Thomas Boyd and Robert W. Boyd. It is dated January 26, 1878, was acknowledged the same day, and recorded July 15, 1878.

The plaintiff claims that this deed was delivered as an escrow, and, although acknowledged and recorded, never became operative. Upon the proofs in the case, we do not think such an attack upon the defendants' title is permissible. The proof is that the deed was made and accepted in part payment of a debt owing from the grantors to the grantees, and that it was in fact delivered to one G. C. Bartlette, an attorney at law, who had been employed by the grantees to collect the debt; that Bartlette afterwards sent the deed by mail to the grantees, and that they caused it to be recorded; and that, at the time of the defendant's purchase, the deed had been on record for more than eight years, its validity apparently uncontested and unchallenged. And it is admitted that the defendants are innocent purchasers for value, and, at the time of their purchase, had no notice of the condition of the title other than that disclosed by the record. Under these circumstances, and for the reasons already given, we think the plaintiff is estopped to deny that the deed was legally delivered. We rest our decision upon the ground that the deed was, in fact, delivered to the grantees' attorney as

[36] **Miller v. Fletcher, cited *supra*, has been repudiated in Whitaker & Fowle v. Lane, (Va.) 104 S. E. 252 (1920) which holds that a sealed contract and promissory notes may be delivered to the obligee and payee to become effective only on the happening of a specified condition.**

such, and that such a delivery is equivalent to a delivery to the grantee himself; and that, when such a delivery is made, it is not competent for the grantor, or those claiming under him by a subsequent conveyance, to show by oral evidence that a condition was annexed to the delivery, for the nonperformance of which the deed never became operative. It seems to us that to hold otherwise would render all deeds of little value as evidence of title. * * *

Escrows are deceptive instruments. They are not what they purport to be. They purport to be instruments which have been delivered, when in fact they have not been delivered. They clothe the grantees with apparent titles which are not real titles. Such deeds are capable of being used to enable the grantees to obtain credit which otherwise they could not obtain. They are capable of being used to deceive innocent purchasers. And the makers of such instruments cannot fail to foresee that they are liable to be so used. And when the maker of such an instrument has voluntarily parted with the possession of it, and delivered it into the care and keeping of a person of his own selection, it seems to us that he ought to be responsible for the use that may in fact be made of it; and that in no other way can the public be protected against the intolerable evil of having our public records incumbered with such false and deceptive instruments.

Another question is whether the deed conveys the whole, or only an undivided half, of the grantor's interest in the demanded premises. We think it conveys only an undivided half. The original deed is not before us. It is said to be lost. We have only an office copy. This copy contains these words: "Undivided half of one and also one other parcel of land, situated in said Eden," etc. This is a bad sentence; but there is evidence tending to show that in the original deed the words "undivided half of" were interlined, and it is not improbable that in recording the deed they were misplaced. It seems to us that such must have been the fact. But whether so or not, we have the words "undivided half" in the deed, and we cannot doubt that they were put there for a purpose, and that that purpose was to describe the interest conveyed. This construction of the deed entitles the plaintiff to judgment for one undivided sixth part of the demanded premises.

*Judgment for plaintiff for one undivided sixth part of the demanded premises, and no more.*[37]

[37] In Whittaker & Fowle v. Lane, (Va.) 104 S. E. 252 (1920), *contra*, Burke, J., for the court, pointed out that the doctrine that a deed cannot be delivered to the grantee to be held as an escrow, resting upon the statements in Coke on Littleton, and in Sheppard's Touchstone, had been abandoned in England, had been modified in Virginia by permitting incomplete sealed instruments to be delivered on condition, had been made difficult of application by letting the grantor or obligor hand the sealed instrument to the grantee or obligee without making a delivery but only giving the instrument to him as custodian, and had been deprived of justification in reason, policy or expediency by the practical similarity in informality of execution of scroll-sealed and unsealed writ-

## GODDARD'S CASE.

## GODDARD *v.* DENTON.

**(Court of Common Pleas, 1584. 2 Co. Rep. 5a.)**

Goddard, administrator of James Newton, brought an action of debt against John Denton, upon a bond made to the intestate, bearing date 4 April, 24 Eliz. The defendant pleaded, that the intestate died before the date of the bond, and so concluded that the said writing was not his deed, upon which they were at issue; the jury found, that the defendant did deliver it as his deed, 30 July, anno. 23 Eliz. and found the tenor of the deed in haec verba, Noverint universi, &c., dat. 4 Aprillis, anno. 24 Eliz.; and that the intestate was living 30 July, 23 Eliz. and that he died before the said date of the bond; and prayed the advice of the court, whether this was the defendant's deed. And it was adjudged by Anderson, Chief Justice, Windham, Periam, and Walmesly, that it was his deed; and the reason of their judgment was,[88] that * * * there are but three things of the essence and substance of a deed, that is to say, writing in paper or parchment, sealing and delivery * * * And when a deed is delivered it takes effect by the delivery, and not from the day of the date. And therefore be the deed without date, or of a false or

ings. On the last point, the opinion concedes that "there may exist good reasons for retaining a scroll to certain instruments in order to dispense with consideration, or to extend the period of limitation" (104 S. E. at p. 263), but insists that the parol evidence rule alone should be applied to sealed and unsealed instruments alike. The opinion pointed out other departures in Virginia from the original common law rule, as follows:

"Of course, it is admitted everywhere that it can be shown that there never was any delivery at all. In addition, we have held that a deed absolute on its face may be shown by parol to be a mortgage, which is nothing more than a condition for the payment of money (Holladay v. Willis, 101 Va. 274, 43 S. E. 619; Motley v. Carstairs, 114 Va. 429, 76 S. E. 948); that parol evidence will be received to show that a consideration expressed in a conveyance of land as paid by one was in fact paid by another, the effect of which is to create a resulting trust in favor of the party paying the money (Bank of U. S. v. Carrington, 7 Leigh (34 Va.) 566; Jesser v. Armentrout, 100 Va. 666, 42 S. E. 681); that a deed absolute on its face may be shown to be subject to an expressed parol trust (Young v. Holland, 117 Va. 616, 84 S. E. 637); and that in suits for the specific performance of contracts for the sale of land it may be shown that the plaintiff is not entitled to have performance. This is placed on the ground that specific performance is not a matter of right, but of grace, and that the object of the evidence is to rebut an equity. This last proposition, though not expressly decided, appears to be a concession in Towner v. Lucas, 13 Grat. (54 Va.) 713." (104 S. E. at p. 262.)

See Harry A. Bigelow, Conditional Deliveries of Deeds of Land, 26 Harv. L. Rev. 565.

For cases on delivery to the grantee as an escrow, see 130 Am. St. Rep. 923, note; 16 L. R. A. (N. S.) 941, note.

[88] Part of the reasoning is omitted.

impossible date, yet the deed is good. * * * And many times bonds are delivered at other days than they bear date. So it appeareth by this judgment that the mistaking of the date of the bond shall not hurt, upon *non est factum* pleaded.[39]

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## THOROUGHGOOD'S CASE.

## THOROUGHGOOD *v.* COLE.

**(Court of Common Pleas, 1582. 2 Co. Rep. 9a.)**

Thoroughgood brought an action of trespass for breaking of his close against Cole, defendant, who pleaded, that long time before the trespass, the plaintiff released to one William Chicken all demands whatsoever, &c., whose estate in the land the defendant hath, and justified the trespass, &c. The plaintiff said, that he was a layman, not lettered, and that at the time of the said release made, divers arrearages of an annuity were due to him by the said William Chicken, and that the said writing of release was read and declared to him as writing or acquittance for those arrearages only; and that he (giving credit thereunto) did seal and deliver the same to the said William Chicken, and so, not his deed; upon which issue was joined; and the jury found a special verdict to this effect; that is to say, that the plaintiff was a layman and not lettered, and that divers arrearages of the said annuity were behind, and that the writing was never read to him; but after that one Thomas Ward, had begun to read it to the plaintiff, and before he had read a line of the writing, one John Ward took the writing out of his hands, saying to the plaintiff, "Goodman Thoroughgood, you are a man unlearned, and I will declare it unto you, and make you understand it better than you can by hearing it read;" and then said further to him, "Goodman Thoroughgood, the effect of it is this, that you do release to William Chicken all the arrearages of rent that he doth owe you, and no otherwise, and then you shall have your land again;" To which the plaintiff said, "If it be no otherwise, I am content;" and thereupon the plaintiff, giving credit to the said John Ward, delivered the said release to the said William Chicken; and whether this, upon the whole matter, be the plaintiff's deed, the jury refer to the court, &c. And it was adjudged, that it was not the plaintiff's deed;

[39] "The time of delivery is the important time when it takes effect as a deed; and the case of Stone v. Bale, 3 Lev. 348, is in point to show that the delivery may be averred to be after the date." Lord Ellenborough, C. J., in Hall v. Cazenove, 4 East 477, 481-482 (1804).

Where a deed is acknowledged before an officer, there is a division of authority as to whether delivery should be presumed at the date of the deed or the date of the acknowledgment.

and in this case three points were resolved:[40] first, that although the party to whom the writing is made, or other by his procurement, doth not read the writing, but a stranger of his own head read it in other words than in truth it is, yet it shall not bind the party who delivereth it; for it is not material who readeth the writing, so as he who maketh it be a layman, and being not lettered, be (without any covin in himself) deceived;[41] * * *

Thirdly, although the writing be not read to the party, yet if the effect be declared to him in other form than is contained in the writing and upon that he deliver it, he shall avoid the deed; for it is all one in law to read it in other words, and to declare the effect thereof in other manner than is contained in the writing. * * *

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J. M. WALKER, Administrator, *v.* ROBERT WALKER.

(Supreme Court of North Carolina, 1852. 13 Ired. L. [35 N. C.] 335.)

This is an action of debt on a [sealed] single bill for forty dollars, and was tried on *non est factum*, payment at and after the day. On the trial it appeared that it had been executed in 1830 to the intestate of the plaintiff, payable one day after date; that the defendant had always been able to pay the amount; and that it was presented to him in 1846, and payment demanded; that he denied its execution several times, but at last said to the holder, "If you will prove that it is my handwrite, and is a just note, I will pay it." Two witnesses deposed that the signature and the body of it was in the defendant's proper handwriting.

The defendant's counsel moved the court to charge the jury that the plaintiff ought to prove that the said note had not been paid. The court declined so to charge, and told the jury, if the defendant promised to pay the note in question, if it were proved to be in his handwriting and a just note, and they were satisfied from the testimony that it was in the handwriting of the defendant, it was sufficient to remove the presumption of payment; that where the execution of a sealed instrument was proved, the law inferred that it was just and founded upon a just

[40] Portions of the resolutions are omitted.

[41] In Shulter's Case, 12 Co. Rep. 90, John Shulter, 115 years old, who "could read and write very well, but by reason of his great age was blind," sealed and delivered two leases on the false statement of the scrivener that they were in all points according to his directions. "And it was resolved by the Lord Ellesmere Chancellor, and the two Chief Justices, that the said indentures could not bind the said John Shulter for this, that he was blind and like to one who could not read at all." In Hunter v. Walters, L. R. 7 Ch. App. 75, 81, Lord Hatherly, L. C., said: "In the early books we find Lord Coke saying that if a man is blind or illiterate, and an instrument is read over to him falsely, then the instrument is void. 2 Rep. 2b, 9a. This is a proposition which one would not be inclined to dispute when broadly laid down."

consideration. The jury returned a verdict for the plaintiff. Rule for a *venire de novo,* because of misdirection. Rule discharged. Judgment; and the defendant appealed to the Supreme Court.

PEARSON, J. His honor charged, "That where the execution of a sealed instrument was proved, the law inferred that it was just, and founded upon a just consideration." In this there is error.

We are not aware of any rule of law by which a consideration is inferred from the fact of execution of a sealed instrument. No consideration is necessary in order to give validity to a deed. It derives its efficacy from the solemnity of its execution—the acts of sealing and delivery—not upon the idea that the seal imports a consideration, but because it is his solemn act and deed, and is therefore obligatory. No consideration being necessary to give validity to a deed, it follows that the law does not, from the fact of execution, make any inference one way or the other in reference to a consideration. A misapprehension of this subject may have arisen from the fact that in deeds of conveyance, operating under the statute of uses, either a valuable or a good consideration is necessary in order to raise the use. But the general rule is, a deed is valid without a consideration. A voluntary bond for money, executed to a stranger, and professing on its face to be without consideration, and for mere friendship, is binding.[42]

[42] "A bond needs no consideration. The solemn act of sealing and delivering is a deed, a thing done which, by the rule of the common law, has full force and effect, without any consideration. *Nudum pactum* applies only to simple contracts—deeds need no consideration, except such as take effect under the doctrine of uses, or such as are made void by the statutes of Elizabeth, as against creditors and purchasers for valuable consideration, but are valid, as at common law, between the parties." Pearson, C. J., in Harrell v. Watson, 63 No. Car. 454, 456-457 (1869).

"To say that the 'want of consideration' is a defence against a bond is to express, in language not remarkable for precision, nothing more than the familiar principle that where the obligor fails to receive the consideration contracted for, and on the faith of which he entered into the contract, he is not bound to pay his bond. This principle has no application whatever to the case before us, because no consideration was contracted for or expected. A voluntary bond, it is true, must be postponed until creditors are paid; but it is always good against the party himself, and against heirs, legatees, and others who stand in no higher equity. 2 Williams on Executors, 871; 3 P. Wms. 223; 2 Mylne & K. 769. In this respect a simple contract differs from a specialty. In the one case the party is not bound without a consideration. 5 T. R. 8. In the other no consideration is necessary if none was contracted for. 17 Johns. Rep. 301." Lewis, C. J., in Candor and Henderson's Appeal, 27 Pa. St. 119, 120-121 (1856).

"It was once gravely considered whether if a man accepted a dinner invitation on a paper indented and sealed with his seal, and failed to turn up, he could be sued for breach of contract; but as his legal position was in no wise altered, it was equally gravely asserted that he could not." J. W. Brodie-Innes, Some Outstanding Differences Between English and Scots Law, 28 Jurid. Rev. at p. 74.

Another view may be taken of the case. The defendant annexed to the promise, which is relied on to rebut the presumption of payment, two conditions precedent: First, proof of his handwriting; secondly, proof of its being a just note. But his Honor put the case to the jury in such a way as entirely to exclude the second condition and deprive the defendant of all benefit from it. He had as much right to the benefit of the second condition as of the first, and might well insist upon proof of the justness of the note; as, for instance, that it should be proven what it was given for, the circumstances under which it was given, etc., so as to show that it was not obtained by fraud or surprise, and was in fact a "just note." The promise is expressed in these words, "I will pay it, if you will prove that it is in my handwriting, and is a just note." By a proper construction, the latter condition may have reference to the present as well as the past. If so, the defendant had a right to insist, not only upon proof that the note was just in its inception, but continued to be just; that is, had not been paid. The matter will then stand thus: Although the note was duly executed, the law presumes that it has been paid, and at the same time, according to the charge, the law, from proof of its execution, infers that it is just; that is, has not been paid—which inference is inconsistent and repugnant. This question of construction is not adverted to by his Honor, although it is presented by the exceptions. But it is said, according to this construction, the promise amounts to nothing. That may be so, and if so, it only shows that the defendant was cautious, and was careful to require proof sufficient to rebut the presumption of payment which the law made in his favor.

PER CURIAM.

*A venire de novo awarded.*

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## TOWNSHIP OF DANBY *v.* BEEBE, ET AL.

**(Supreme Court of Michigan, 1907. 147 Mich. 312, 110 N. W. 1066.)**

Action by the township of Danby against Henry O. Beebe and others on a bond whereby the defendants, farmers, living along a road which led to a stream flowing between two different townships, agreed to pay a certain sum into the bridge fund of the township in which they resided, if the construction of a bridge across the stream should be ordered by the supervisors on a petition by the township board of the other township. Judgment in favor of plaintiff, and defendants bring error. Reversed.

OSTRANDER, J.[48] * * * No consideration, in fact, moved from the

[48] The statement of facts is abbreviated and parts of the opinion are omitted.

obligee to the obligors, and no burden has been assumed, or undertaking begun, by the obligee in reliance upon the bond. * * * There is judicial precedent for the proposition that the statute (Comp. Laws, § 10,185), which provides that in any action upon a sealed instrument the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner and to the same effect as if such instrument were not sealed,[44] has no application in a case where a consideration, passing between the parties thereto, was never contemplated. Aller v. Aller, 40 N. J. Law, 446. The reasoning employed is that, no consideration for the promise having been contemplated, in the absence of fraud, illegality, or mistake, the rights of creditors not being involved, the law should, notwithstanding the statute, execute a promise made in a writing, sealed and delivered with the most solemn sanction known to the law; that, if such an instrument contained the recital that it was given upon no consideration, it would not for that reason be refused enforcement.[45] See, also, Harris v. Harris' Exr, 23

[44] Some statutes abolish the common law effect of a seal. Local statutes should be consulted.

[45] "Our statute concerning evidence (Rev., p. 380, § 16) which enacts that in any action upon an instrument in writing, under seal, the defendant in such action may plead and set up as a defence therein fraud in the consideration, is not applicable, for here there is no fraud shown.

"But it is said that the act of April 6th, 1875 (Rev., p. 387, § 52), opens it to the defence of want of sufficient consideration, as if it were a simple contract, and, that being shown, the contract becomes inoperative. The statute reads: 'That in every action upon a sealed instrument or where a set-off is founded on a sealed instrument, the seal thereof shall be only presumptive evidence of a sufficient consideration, which may be rebutted, as if such instrument was not sealed,' etc.

"Suppose the presumption that the seal carries with it, that there is a sufficient consideration, is rebutted, and overcome by evidence showing there was no such consideration, the question still remains, whether an instrument under seal, without sufficient consideration, is not a good promise and enforceable at law. It is manifest that here the parties intended and understood that there should be no consideration. The old man said, 'Now here, girls, is a nice present for each of you,' and so it was received by them. The mischief which the above quoted law was designed to remedy, was that where the parties intended there should be a consideration, they were prevented by the common law from showing none, if the contract was under seal. But it would be going too far to say that the statute was intended to abrogate all voluntary contracts, and to abolish all distinction between specialties and simple contracts.

"It will not do to hold that every conveyance of land, or of chattels, is void by showing that no sufficient consideration passed when creditors are not affected. Nor can it be shown by authority that an executory contract, entered into intentionally and deliberately, and attested in solemn form by a seal, cannot be enforced. * * * If a party has fully and absolutely expressed his intention in a writing sealed and delivered, with the most solemn sanction known to our law, what should prevent its execution where there is no fraud or illegality? But because deeds have been used to cover fraud and illegality in the consideration, and just defences have been often shut out by the conclusive

Grat. (Va.) 737. But the effect given to our statute has been stated to be one which with respect to the consideration places simple executory, and sealed executory, contracts upon the same footing. Green v. Langdon, 28 Mich. 221, 226; Hobbs v. Electric Light Co., 75 Mich. 550, 42 N. W. 965. It must be held, in the light of the evidence, that the bond is a mere voluntary, gratuitous promise by the obligors to the obligee to pay a sum of money. Being so, it cannot be sustained as a gift in jurisdictions in which a seal may be impeached. 4 Am. & Eng. Ency. L. 665; Matter of James, 146 N. Y. 78, 40 N. E. 876, 48 Am. St. Rep. 774. * * *

The judgment is reversed, and, as it appears that upon no theory can plaintiff recover, no new trial is awarded.[46]

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## NURSE *v.* FRAMPTON.

(Court of King's Bench, 1695. 1 Ld. Raym. 28.)

Nurse brought debt against Frampton for a certain sum of £25 due to Nurse by agreement by deed between the plaintiff and the defendant. Upon oyer of the deed it appeared to be thus, viz. 'tis agreed, that a grey

character of the formality of sealing, we have enacted in our state the two recent statutes above quoted. The one allows fraud in the consideration of instruments under seal to be set up as defence, the other takes away the conclusive evidence of a sufficient consideration heretofore accorded to a sealed writing, and makes it only presumptive evidence. This does not reach the case of a voluntary agreement, where there was no consideration, and none intended by the parties. The statute establishes a new rule of evidence, by which the consideration of sealed instruments may be shown, but does not take from them the effect of establishing a contract expressing the intention of the parties, made with the most solemn authentication, which is not shown to be fraudulent or illegal. It could not have been in the mind of the legislature to make it impossible for parties to enter into such promises; and without a clear expression of the legislative will, not only as to the admissibility, but the effect of such evidence, such construction should not be given to this law. Even if it should be held that a consideration is required to uphold a deed, yet it might still be implied where its purpose is not within the mischief which the statute was intended to remedy. It was certainly not the intention of the legislature to abolish all distinction between simple contracts and specialties, for in the last clause of the section they say that all instruments executed with a scroll, or other device by way of scroll, shall be deemed sealed instruments. It is evident that they were to be continued with their former legal effect, except so far as they might be controlled by evidence affecting their intended consideration." Scudder, J., in Aller v. Aller, 40 N. J. L. 446, 449-452 (1878). See also, 95 Am. Dec. 287, note.

[46] "A formal instrument like the present, drawn up by lawyers and executed in the most solemn form known to the law, is less likely to be a vehicle for fraud than a parol contract based on a technical detriment to the promisee." Holmes, J., in Krell v. Codman, 154 Mass. 454, 457 (1891).

nag bought of J. S. by Mr. Frampton shall run twenty-five miles in two hours time, for, &c., in witness whereof we have set our hands and seals, &c., omitting the names of the persons between whom this deed was made, but the plaintiff and defendant had signed the deed. And after demurrer the court was of opinion that inasmuch as the plaintiff and defendant had signed this, although it was not mentioned in the body of the deed, by whom or to whom it was made; yet it will warrant the declaration's reciting, that it was made by the plaintiff and defendant. And judgment was given for the plaintiff.[47]

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## GREEN *v.* HORNE.

**(Court of King's Bench, 1695. 1 Salk. 197.)**

In covenant the plaintiff declared, that A. being indebted to him, and arrested at his suit, the defendant, in consideration that he would order the bailiff to let A. go at large, undertook and covenanted with the plaintiff to bring in the body of the said A. and deliver him into the custody of the said bailiff, such a day, &c. The defendant prayed oyer of the deed, which was, *I* (the defendant) *do promise and engage myself to bring in the body of A. to the custody of B. bailiff, such a day;* and thereupon it was demurred. *Et per Cur.* first, the plaintiff cannot set forth matter of fact in his declaration not contained in the deed, so as to alter the case; therefore, all such matter of fact so alleged or averred is immaterial. 8 Rep. 151.

2dly, the plaintiff is no party to the deed, nor so much as named in it, and though covenant may be brought on a deed-poll, yet the party must be named in the deed. 1 Rol. Ab. 517.[48]

[47] "If one party only be named as obligor in the body of a bond, and others sign it also, all are bound. In no other way can any effect be given to the signatures of those not so named. The intent is clear, and that is sufficient. Parks v. Brinkerhoff, 2 Hill (N. Y.) 663; Perkins v. Goodman, 21 Barb. (N. Y.) 218." Swayne, J., in George v. Tate, 102 U. S. 564, 569 (1881).

[48] "But it cannot be meant that his name of baptism and his surname must necessarily be set out. If he be sufficiently designated in the deed, this must be enough to entitle him to sue for breach of a covenant to pay money to the person so designated." Lord Campbell, C. J., in Sunderland Marine Ins. Co. v. Kearney, 16 Q. B. 925, 938 (1851).

If a party is named as grantee in a deed poll which contains covenants which purport to bind him, the nature of his obligation is in dispute.

"How it came to be thought by the profession at an early day and to be handed down to the present, that an action of covenant might be maintained against the grantee in a deed poll under any circumstances, or against anyone else who had not sealed it, I cannot imagine. * * * This supposition had its root in the case obscurely stated in Co. Litt. 331a; but it is clearly shown by Mr. Platt, the only lawyer who has searched the original roll, that there has

## SCUDAMORE *v.* VANDENSTENE.

(Court of King's Bench, 1587. 2 Co. Inst. 673.)

In an action of debt between Scudamore and others plaintifes and Vandenstene defendant, upon an indenture of charterparty the case was this: the indenture of charterparty was made between Scudamore and others owners of the good ship, called B., whereof Robert Pitman was master, on the one partie, and Vandenstene on the other party. In which indenture the plaintife did covenant with the said Vandenstene and Robert Pitman, and also Vandenstene covenanted with the Plaintife and Robert Pitman, and bound themselves to the plaintife and Robert Pitman for performance of covenants in 600 pounds. And the conclusion of the said indenture was, "In witnesse whereof the parties abovesaid to these present indentures have put to their seals" And the said Robert Pitman to the said indenture put his hand and seal, and delivered the same. The defendant in barre of the said action pleaded the release of Pitman, &c. whereupon the plaintife demurred. And it was adjudged, that the release of Pitman did not barre the plaintife, because hee was no party to the indenture. And the diversity was taken and agreed betweene an indenture reciprocall betweene parties on the one side, and parties on the other side, as this was; for there no bond, covenant, or grant can be made to or with any that is not party to the deed.[49] But where the deed indented

been a prodigious misconception of the language of Lord Coke, which was predicated, not of an action of covenant, but of an action of debt. * * * It ought to have occurred to them [the profession] that forms of pleading are touchstones of the law, and that the most dexterous pleader would find himself unable to make a successful profert of a deed poll as the act of one who had not sealed it. Mutual covenants may be contained in the same instrument; but each party must seal and deliver his own exactly as if they were contained in several parts of it." Gibson, C. J., in Maule v. Weaver, 7 Pa. St. 329, 331-332 (1847).

See Taylor v. Forbes, 101 Va. 658 (1903), holding that the grantee's obligation is subject to the statute of limitations applicable to simple contracts instead of that which applies to specialties. Cf. Lock v. Wright, 1 Stra. 569 (1723). But see Midland Railway Co. v. Fisher, 125 Ind. 19 (1890). See note on liability of grantee upon a condition of a deed poll in 23 L. R. A. 396.

[49] "The rule and distinction as to deeds *inter partes* and deeds not of that character is very old, and to be found in the ancient legal authorities, but it is impossible to state or illustrate it more clearly than is done by Lord Tenterden in his Book on Shipping, p. 170. * * * He states the rule to be a technical one, and thus illustrates it: 'If a charter-party under seal is expressed to be made between certain parties, as between A and B, owners of a ship whereof C is master of the one part, and D and E of the other part, and purports to contain covenants with C, nevertheless C cannot bring an action in his own name upon the covenant, and this even although he sealed and delivered the instrument; but if the charter-party is not expressed to be made between parties, but is written thus "This charter-party indented witnesseth" it is otherwise.' He adds, 'this latter then is the most proper form.' In the case of Berkeley v. Hardy, 5 B. & C. 355, the same rule is laid down, and in the judgment it is

is not reciprocall, but is without a between, &c. as, *omnibus Christi fidelibus, &c.* there a bond, covenant, or grant may be made to divers severall persons.

stated to be a long established technical rule and one believed to be peculiar to the law of England." Martin, B., in Chesterfield & Midland Silkstone Colliery Co. v. Hawkins, 3 H. & C. 677, 692 (1865).

"At common law a person though not a party to a deed poll, could sue upon it, if the instrument showed upon its face that it was made for his benefit, but this was not so as to a deed *inter partes*. The latter was only available between the parties to it and their privies, and a third person could not maintain an action of covenant upon it. Jones v. Thomas, 21 Gratt. 96; Stuart v. James River & K. Co., 24 Gratt. 274; Ross v. Milne, 12 Leigh 204; and Fellows v. Gilman, 4 Wend. 414." Riley, J., in Newberry Land Co. v. Newberry, 95 Va. 119, 120 (1897).

In Saunders v. Saunders, 154 Mass. 337 (1891), where there was an *inter partes* sealed contract, recovery was denied to the widow of one of the covenantors who was suing the surviving covenantor on his covenant to pay to such person as might be the deceased covenantor's widow certain sums. The court said that only those who are parties to contracts under seal can sue upon them and that the instrument was objectionable as "An attempt to create a covenant to arise wholly in the future between the defendant and a party who at the time was unascertained, and from whom no consideration was to move and who was not in any way privy to the contract." In a jurisdiction which will permit the beneficiary of a contract under seal to sue upon the contract, however, the fact that the beneficiary will not be known, or even will not come into being, until some time after the contract, would not seem to be a sufficient ground for denying a recovery.

## CHAPTER II.

## THE OFFER AND THE ACCEPTANCE OF A SIMPLE CONTRACT.[1]

### HUDSON *v.* COLUMBIAN TRANSFER CO.

**(Supreme Court of Michigan, 1904. 137 Mich. 255, 110 N. W. 402, 109 Am. St. Rep. 679.)**

Action by Horace A. Hudson against the Columbian Transfer Company. Judgment for plaintiff. Defendant brings error. Affirmed.

MONTGOMERY, J.* This action is brought to recover the value of goods stored with the defendant as warehouseman, and destroyed by fire. * * * In March, 1901, plaintiff made a contract to store the goods in question with defendant for hire, on the fourth floor of the building known as 21 and 23 Campau street. This statement is denied, but the question was submitted to the jury, and found in favor of the plaintiff. The plaintiff thereupon took out insurance on his goods as located in the building known as 21 and 23 Campau street, but whether this fact was communicated to the defendant is a matter of dispute; and, as this question was not submitted to the jury, the plaintiff's rights are to be determined upon the assumption that notice of the insurance was not given. The goods were taken from plaintiff's house, and were stored by defendant not in the building known as 21 and 23 Campau street, but in the [adjoining] Hopson-Haftencamp building, where, without negligence on the part of the defendant, they were destroyed by fire. * * *

[1] "There are two modes of making simple contracts * * *. The one is, when one party promises to do a certain thing and in consideration of that promise the other party engages to do something on his part. Then as nothing is done but the making of the promises, it is absolutely necessary that mutual, valid promises, amounting to an express contract, should appear; otherwise one of the parties might claim the benefit of the promise of the other, without in return doing any act or being liable for any loss whatever. * * * The other mode is, when one party promises in consideration that the other will or will not do some act. Then no mutual promise need be set forth or exist; but it is necessary and sufficient to show the act done. It is not requisite that it should appear the plaintiff might have been sued for not doing the act; for he may recover after the thing done, though it was at his election whether he would do it or not up to the moment of its execution." Ruffin, C. J., in Gurvin v. Cromartie, 11 Ired. (N. C.) 174, 179 (1850).

In an acceptance of a bilateral contract "The term 'I accept' fully expressed would read 'I accept and promise.'" Ashley on Contracts, p. 86.

* Parts of the opinion are omitted.

Complaint is made of the failure to present certain special questions to the jury. * * *

The other questions asked for the defendant's understanding of the agreement, and were preferred upon the theory that, as the minds of the parties must have met, the defendant's failure of understanding would answer plaintiff's claim of a contract. This is a fallacy. What is meant by "meeting of minds" is the agreement reached by the parties and expressed. As is well said in Brewington v. Mesker, 51 Mo. App. 348, "The meeting of minds which is essential to the formation of a contract is not determined by the secret intentions of the parties, but by their expressed intention, which may be wholly at variance with the former." See, also, 9 Cyc. 244; 9 Cyc. 578; Brown v. Hare, 3 H. & N. 484.

The question then, is whether, under the facts as found by the jury, the plaintiff was entitled to recover. We think this question should be answered in the affirmative. The theory of the plaintiff's case is that the defendant broke its contract of bailment, and subjected the property to a risk never contemplated by plaintiff, nor assumed or assented to by him. In such a case the rule is general that the bailee assumes the risk of the destruction of the property. The defendant was guilty of a technical conversion of plaintiff's property. See Lawson on Bailments, § 20; Martin v. Cuthbertson, 64 N. C. 328; Lane v. Cameron, 38 Wis. 603. A case precisely in point is that of Lilly v. Doubleday, L. R. 7 Q. B. 310, which case is cited with approval in Bradley v. Cunningham, 61 Conn. 485, 23 Atl. 932, 15 L. R. A. 679, and followed in Line v. Mills, 12 Ind. App. 100, 39 N. E. 870. * * *

We discover no error in the case.

*Judgment affirmed.*[2]

[2] "I dare say few assured have any distinct view of their own on the point, and might not even see it, if it were explained to them, but what they intend contractually does not depend on what they understand individually." Lord Sumner in Becker v. London Assur. Corp., 117 L. T. 609 (1918).

"A contract has, strictly speaking, nothing to do with the personal, or individual intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort. Of course, if it appear by other words or acts of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent." Learned Hand, J., in Hotchkiss v. National City Bank of N. Y., 200 Fed. 287, 293 (1911).

"To lead a person reasonably to suppose that you assent to an oral arrangement is to assent to it, wholly irrespective of fraud. Assent, in the sense of the law, is a matter of overt acts, not of inward unanimity in motives, design, or the interpretation of words." Holmes, J., in O'Donnell v. Inhabitants of Clinton, 145 Mass. 461, 463 (1888).

## SPENCER *v.* SPENCER.

**(Supreme Judicial Court of Massachusetts, 1902. 181 Mass. 471, 63 N. E. 947.)**

Action by Sarah Jane Spencer against John Spencer. Judgment for defendant, and plaintiff brings exceptions. Sustained.

HOLMES, C. J. This is an action for personal services brought against the defendant by his sister, an unmarried woman. For a time she lived with him as his housekeeper for pay. Then he fell ill and she kept on for two years, receiving no pay, or at most, five dollars, which was disputed, but on the contrary working out and using the money she earned for the support of the defendant and his children. The judge instructed the jury in substance that the plaintiff could not recover unless she had expected to be paid for her services and had believed that the defendant knew that

See generally, Samuel Williston, Mutual Assent in the Formation of Contracts, 14 Ill. L. Rev. 85; George P. Costigan, Jr., Constructive Contracts, 19 Green Bag, 512, and Implied in Fact Contracts and Mutual Assent, 33 Harv. Law Rev. 376. See, also, Arthur L. Corbin, Offer and Acceptance and Some of the Resulting Legal Relations, 26 Yale L. J. 169.

A meeting of the minds of the parties, however, may be essential to a recovery in chancery even though the lack of a meeting of minds may not be so serious as to prevent a contract from arising.

"A court of equity will not enforce a contract which is uncertain and indefinite, or where, from all the evidence, there is grave doubt as to whether the minds of the parties really met. Even where there has been a mistake as to the terms of a contract, equity will not enforce it, if it is unreasonable, unconscientious, or a hard bargain that ought not to be enforced. In an early case this court decided that—

" 'Upon breach of a contract for the sale of real estate, it is not a matter of course for the court to enter a decree of specific performance. That will be done only when upon all the facts it is equitable it should be done.' Fowler v. Marshall, 29 Kan. 665, Syl. par. 1.

"In another case it was held that, while in legal contemplation two persons may make a contract that would be enforced at law, yet, if it should seem probable from the facts of the case that the parties did not in fact and equity agree to the same thing, the supposed contract would not be decreed in equity to be enforced specifically. Burkhalter v. Jones, 32 Kan. 5, 3 Pac. 559. In that case there was an offer to purchase and an agreement to sell land for the sum of $2,000. The court said, however, that in all probability the vendor at the time did not believe he was making a contract to sell the land for that sum, but believed that he was making a contract to sell the land for $2,100. The court below refused to order specific performance and the judgment was affirmed. * * *

"The opinion recognized that on the facts the case was a close one:

" 'In strict law, and by the words of the letters of the parties, we think the parties made a contract; but we also think that in fact and in equity the minds of the parties never came together; that they really never agreed to the same thing; and therefore, in equity and good conscience, they did not make a contract, or at least they did not make such a contract as equity should adjudge to be specifically enforced.' 32 Kan. 13, 3 Pac. 565.

"The case was followed and approved in Bird v. Logan, 35 Kan. 228, 10 Pac. 564." Porter, J., in Young v. Schwint (Kans.) 195 Pac. 614, 615, 616 (1921).

payment was expected for them, and unless the defendant had expected to pay for them and had believed that the plaintiff expected to have pay for them. The plaintiff excepted, and brings the case here after a verdict for the defendant.

We have felt some doubt whether these instructions should be construed to mean anything more than that the parties must have understood that they were dealing on a business footing, in which case we should hesitate to sustain the exceptions merely because of a theoretical leak to which no attention was called. Even so construed the proposition would be inaccurate since it would be enough to make a contract if the defendant as a reasonable man ought to have understood that the services were rendered for pay and not merely for love. But we are of opinion that the language of the judge went further than we have suggested, and too far for us to save it, however proper the verdict may seem to have been. Of course it does not matter whether the defendant expected to pay for the services or not, the question is as to the natural import of his overt acts. Manufacturing Co. v. Sawyer, 169 Mass. 477, 48 N. E. 620; Hobbs v. Whip Co., 158 Mass. 194, 197, 33 N. E. 495. Again, it is not necessary that the defendant should have believed that the plaintiff expected pay. If as a reasonable man he should have understood from what he knew that such was the expectation, he would be bound by accepting the services. Day v. Caton, 119 Mass. 513, 20 Am. Rep. 347.[3] It is unnecessary to criticise the ruling further.

*Exceptions sustained.*[4]

[3] In Day v. Caton, *supra*, Devens, J., said:

"If a person saw day after day a laborer at work in his field doing services, which must of necessity inure to his benefit, knowing that the laborer expected pay for his work, when it was perfectly easy to notify him if his services were not wanted, even if a request were not expressly proved, such a request, either previous to or contemporaneous with the performance of the services, might fairly be inferred. But if the fact was merely brought to his attention upon a single occasion and casually, if he has little opportunity to notify the other that he did not desire the work and should not pay for it, or could only do so at the expense of much time and trouble, the same inference might not be made. The circumstances of each case would necessarily determine whether silence with a knowledge that another was doing valuable work for his benefit, and with the expectation of payment, indicated that consent which would give rise to the inference of a contract. The question would be one for the jury."

[4] "In People v. Dummer, 274 Ill. 637, 640-641, 113 N. E. 934 (1916), Cartwright, J., said: 'A contract may be implied where an agreement in fact is presumed from the acts of the parties, and this is the proper meaning of an implied contract. An illustration of such a contract is where one performs services for another under circumstances showing that they were not intended to be gratuitous and the services are accepted.'

"In Ramsden & Carr v. Chessum & Sons, 110 L. T. 274 (1913), Lord Chancellor Haldane said: 'If A. brings goods to B. to be used in work which B. is doing, and B. knows that A. has brought them, not as a gift but as expecting to be paid for them, and B. uses these goods in his work, then *prima facie* B. is liable to pay the price of the goods.'

## YALE *v.* CURTISS.

(Court of Appeals of New York, 1897. 151 N. Y. 598, 45 N. E. 1125.)

Action by Nellie E. Yale against William R. Curtiss. From the affirmance of a judgment in favor of plaintiff (24 N. Y. Supp. 981), defendant appeals. Reversed.

HAIGHT, J.† This action was brought to recover damages for a breach of promise to marry. * * *

The rule governing contracts of this character has been fully discussed in the case of Homan v. Earle, 53 N. Y. 267. Formerly, contracts of this character were often inferred or implied from proof of such circumstances as usually attend an engagement; but, after the statute was changed so as to permit parties to testify in their own behalf, they were expected to state all that was said and done, so as to remove from the field of speculation facts that had theretofore been inferred, thus leaving the court to deter-

"In Wojahn v. National Union Bank, 144 Wis. 646, 667, 129 N. W. 1068 (1911), Marshall, J., said: 'The general rule is that if a person performs valuable services for another at that other's request, the law implies, as matter of fact, the making of a promise by the latter and acceptance thereof by the former to pay the one performing the service the reasonable value thereof [citations]. If one merely accepts services from another which are valuable to him, in general, the presumption of fact arises that a compensation equivalent is to pass between the parties, and the burden of proof is upon the recipient of the service to rebut such presumption if he would escape from rendering such equivalent. The burden may be much more easily lifted in such a case than in the case of there being a request for the performance. * * *'

"Professor Corbin has suggested that this true meeting-of-the-minds implied-in-fact contract is really one form of express contract. He says: 'A contract implied in fact is a true contract based upon a real agreement of the parties. It differs from an express contract only in the evidence necessary to establish its existence and its terms. In reality a contract implied in fact is an express contract, for intentions can be expressed as clearly by actions as by words.' Corbin, 'Quasi-Contractual Obligations,' 21 Yale L. J., 533, 546-547. No doubt that is a possible way of looking at them, but it is also possible to emphasize their inferred-as-a-fact nature, as the courts have done. The situation, therefore, is not like that which existed when the courts were pronouncing the non-contractual obligations now known as quasi-contracts to be contracts implied in law and when the courts were, accordingly, demonstrably in error. Instead of dealing with a truth having only one aspect, as was the case in that instance, we have here a double-aspect truth. In a sense the inferred as a fact or tacit contract is expressed by conduct, but in a sense also it is implied-in-fact. It would seem to be hopeless, therefore, to attempt to get rid of the term implied-in-fact as applied to these true contracts enforced because of conduct expressions." George P. Costigan, Jr., Implied in Fact Contracts and Mutual Assent. 33 Harv. L. Rev. 376, 382, n.

On implication of agreement to pay for services rendered by relative or member of household, see 1 L. R. A. (N. S.) 819, note; 11 L. R. A. (N. S.) 873, note; 8 Ann. Cas. 203, note. See, as between husband and wife, 15 L. R. A. 215, note, and, as between parties living in illicit relations, 29 L. R. A. (N. S.) 787, note; L. R. A. 1917 B, 683, note.

† Parts of the opinion are omitted.

mine whether the facts sworn to constituted a contract. In determining this question, however, while we may not imply facts not sworn to, we may infer the meaning and intention of the parties. In the absence of fraud and deception, there must be a contract. There must be a meeting of the minds of the contracting parties, and the evidence must be of such a character as to justify a finding that such was the case. No form of words is required. A formal offer and acceptance is not necessary, but there must be an offer and an acceptance "sufficiently disclosed or expressed to fix the fact that they were to marry, as clearly as if put in formal words." The language used must be such as to show that the minds of the parties met. Contracts of marriage concern the highest interests of life, and should be sacredly guarded. If the conduct and declarations of the parties clearly indicate that they regard themselves as engaged, it is sufficient; otherwise, not. Mere courtship, or even an intention to marry, is not sufficient to constitute a contract. Thorough acquaintance with character, habits, and disposition is essential in order to make an intelligent contract. The parties, therefore, may form such an acquaintance without having the inferences of a contract attach. Applying these rules to the facts of this case, it is apparent that the evidence falls short of that which is necessary to establish a contract. * * *

*Judgment reversed.*[5]

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## HIGGINS *v.* LESSIG.

**(Appellate Court of Illinois, Second District, 1893. 49 Ill. App. 459.)**

CARTWRIGHT, J.‡ Appellant was the owner of a set of old double harness, worth perhaps $15.00, which was taken from his premises without his knowledge, and he offered a reward of $100 for the recovery of the harness and the conviction of the thief. A few days afterward a boy named Wilt found part of the harness in appellee's berry patch, and appellant went with appellee to the place and brought that part of the harness into appellee's blacksmith shop. Appellant gave the boy who had found the harness a quarter of a dollar, and said that he would give him a dollar to find the rest of it. Appellee claims that appellant at that time offered a reward of $100 to the one who would find out who the

[5] It has been held that if the defendant's acts induced the plaintiff to believe that they were engaged and the defendant knew that plaintiff was acting on that belief and yet continued to act so as to induce that belief, he cannot avoid liability by showing that he did not intend an engagement. Stamm v. Wood, 86 Ore. 174 (1917).

For a contract to exist it is not necessary to have "express words clearly expressed." Zilske v. Grohn, 128 Wis. 159 (1906).

‡ Part of the opinion is omitted.

thief was, and that he earned the reward. This suit was brought to recover the amount so claimed as a reward, and a trial resulted in a verdict and judgment for appellee for $100.

The evidence showed that the defendant was much excited on the occasion, when it is claimed that the offer was made in the shop. Plaintiff's version of the language used was that the defendant said, "I will give $100 to any man who will find out who the thief is, and I will give a lawyer $100 for prosecuting him," using rough language and epithets concerning the thief. There was evidence of substantial repetition of the same statement, together with the assertion that he would not hire a cheap lawyer, but a good lawyer. The harness had been taken by a man called Red John Smith, who had been adjudged insane, and a Mrs. Phillips told the plaintiff that she saw Smith walking by with the harness on his back, on Sunday morning which was the time when it was taken. Plaintiff watched Smith that night and saw him hiding the collars, and the next day he waited for the return of the defendant from Galesburg, and told him that Red John Smith had the harness. A search warrant was procured, and the remainder of the harness was found.

We do not think that the language used was such as, under the circumstances, would show an intention to contract to pay the reward, and think plaintiff had no right to regard it as such. Defendant had previously offered a very liberal reward for the return of the old harness and the conviction of the thief. On this occasion he paid the boy only a trifling sum, and offered only $1 for finding the rest of the property. His further language was in the nature of an explosion of wrath against some supposed thief who had stolen the harness, and was coupled with boasting and bluster about the prosecution of the thief. It was indicative of a state of excitement so out of proportion to the supposed cause of it, that it should be regarded rather as the extravagant exclamations of an excited man than as manifesting an intention to contract.[6]

[6] "We are constrained to believe that what is called an offered reward of $200, was nothing but a strong expression of his feelings of anxiety for the arrest of those who had so severely injured him, and this greatly increased by the distracted state of his own mind, and that of his family; as we frequently hear persons exclaim, oh! I would give a thousand dollars if such an event were to happen, or *vice versa*. No contract can be made out of such expressions; they are evidence of strong excitement, but not of a contracting intention." Turley, J., in Stamper v. Temple, 6 Humph. (Tenn.) 113, 115-116 (1845).

The joke contract cases are of a similar nature. In McClung v. Terry, 21 N. J. Eq. 225 (1870) a marriage was annulled where the parties went through the ceremony in joke, even though the justice who performed it was in doubt whether they were in earnest or in jest. But in Girvan v. Griffin, N. J. 108 Atl. 182 (1919), where the clergyman and the only witness who testified did not think that the parties were acting in jest, the court refused to annul the marriage.

"The transaction looks like * * * a bantering proposition by the plaintiff to the defendant, and wanting the intention to contract. * * * It is not every loose conversation that is to be turned into a contract although the

But if we concede that defendant's language indicated an intention to contract to pay a reward, the plaintiff, although he obtained some definite knowledge by watching Smith, was neither the discoverer nor the first informer as to the identity of the thief. The evidence was that other persons learned of facts which showed that Red John Smith had taken the harness and told the defendant of such facts before the plaintiff did. * * *

*The judgment will be reversed and the cause remanded.*

parties may seem to agree. A man is not to be snapped up for an unintended proposition made when he has no reason to suppose anybody wants to accept what he proposes. When people meet to do business they are presumed to mean what they propose, and expect to be taken up; but a proposition made and accepted where no expectation of contracting exists should be carefully weighed with all the circumstances when the question of assent at the time comes to be questioned, as here." Thompson, J., in Brown v. Finney, 53 Pa. St. 373, 378 (1866).

"Jokes are sometimes taken seriously by the young and inexperienced in the deceptive ways of the business world, and if such is the case and thereby the person deceived is led to give valuable services in the full belief and expectation that the joker is in earnest, the law will also take the joker at his word and give him good reason to smile." Dent, J., in Plate v. Durst, 42 W. Va. 63, 66-67 (1896) and "A person is estopped to deny the sincerity of his conduct, to the injury of a person misled thereby," Id. p. 68. In Plate v. Durst a promise which the defendant declared made in jest was allowed to rebut the presumption of a gift of services rendered by plaintiff while a member of defendant's household, that is, was allowed to uphold plaintiff's recovery on an implied in fact contract.

In Thruston v. Thornton, 1 Cush. (Mass.) 89 (1848), Wilde, J., for the court, agreed with the trial judge that it was for the jury to decide whether "at the interview between the parties, their minds met, and they made a legal and binding contract; or whether the transaction, as was insisted by the defendant, was a loose conversation, not understood or intended by them as an agreement."

In Stollery v. Maskelyne, 15 T. L. R. 79 (1898), there was a dispute as to the meaning of an oral offer by a conjurer of £500 to any person who could discover the secret of his box trick or produce a correct imitation of it. The dispute was as to the second branch of the offer, for defendant contended that the plaintiffs did not profess to have discovered his secret, but merely to have made a box by which they could produce an illusion similar to that produced by him. The jury having found a verdict for the plaintiffs for £500, the Court of Appeal dismissed an application for judgment or a new trial because the words were capable of bearing the meaning which the plaintiffs put upon them and therefore twelve reasonable men could properly come to the conclusion which the jury did.

In Balfour v. Balfour, [1919] 2 K. B. 571, the Court of Appeal held that a promise by a husband to his wife to pay her £30 a month to cover her estimated expenses was not contractual. Atkin, L. J., pointed out (pp. 578-579) that "it is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract and one of the most usual forms of agreement which does not

## SPENCER *v.* HARDING.

(Court of Common Pleas, 1870. L. R., 5 C. P. 561.)

The second count of the declaration stated that the defendants by their agents issued to the plaintiffs and other persons engaged in the wholesale trade a circular in the words and figures following: that is to say, "28 King Street, Cheapside, May 17th, 1869. We are instructed to offer to the wholesale trade for sale by tender the stock in trade of Messrs. G. Eilbeck & Co., of No. 1 Milk Street, amounting as per stock-book to £2,503. 13s. 1d., and which will be sold at a discount in one lot. Payment to be made in cash. The stock may be viewed on the premises, No. 1, Milk Street, up to Thursday, the 20th instant, on which day, at 12 o'clock at noon precisely, the tenders will be received and opened at our offices. Should you tender and not attend the sale, please address to us, sealed and inclosed, 'Tender for Eilbeck's stock.' Stock-books may be had at our office on Tuesday morning. Honey, Humphreys & Co." And the defendants offered and undertook to sell the said stock to the highest bidder for cash, and to receive and open the tenders delivered to them or their agents in that behalf, according to the true intent and meaning of the said circular. And the plaintiffs thereupon sent to the said agents of the defendants a tender for the said goods, in accordance with the said circular, and also attended the said sale at the time and place named in the said circular. And the said tender of the plaintiff was the highest tender received by the defendants or their agents in that behalf. And the plaintiffs were ready and willing to pay for the said goods according to the true intent and meaning of the said circular. And all conditions were performed, &c., to entitle the plaintiffs to have their said tender accepted by the defendants, and to be declared the purchasers of the said goods according to the true intent and meaning of the said circular; yet the defendants refused to accept the said tender of the plaintiffs, and refused to sell the said goods to the plaintiffs, and refused to open the said tender or proceed with the sale of the said goods, in accordance with their said offer and undertaking in that behalf, whereby the plaintiffs had been deprived of profit, &c.

Demurrer, on the ground that the count showed no promise to accept

constitute a contract appears to me to be the arrangements [as to allowances] which are made between husband and wife * * * To my mind those agreements, or many of them, do not result in contracts at all and they do not result in contracts even though there may be what as between other parties would constitute consideration for the agreement. * * * They are not contracts because the parties did not intend that they should be attended by legal consequences. * * * They are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon. Agreements such as these are outside the realm of contracts altogether."

the plaintiffs' tender or sell them the goods. Joinder.

WILLES, J. I am of opinion that the defendants are entitled to judgment. The action is brought against persons who issued a circular offering a stock for sale by tender, to be sold at a discount in one lot. The plaintiffs sent in a tender which turned out to be the highest, but which was not accepted. They now insist that the circular amounts to a contract or promise to sell the goods to the highest bidder—that is, in this case, to the person who should tender for them at the smallest rate of discount; and reliance is placed on the cases as to rewards offered for the discovery of an offender. In those cases, however, there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave the information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who before the offer should be retracted should happen to be the person to fulfill the contract of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on, "and we undertake to sell to the highest bidder," the reward cases would have applied, and there would have been a good contract in respect of the persons. But the question is, whether there is here any offer to enter into a contract at all, or whether the circular amounts to anything more than a mere proclamation that the defendants are ready to chaffer for the sale of the goods, and to receive offers for the purchase of them. In advertisements for tenders for buildings it is not usual to say that the contract will be given to the lowest bidder, and it is not always that the contract is made with the lowest bidder. Here there is a total absence of any words to intimate that the highest bidder is to be the purchaser. It is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt.

KEATING and MONTAGUE SMITH, JJ., concurred.

*Judgment for the defendants.*[7]

[7] In Grainger & Son v. Gough, [1896] A. C. 325, 333, Lord Herschell discussed the argument of counsel as to the effect of orders given by buyers who received price lists from the London agents of M. Louis Roederer, a wine merchant of Reims, France, who, in his arrangements with his agents, reserved the right to reject any particular order. Lord Herschell said:

"He [counsel] called attention to certain price lists which were distributed by the appellants among persons likely to give orders, and contended that as soon as an order was given to them by a person receiving one of those lists a contract to supply the specified quantity at the price named in the list was complete, subject only to a right on the part of Roederer to disavow it. I think it impossible to accede to this contention. In my opinion, this would not be understood by any one in the trade to be the effect of giving an order for goods specified in such a price list. The transmission of such a price list does not amount to an offer to supply an unlimited quantity of the wine described at the price named, so that as soon as an order is given there is a binding contract to supply that quantity. If it were so, the merchant might find him-

## DAVID SEARS, JR., *v.* EASTERN RAILROAD COMPANY.

**(Supreme Judicial Court of Massachusetts, 1867. 14 Allen 433, 92 Am. Dec. 780.)**

CHAPMAN, J. If this action can be maintained, it must be for the breach of the contract which the defendants made with the plaintiff. He had purchased a package of tickets entitling him to a passage in their cars for each ticket from Boston to Lynn. This constituted a contract between the parties. Cheney v. Boston & Fall River Railroad, 11 Met. 121; Boston & Lowell Railroad v. Proctor, 1 Allen 267; Najac v. Boston & Lowell Railroad, 7 Allen 329. The principal question in this case is, what are the terms of the contract? The ticket does not express all of them. A public advertisement of the times when their trains run enters into the contracts, and forms a part of it. Denton v. Great Northern Railway, 5 El. & Bl. 860. It is an offer which, when once publicly made, becomes binding, if accepted before it is retracted. Boston & Maine Railroad v. Bartlett, 3 Cush. 227. Advertisements offering rewards are illustrations of this method of making contracts. But it would be unreasonable to hold that advertisements as to the time of running trains, when once made, are irrevocable. Railroad corporations find it necessary to vary the time of running their trains, and they have a right, under reasonable limitations, to make this variation, even as against those who have purchased tickets. This reserved right enters into the contract, and forms a part of it. The defendants had such a right in this case.

But if the time is varied, and the train fails to go at the appointed time, for the mere convenience of the company or a portion of their

**self involved in any number of contractual obligations to supply wine of a particular description which he would be quite unable to carry out, his stock of wine of that description being necessarily limited."**

**"And an invitation to prospective buyers to negotiate for a license [to sell defendant's patented products] and to trade with the defendant, even when confined to a definite class, imposes no obligation on the sender of accepting any offer which thereafter might be received. The order of the prospective buyer does not ripen into a contract of sale until the defendant's acceptance, and then only as to goods specifically ordered." Braley, J., in Montgomery Ward & Co. v. Johnson, 209 Mass. 89, 91 (1911).**

**"There may be offers not resulting, when the offer is accepted, in a contract. An excellent illustration of that proposition is offered by Spencer v. Harding, L. R. 5 C. P. 561. * * * Applying the principles of that case to the present, is there a contract? In my opinion there is nothing more than a proclamation that an examination for a scholarship will be held, and there is no announcement that the scholarship will be awarded to the scholar who obtains the highest number of marks. Consequently by coming in and submitting to the examination [and getting the highest number of marks] the plaintiff did not do that which resulted in a contract." Chitty, J., in Rooke v. Dawson, [1895] 1 Ch. 480, 485-486.**

**On the distinction between offer or acceptance and a preliminary step in negotiation, see 4 L. R. A. (N. S.) 177, note.**

expected passengers, a person who presents himself at the advertised hour, and demands a passage, is not bound by the change unless he has had a reasonable notice of it. The defendants acted upon this view of their duty, and gave certain notices. Their trains had been advertised to go from Boston to Lynn at 9.30 P. M., and the plaintiff presented himself, with his ticket, at the station to take the train; but was there informed that it was postponed to 11.15. The postponement had been made for the accommodation of passengers who desired to remain in Boston to attend places of amusement. Certain notices of the change had been given; but none of them had reached the plaintiff. They were printed handbills posted up in the cars and stations on the day of the change, and also a day or two before. Though he rode in one of the morning cars from Lynn to Boston, he did not see the notice, and no legal presumption of notice to him arises from the fact of its being posted up. Brown v. Eastern Railroad, 11 Cush. 101; Malone v. Boston & Worcester Railroad, 12 Gray, 388. The defendants published daily advertisements of their regular trains in the "Boston Daily Advertiser," "Post," and "Courier," and the plaintiff had obtained his information as to the time of running from one of these papers. If they had published a notice of the change in these papers, we think he would have been bound by it. For as they had a right to make changes, he would be bound to take reasonable pains to inform himself whether or not a change was made. So if in their advertisement they had reserved the right to make occasional changes in the time of running a particular train, he would have been bound by the reservation. It would have bound all passengers who obtained their knowledge of the time-table from either of these sources. But it would be contrary to the elementary law of contracts to hold that persons who relied upon the advertisements in either of those papers should be bound by a reservation of the offer, which was, without their knowledge, posted up in the cars and stations. If the defendants wished to free themselves from their obligations to the whole public to run a train as advertised, they should publish notice of the change as extensively as they published notice of the regular trains. And as to the plaintiff, he was not bound by a notice published in the cars and stations which he did not see. If it had been published in the newspapers above mentioned, where his information had in fact been obtained, and he had neglected to look for it, the fault would have been his own.

The evidence as to the former usage of the defendants to make occasional changes was immaterial, because the advertisement was an express stipulation which superseded all customs that were inconsistent with it. An express contract cannot be controlled or varied by usage. Ware v. Hayward Rubber Co., 3 Allen 84.

The court are of opinion that the defendants, by failing to give such notice of the change made by them in the time of running their train

on the evening referred to as the plaintiff was entitled to receive, violated their contract with him, and are liable in this action.

*Judgment for the plaintiff.*[8]

[8] It has been said that "The passing of a street railway car is the offer of a contract of transportation which is accepted by the passenger's boarding the car." Brantly on Contracts, 2 ed., 22-23.

"The printed schedule is an offer which was accepted by the plaintiff when he asked for a ticket, and he had a legal right to be transported by the first train stopping at Harrisburg. If the train arrives after schedule time or misses connection, or delivers a passenger at his destination after the schedule time, unless the delay is caused by no fault of the carrier, the passenger has a right to recover compensation for his loss of time and actual expenses." Clark, C. J., in Coleman v. R. R., 138 N. C. 351, 354, (1905). But Professor Williston has pointed out (1 Williston on Contracts, § 32a) that the exception of delay without the fault of the carrier shows that the doctrine is erroneous, and that accordingly, "the obligation of the railroad to conform to its time table seems rather due to its obligations as a public service corporation, irrespective of contract, than to an obligation voluntarily assumed."

The railroads have avoided the contract difficulty by printing on their time tables, "subject to change without notice."

In Mulligan v. Southern Rwy., 84 So. Car. 171, 175-6 (1909), Jones, C. J., said: "The carrier cannot by contract limit its common law liability for injury resulting from its negligence, but if the passenger has, or should have, knowledge that the schedules as published are not guaranteed by the carrier, he takes passage subject to such delays in making advertised schedules and connections as are not due to the negligence or wilful act of the carrier; but if the carrier negligently or wilfully fails to make the published schedules, the passenger injured thereby may recover damages."

It seems judicially assumed that by inserting "Subject to change without notice" and other conditions in time tables, the railroads have eliminated the contract question raised in Sears v. Eastern Railroad Co. This is well illustrated in several English cases. In Driver v. London & North-Western Rwy. Co., 16 T. L. R. 293 (1900) railway tickets referred passengers to the time tables which contained a condition which A. L. Smith, L. J., summarized as stating that the defendants "would not undertake that the trains would arrive at the times stated in their time tables, nor would they be accountable for any loss or inconvenience or injury arising from delays or detention." The validity of the condition was recognized by holding that in the absence of evidence of negligence on their part, the defendants were not liable. Similar conditions were held to form part of the contract of carriage in McCartan v. The North-Eastern Rwy. Co., 54 L. J. Q. B. 441 (1885); Prevost v. Great Eastern Rwy. Co., 13 L. T. R. 20 (1865); Thompson v. Midland Rwy. Co., 34 L. T. R. 34 (1875). But by such a contract the company cannot escape responsibility for its negligence. Buckmaster v. Great Eastern Rwy. Co., 23 L. T. R. 471 (1870). As was said in Prevost v. Great Eastern Rwy. Co., *supra*, by Crompton, J.: "The company expressly say, 'We will not contract, and it shall not be taken as part of our duty, to guarantee the arrival of trains,' but they go on to say, we will take the greatest care to insure punctuality. I think that the contract and duty is simply this, that they will use proper care and not be negligent" (p. 21).

## CHEROKEE TANNING EXTRACT CO. *v.* WESTERN UNION TELEGRAPH CO.

**(Supreme Court of North Carolina, 1906. 143 N. C. 376, 55 S. E. 777, 118 Am. St. Rep. 806.)**

Action by the Cherokee Tanning Extract Company against the Western Union Telegraph Company, for damages alleged to have been sustained through the negligence of the defendant in failing to transmit and deliver promptly a certain telegram. Judgment for plaintiff, and defendant appeals. Reversed, and partial new trial ordered.

BROWN, J. There is no dispute as to the material facts. The evidence shows: That on the 7th day of November, 1903. an agent of the Standard Oil Company at Wilmington, N. C., wrote to the plaintiff at Andrews, N. C., a letter containing among other things, this request: "Kindly advise us by wire Monday if you can use about 1,500 creosote barrels between now and January 1st at 95 cents each delivered in car load lots." That the plaintiff received this letter on Monday, November 9th, and at 7:30 P. M., of that day filed with the defendant, at its Andrews office, a message addressed to the Standard Oil Company, Wilmington, N. C., and reading as follows: "We accept your offer 1,500 barrels as per yours of the 7th." This message was delivered to the sendee at 10:36 A. M., November 10th. At the same time it wrote to plaintiff, the oil company addressed a similar letter to the Brevard Tanning Company and others. The latter company purchased the barrels by telegram received by the oil company shortly before plaintiff's message. The plaintiff claims substantial damage. Defendant requested the court to charge that plaintiff was entitled to recover nominal damages only, to wit, the price paid for the telegram. We think this instruction should have been given.

Damages are measured in matters of contract not only by the well-known rule laid down in Hadley v. Baxendale, 9 Exch. 341, but they must not be the remote, but the proximate, consequence of a breach of contract, and must not be speculative or contingent. Unless the reply of plaintiff by wire to the letter of the oil company created a contract between the two for the sale and delivery of 1,500 barrels at 95 cents each, then plaintiff can recover only nominal damages for any other damages would necessarily be purely speculative or contingent. The language of Brannon, J., in a similar case in West Virginia is appropriate to this: "But the trouble facing the plaintiff in this case is that there was no final contract between the parties, but only a proposal for a contract, and there can be no contract without both a proposal and its acceptance. The failure of the telegram company did not cause the breach of a consummate contract; it only prevented one that might or might not have been made." Beatty v. Tel. Co. (W. Va.) 44 S. E. 309. See, also, Hosiery Co. v. Tel. Co. (Ga.) 51 S. E. 290 and Wilson v. Tel. Co. (N. C.) 52 S. E. 153. The offer must be distinct as such, and not merely an invitation

to enter into negotiations upon a certain basis. Wire Works v. Sorrell, 142 Mass 442, 8 N. E. 332; Beaupre v. Tel. Co., 21 Minn. 155; 24 Am. & Eng. Enc. 1029, and cases cited.

Again, the offer must specify the specific quantity to be furnished, as a mere acceptance of an indefinite offer will not create a binding contract. McCaw Mfg. Co. v. Felder, 115 Ga. 408, 41 S. E. 664; 24 Am. & Eng. Enc. 1030, note 1, and cases cited. "The offer must be one which is intended of itself to create legal relations on acceptance. It must not be an offer merely to open negotiations which will ultimately result in a contract." 1 Page on Cont. § 26, and cases cited; Clark on Contracts, § 29. In Moulton v. Kershaw, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516, the defendants wrote to the plaintiff as follows: "In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt in full car load lots of 80 to 75 barrels, delivered at your city at 85 cents per barrel to be shipped per C. & N. W. R. R. Co. only. At this price it is a bargain as the price in general remains unchanged. Shall be pleased to receive your order." The plaintiff at once telegraphed the defendant: "Your letter of yesterday received and noted. You may ship me two thousand barrels Michigan fine salt as offered in your letter." The defendant declined to deliver the sale and plaintiff sued for damages. The Supreme Court of Wisconsin, sustaining a demurrer to the complaint, held that the communication between the parties did not show a contract; that the letter of the defendants was not such an offer as plaintiff could by an acceptance change into a binding agreement.[9] See, also, Smith v. Gowdy, 90 Mass. 566. The letter from the oil company to the plaintiff was a mere inquiry. Walser v. Tel. Co., 114 N. C. 440, 19 S. E. 366. It was evidently a "trade inquiry" sent out by the oil company to customers, and did not purport and was not intended to be a legal offer binding on acceptance. "Care should be taken always not to construe as an agreement letters which the parties intended only as preliminary negotiations." Lyman v. Robinson, 14 Allen (Mass.) 254.

Again, the acceptance by the plaintiff was not in terms of the offer. The acceptance was for 1,500 barrels. The oil company could not have compelled the plaintiff to take a less number. If the plaintiff regarded the oil company's letter as a valid offer, it should have replied that it would take what barrels the oil company had, not exceeding 1,500, as

[9] In Moulton v. Kershaw, cited *supra*, Taylor, J., for the court said: "They say, 'We are authorized to offer Michigan fine salt,' etc., and volunteer an opinion that at the terms stated it is a bargain. They do not say, 'We offer to sell to you.' They use general language proper to be addressed generally to those who were interested in the salt trade. It is clearly in the nature of an advertisement or business circular, to attract the attention of those interested in that business to the fact that good bargains in salt could be had by applying to them, and not as an offer by which they were to be bound, if accepted, for any amount the persons to whom it was addressed might see fit to order. We think the complaint fails to show any contract between the parties."

that company had offered no exact specific number. "An acceptance to bind the other party must be unconditional and unqualified and must correspond exactly to the terms of the offer." 24 Am. & Eng. Enc. 1031, 1032, and cases cited; 1 Parsons, Cont. 476, 477. As the plaintiff's message to the oil company seasonably delivered would not, of itself, have effected a legal contract between the plaintiff and the oil company for the delivery of 1,500 barrels at 95 cents each, it follows that any other than nominal damages would be purely speculative. The oil company might have delivered the barrels, and then, again, it might not have done so. It might have delivered 1,500, and again it might have delivered a much less number. Its letter specified no exact number and it was under no legal compulsion to deliver any.

As the defendant manifests its willingness to pay nominal damages, it is unnecessary to consider the exceptions to his honor's rulings on the issue of negligence.

We award a new trial upon the second issue relating to the damages.

*Partial new trial.*[10]

[10] In Cox v. Denton, 104 Kans. 516 (1919), of a letter to plaintiff by one of the defendants for all, reading: "Do you want to buy 240 good 100 lb. [1000 lb.] cattle at 8.25 must be sold by Friday. * * * Phone me at Wichita Ks.," Dawson, J., for the court said: "But in all justice and good conscience, it must be said that the letter of inquiry was not an offer; it was merely a common and practical inquiry to arouse the interest of one with whom preliminary negotiations and an eventual bargain might be made" (p. 262). See Smith v. Gowdy, 8 Allen (Mass.) 566 (1864); Lincoln v. Erie Preserving Co., 132 Mass. 129 (1882).

In Davis v. Brigham, 56 Ore. 41 (1910), one Mitchell wrote Brigham in Michigan that one Davis of a certain lumber company had been looking over timber in Lane County, Oregon, where Mitchell and Brigham had land, and that "they will buy in there if they can get thirty or more claims at about $1500 or $1600 per claim" etc. Mitchell's second letter was dated Aug. 19. On Aug. 25 Brigham wrote to Mitchell "Yours of the 19th relative to my quarter section near yours, I consider $1600 decidedly too small a price, but if mine is needed to develop the country I will let it go for that price provided it is taken within twenty days." On Sept. 13th Mitchell wired Brigham: "Send deed in name of W. G. Davis to Dexter Horton & Co., bankers, Seattle, Wash., per your letter August 25." *Held*, (1) Brigham's letter of Aug. 25 was not an offer but an authorization to bring a purchaser; (2) Mitchell's telegram was not an acceptance.

In Sellers v. Warren, 116 Me. 350 (1917) to an offer which seemingly was that offeree should receive one-fourth of the purchase money named, the offeree telegraphed "would not consider less than half." Bird, J., said (pp. 353-4): "It cannot be held that a refusal to consider less than half is an offer to accept one-half. It is tantamount to saying that a party will consider, think or reflect upon such an offer of one-half, if made. The words are appropriate to the invitation rather than to the proposal of an offer."

## BOYERS & CO. *v.* D. & R. DUKE.

(High Court of Justice in Ireland, King's Bench Division. [1905] 2 Ir. Rep. 617, 3 B. R. C. 220.)

Motion on behalf of the plaintiffs to set aside the verdict [directed by Wright, J.], and judgment entered for the defendants, and enter verdict and judgment for the plaintiffs for £29 13s. 9d and costs.

LORD O'BRIEN, L. C. J.* The short question in this case is, whether these letters or documents which passed between the plaintiffs and the defendants constitute a completed contract—whether they amount to an offer and an acceptance of the offer, or to a quotation and an order? If they amount to the former, they constitute a contract; if to the latter, that is to say to a quotation and order, they do not constitute a contract. The action in which the question arises was brought by the plaintiffs against the defendants for alleged breach of contract for the supply of canvass. * * * The controversy arises, as I have said, upon the construction of the documents. My brother Wright, who tried the case, held that they did not constitute a completed contract, and we are of the opinion that he was right in so holding.

What then, are these documents? The first is dated the 23rd February, 1904, from the plaintiffs to the defendants, and is in the following terms: "Please give us your lowest quotation for 3000 yards of canvas, 32½ inches wide, to the enclosed sample, or near, and your shortest time for delivery, and oblige, etc." Now, this is expressly a request for a quotation. The reply is dated the 24th February 1904, and is as follows: "We enclose sample, No. B3932, nearest we have to match yours, also enclosed. Lowest price, 32½ inches wide, is 4⅝d per yard, 36 inches measure. Delivery of 3000 yards in 5/6 weeks." This, in my opinion, amounts only to a quotation. Certainly, quantity, price and time of delivery are stated, but I think it is nothing more than a statement of their ability to turn out the subject-matter at a certain price at a certain time, and not an offer to sell it at the price and to deliver it within the time mentioned. It amounted to nothing more, in my opinion, than a quotation in reply to a request for one.

Now comes the third and last letter, which is said by the plaintiffs to be an acceptance of an offer to sell on certain terms. It is dated March the 3rd. I shall read it: "Messrs D. & R. Duke, Brechin, N. B. Gents, —Please get made for us 3000 yards of canvas, 32½ inches wide, as per your quotation, February 24th, at 4⅝d per yard; deliver same as quickly as possible. Also please quote us for same, 52 inches wide, for quantity of amount 20,000 yards annually. As we have not had the pleasure of doing business with you before, we give you as reference Messrs. Baxter Brothers, Dundee; Messrs. Richards, Ltd. Aberdeen. Canvas No. B. 3932.

* The statement of facts and portions of the opinions are omitted.

—(Signed) Boyers & Co. Also please quote us for canvas to sample enclosed, 52 inches wide, and oblige, B. & Co."

Is this an acceptance of an offer or an order? In my opinion it is not the acceptance of an offer, because the letter to which it was a reply was a quotation and not an offer.

This letter is nothing more than it purports to be, namely, an order based on a quotation. The words are "Please get made for us 3000 yards of canvas, 32½ inches wide, as per your quotation, February 24th." The first letter, that is to say, the letter of the 23rd February asked for a quotation; the letter of the 24th sent what was asked for; and the plaintiffs' letter of the 3rd March expressly refers to the letter of the 24th, as "per your quotation February 24th."

Light is also thrown upon the true character of the letter of the 3rd March by the giving of references as therein, which is certainly far more compatible with the giving of an order or offer to purchase, than with a completed contract. The words "as quickly as possible" in the letter of the 3rd March would perhaps point to an uncompleted contract, but I think this criticism is so minute that much weight is not to be attached to it.

We are of the opinion that my brother Wright's view was correct and that judgment should be for the defendants.

GIBSON, J. * * * It is suggested for the plaintiffs that defendants' only reason for denying the existence of a contract is that there was a mistake in the price quoted. Whatever was the reason—whether mistake, rise of price, or otherwise—what we have to determine is whether there was a proposal to sell followed by an acceptance. It is very much a question of mercantile fact.

* * * The case is a difficult one; but, taking all the circumstances together, * * * I am not satisfied that a concluded contract is made out. If the plaintiffs' reference had proved unsatisfactory, could not the defendants have declined to execute the order? The letter of March 3rd following the letter of February 23rd is much more like an order, offered on the basis of a quotation, than the acceptance of a proposal to sell by which the plaintiffs understood the defendants to be bound.

MADDEN, J. The defendants in this case were asked for a "quotation". Now the word "quotation" is capable of different meanings according to the connexion in which it is used, but there is a common idea underlying them all, that of notation and enumeration. The thing quoted may be passages in an author, the price of specific articles, or the terms upon which work is to be done. In the case before us both parties agree that the documents before us must be read and construed giving the words the ordinary meaning which they bear in the English language, having regard to the subject-matter to which they relate; for neither party has contended that evidence should have been taken as to the use of the word "quotation" in mercantile transactions.

A quotation might be so expressed as to amount to an offer to provide a definite article, or to do a certain work, at a defined price. But the ideas of a quotation, and of an offer to sell, are radically different. The difference is well illustrated by the case of Harvey v. Facey, [1893] A. C. 552. There, to a telegram in these terms, "Will you sell us B.H.P.? Telegraph lowest cash price," the answer was returned, "Lowest price for B.H.P., £900." The inquirer telegraphed, "We agree to buy B.H.P. for £900 asked by you." An exceptionally strong judicial committee of the Privy Council, in a judgment delivered by Lord Morris, held that the statement, or quotation, of the lowest price at which a definite thing will be sold, does not import an offer to sell.[11]

The principle on which this case was decided applies with greater force to mercantile transactions than to an application for a statement of the price of a single parcel of land. It is a matter of common knowledge that quotations of prices are scattered broadcast among possible customers. Business could not be carried on if each such recipient of a priced catalogue offering a desirable article—say a rare book—at an attractive price, were in a position to create a contract of sale by writing that he would buy at the price mentioned. The catalogue had probably reached many collectors. The order of one only can be honoured. Has each of the others who write for the book a right of action? Wholesale dealers have

[11] In Harvey v. Facey, Lord Morris said: "The first telegram asks two questions. The first question is as to the willingness of L. M. Facey to sell to the appellants; the second question asks the lowest price, and the word 'Telegraph' is in its collocation addressed to that second question only. L. M. Facey replied to the second question only, and gives his lowest price. The third telegram from the appellants treats the answer of L. M. Facey stating his lowest price as an unconditional offer to sell to them at the price named. Their Lordships cannot treat the telegram from L. M. Facey as binding him in any respect, except to the extent it does by its terms—viz., the lowest price. Everything else is left open, and the reply telegram from the appellants cannot be treated as an acceptance of an offer to sell to them; it is an offer that required to be accepted by L. M. Facey. The contract could only be completed if L. M. Facey had accepted the appellant's last telegram. It has been contended for the appellants that L. M. Facey's telegram should be read as saying 'yes' to the first question put in the appellant's telegram, but there is nothing to support that contention. L. M. Facey's telegram gives a precise answer to a precise question—viz., the price. The contract must appear by the telegrams, whereas the appellants are obliged to contend that an acceptance of the first question is to be implied. Their Lordships are of opinion that the mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at that price to the persons making the inquiry."

In Knight v. Cooley, 34 Ia. 218 (1872) Beck, C. J. said: "The mere statement of the price at which property is held cannot be understood as an offer to sell. The seller may desire to choose the purchaser and may not be willing to part with his property to any one who offers his price." See Smith v. Gowdy, 8 Allen (Mass.) 566 (1864).

On naming price as an offer to sell or a quotation, see L. R. A. 1915 F, 824, note; 3 B. R. C. 229, note.

not in stock an unlimited supply of the articles the prices of which they quote to the public at large. This stock usually bears some proportion to the orders which they may reasonably expect to receive. Transactions of the kind under consideration are intelligible and business-like, if we bear in mind the distinction between a quotation, submitted as a basis of a possible order, and an offer to sell which, if accepted, creates a contract, for the breach of which damages may be recovered.

These observations seem to apply with special force to a quotation furnished by a manufacturer, in the position of the defendants, stating the terms on which he is prepared to work, as to price and time for completion. He may receive and comply with many applications for quotations on the same day. If his reply in each case can be turned into a contract by acceptance, his looms might be burdened with an amount of work which would render it impossible for him to meet his engagements. In my opinion, a merchant, dealer, or manufacturer, by furnishing a quotation invites an offer which will be honored or not according to the exigencies of the business. A quotation based on current prices usually holds good for a limited time. But it remains a quotation on the basis of which an offer will not be entertained after a certain date.[18] I have arrived at this conclusion irrespective of the terms of the letter of the 3rd March, as to which I will only say that it suggests to my mind that the writer knew well that he was giving an order, not accepting an offer for sale.

[*Motion to set aside judgment for defendants denied.*]

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## FAIRMOUNT GLASS WORKS *v.* GRUNDEN-MARTIN WOODENWARE CO.

(Court of Appeals of Kentucky, 1899. 106 Ky. 659, 51 S. W. 196.)

Action by the Grunden-Martin Woodenware Company against the Fairmount Glass Works to recover damages for breach of contract. Judgment for plaintiff, and defendant appeals. Affirmed.

[18] In Johnston Bros. v. Rogers Bros., 30 Ontario, 150 (1899), defendants wrote to plaintiffs who were bakers, about flour, saying, "We quote you, R. O. B. or F. O. B. your station, Hungarian $5.40 and strong Bakers $5.00, car lots only, and subject to sight draft with bill of lading." Plaintiffs immediately telegraphed, "We will take two cars Hungarian at your offer of yesterday." Defendants telegraphed back the same day, "Will accept advance of thirty on yesterday's quotations." It was held that there was no contract. After giving dictionary definitions of "quotation" and "quote" as "to give" or "to name" or "to state" "the current or market price of," Falconbridge, J., said: "Now if we write the equivalent phrase into the letter—'We give you the current or market price, F. O. B. your station of Hungarian Patent $5.40—' can it be for a moment contended that it is an offer which needs only an acceptance in terms to constitute a contract?"

HOBSON, J. On April 20, 1895, appellee wrote appellant the following letter:

"St. Louis, Mo., April 20, 1895. Gentlemen: Please advise us the lowest price you can make us on our order for ten car loads of Mason green jars, complete, with caps, packed one dozen in a case, either delivered here, or f. o. b. cars your place, as you prefer. State terms and cash discount. Very truly, Grunden-Martin W. W. Co."

To this letter appellant answered as follows:

"Fairmount, Ind., April 23, 1895. Grunden-Martin Wooden Ware Co., St. Louis, Mo.—Gentlemen: Replying to your favor of April 20, we quote you Mason fruit jars, complete, in one-dozen boxes, delivered in East St. Louis, Ill.: Pints $4.50, quarts $5.00, half gallons $6.50 per gross, for immediate acceptance, and shipment not later than May 15, 1895; sixty days' acceptance, or 2 off, cash in ten days. Yours, truly, Fairmount Glass Works.

"Please note that we make all quotations and contracts subject to the contingencies of agencies or transportation, delays or accidents beyond our control."

For reply thereto, appellee sent the following telegram on April 24, 1895:

"Fairmount Glass Works, Fairmount, Ind.: Your letter twenty-third received. Enter order ten car loads as per your quotation. Specifications mailed. Grunden-Martin W. W. Co."

In response to this telegram, appellant sent the following:

"Fairmount, Ind., April 24, 1895. Grunden-Martin W. W. Co., St. Louis, Mo.: Impossible to book your order. Output all sold. See letter. Fairmount Glass Works."

Appellee insists that, by its telegram sent in answer to the letter of April 23d, the contract was closed for the purchase of 10 car loads of Mason fruit jars. Appellant insists that the contract was not closed by this telegram, and that it had the right to decline to fill the order at the time it sent its telegram of April 24. This is the chief question in the case. The court below gave judgment in favor of appellee, and appellant has appealed, earnestly insisting that the judgment is erroneous.

We are referred to a number of authorities holding that a quotation of prices is not an offer to sell, in the sense that a completed contract will arise out of the giving of an order for merchandise in accordance with the proposed terms. There are a number of cases holding that the transaction is not completed until the order so made is accepted. 7 Am. & Eng. Enc. Law (2d Ed.) p. 138; Smith v. Gowdy, 8 Allen 566; Beaupre v. Telegraph Co., 21 Minn. 155. But each case must turn largely upon the language there used. In this case we think there was more than

a quotation of prices, although appellant's letter uses the word "quote" in stating the prices given. The true meaning of the correspondence must be determined by reading it as a whole. Appellee's letter of April 20th, which began the transaction, did not ask for a quotation of prices. It reads: "Please advise us the lowest price you can make us on our order for ten carloads of Mason green jars. * * * State terms and cash discount." From this appellant could not fail to understand that appellee wanted to know at what price it would sell it ten car loads of these jars; so when, in answer, it wrote: "We quote you Mason fruit jars * * * pints $4.50, quarts $5.00, half gallons $6.50, per gross, for immediate acceptance; * * * 2 off, cash in ten days,"—it must be deemed as intending to give appellee the information it had asked for. We can hardly understand what was meant by the words "for immediate acceptance," unless the latter was intended as a proposition to sell at these prices if accepted immediately. In construing every contract, the aim of the court is to arrive at the intention of the parties. In none of the cases to which we have been referred on behalf of appellant was there on the face of the correspondence any such expression of intention to make an offer to sell on the terms indicated. In Fitzhugh v. Jones, 6 Munf. 83, the use of the expression that the buyer should reply as soon as possible, in case he was disposed to accede to the terms offered, was held sufficient to show that there was a definite proposition, which was closed by the buyer's acceptance. The expresssion in appellant's letter, "for immediate acceptance," taken in connection with appellee's letter, in effect, at what price it would sell it the goods, is it seems to us, much stronger evidence of a present offer, which, when accepted immediately, closed the contract. Appellee's letter was plainly an inquiry for the price and terms on which appellant would sell it the goods, and appellant's answer to it was not a quotation of prices, but a definite offer to sell on the terms indicated, and could not be withdrawn after the terms had been accepted.

It will be observed that the telegram of acceptance refers to the specifications mailed. These specifications were contained in the following letter: "St. Louis, Mo., April 24, 1895. Fairmount Glass-Works Co., Fairmount, Ind.—Gentlemen: We received your letter of 23rd this morning, and telegraphed you in reply as follows: 'Your letter 23rd received. Enter order ten car loads as per your quotation. Specifications mailed,'—which we now confirm. We have accordingly entered this contract on our books for the ten cars Mason green jars, complete, with caps and rubbers, one dozen in case, delivered to us in East St. Louis at $4.50 per gross for pint, $5.00 for quart, $6.50 for one-half gallon. Terms, 60 days' acceptance, or 2 per cent. for cash in ten days, to be shipped not later than May 15, 1895. The jars and caps to be strictly first-quality goods. You may ship the first car to us here assorted: Five gross pint, fifty-five gross quart, forty gross one-half gallon. Specifications for the remaining 9 cars we will send later. Grunden-Martin W. W. Co." It is insisted for

appellant that this was not an acceptance of the offer as made; that the stipulation, "The jars and caps to be strictly first-quality goods," was not in their offer; and that, it not having been accepted as made, appellant is not bound. But it will be observed that appellant declined to furnish the goods before it got this letter, and in the correspondence with appellee it nowhere complained of these words as an addition to the contract. Quite a number of other letters passed, in which the refusal to deliver the goods was placed on other grounds, none of which have been sustained by the evidence. Appellee offers proof tending to show that these words, in the trade in which parties were engaged, conveyed the same meaning as the words used in appellant's letter, and were only a different form of expressing the same idea. Appellant's conduct would seem to confirm this evidence.

Appellant also insists that the contract was indefinite, because the quantity of each size of the jars was not fixed, that 10 car loads is too indefinite a specification of the quantity sold, and that appellee had no right to accept the goods to be delivered on different days. The proof shows that "10 car loads" is an expression used in the trade as equivalent to 1,000 gross, 100 gross being regarded a car load. The offer to sell the different sizes at different prices gave the purchaser the right to name the quantity of each size, and, the offer being to ship not later than May 15th, the buyer had the right to fix the time of delivery at any time before that. Sousely v. Burns', Adm'r, 10 Bush, 87; Williamson's Heirs v. Johnston's Heirs, 4 T. B. Mon. 253; Wheeler v. Railroad Co., 115 U. S. 34, 5 Sup. Ct. 1061, 1160. The petition, if defective, was cured by the judgment, which is fully sustained by the evidence.

*Judgment affirmed.*[18]

[18] In Philip & Co. v. Knoblauch, [1907] Session Cases 994, a merchant wrote to a firm of oil-millers, "I am offering today Plate linseed for January-February shipment, and have pleasure in quoting you 100 tons at 4⅓, usual Plate terms. I shall be glad to hear if you are buyers and await your esteemed reply." On the following day the oil-millers telegraphed: "Accept hundred January-February Plate" and confirmed this by a letter of the same date, in which, referring to their telegram, they wrote: "Thus buying from you 100 tons Plate linseed January-February shipment usual contract." It was held that the merchant's letter was an offer to sell and not merely a quotation of price and that this offer was accepted so as to constitute a concluded contract by the oil-millers' telegram, although it did not expressly refer to the condition of "usual Plate terms" mentioned in the offer. In that case the judges emphasized the words "await your esteemed reply." As Lord Ardwell put it: "The defender [in his letter] says, 'I shall be glad to hear that you are buyers.' This does not mean buyers in general, but buyers of the quantity specified at the price quoted, otherwise there would be no meaning in the phrase which follows, 'and await your esteemed reply'" (p. 998).

## BENTON *v.* SPRINGFIELD YOUNG MEN'S CHRISTIAN ASS'N.

**(Supreme Judicial Court of Massachusetts, 1898. 170 Mass. 534, 49 N. E. 928, 64 Am. St. Rep. 320.)**

Action by Edward R. Benton against the Springfield Young Men's Christian Association for breach of contract. Judgment for defendant, and plaintiff excepts. Exceptions overruled.

ALLEN, J.[14] The "notice to architects" issued by the defendant invited the plaintiff and other architects "to participate in the competition for plans, on the conditions" therein stated. One of these conditions was that "the committee reserve the right to reject any and all of the designs submitted." According to the plaintiff's offer of proof, he presented to the committee a full set of drawings of the proposed building. Other architects did the same. The committee thereupon, on May 19, 1893, passed a vote "that we proceed to examine drawings and specifications presented to us on basis of compliance with each and every requirement in our letter of invitation; and, after considering and discussing each requirement separately, a vote of the committee be taken as to which plan best meets the letter of requirements and the needs of the association, and that, on completion of this examination, we select the architect who has the largest number of votes." The offer of proof also states that the committee "agreed that the person who should receive the greatest number of votes should superintend the construction of the same." This can mean only that they so agreed among themselves. The next day, another meeting of the committee was held, and the plaintiff was found to have received the greatest number of first marks in the competition. Afterwards, at this meeting, the committee voted to reject all the plans submitted, and to return them to their owners, and all the plans were rejected. Immediately after this vote had been passed, another vote was passed, that the plaintiff "be chosen architect in accordance with the vote of last night"; the words "vote of last night" having reference to the receipt of the greatest number of first marks. This vote remained upon the books of the defendant for 40 days without being changed, at the end of which time it was rescinded. The committee did not, as a committee, communicate this vote to the plaintiff, or ask him to act under it; but two members of the committee notified him that he had been appointed as architect of the building, and this fact was known to the secretary of the committee, and also to other members of the committee, who made no objections to the notification, and did nothing in regard to the matter until the time of passing the vote of rescission. On July 3, 1893, the plaintiff wrote a letter to the committee claiming to act as architect, and saying that he had just heard that the committee had lately taken action which appeared to show their intention to deprive him

[14] Part of the opinion is omitted.

of the position. The committee answered that no contract with him had been made. * * *

It is apparent, in the first place, that no contract arose out of the "notice to architects" and the presentation of plans by the plaintiff, because the right to reject any and all of the designs submitted was expressly reserved, and this right was exercised by a formal vote. The plaintiff, however, contends that his presentation of plans was an offer of his services as architect of the building, and that this offer was accepted by the vote of May 20th. There is nothing in the offer of proof to support this position. The notice to architects called simply for the submission of plans, with a description and explanation of them. Rejected designs were to be returned to their authors without any compensation. The plaintiff submitted drawings "in the manner specified." There is nothing to show that either by express words or by implication, he offered or was understood to offer his services as architect, unless his plans should be accepted. The vote rejecting his plans rejected all that he had offered. The new vote that he be chosen architect was not an offer to him. It was not communicated to him by the committee, nor voted to be so communicated. Those members who gave notice of the vote to the plaintiff did not act for or by authority of the committee. Their notification was not official, and did not purport to be so. The vote did not specify any terms or duties in detail, and it was not in form or intention a contract or the offer of a contract. It was merely an initiatory step, signifying the intention or purpose of the committee, and was not an act by which they meant to be bound as by a contract. If the plaintiff had notified them at once that he would act as architect, in pursuance of their vote, they might have answered that their vote was not a proposal or offer to him. Shaw v. Stone, 1 Cush. 228, 244; Dunham v. City of Boston, 12 Allen 375; Sears v. Railway Co., 152 Mass. 151, 25 N. E. 98; Edgemoor Bridge Works v. Bristol County, 49 N. E. 918.

If the plaintiff's letter was sent after the formal rescission of the vote, the plaintiff would fail to maintain his case for the additional reason that his acceptance of an offer after it had been recalled would be too late. But the decision is not put upon that ground, because, upon the facts stated, the vote was not a proposal or offer to him, and he could not convert it into a contract by signifying his acceptance of it, even though he acted promptly.

*Exceptions overruled.*[15]

[15] "A proposition for a contract, to be competent to be accepted, must be communicated to the party with whom the contract is proposed. It will not be sufficient that the latter acquired knowledge of it unless the knowledge is acquired with the express or implied intention of the proposing party. An owner of land, contemplating a sale thereof, might direct his stenographer or other agent to draft a contract for sale to a particular person on specified terms. If the owner has not communicated, or intended to communicate, the

## THE "SATANITA."

(Court of Appeal. [1895] P. 248.)

The Mudhook Yacht Club having advertised a regatta to be held on the Clyde in July, 1894, the defendant entered his yacht the Satanita, and the plaintiff entered his yacht, the Valkyrie, for a first-class race in the regatta, each owner signing a letter to the secretary of the club undertaking that while sailing under the entry he would obey and be bound by the sailing rules of the Yacht Club Association. Those rules contained a number of regulations to be observed in races, and among them rule 18 which corresponded to art. 14 of the Regulations for Preventing Collisions at Sea. By rule 24, "* * * If a yacht, in consequence of her neglect of any of these rules, shall foul another yacht, or compel another yacht to foul, she shall forfeit all claims to the prize and shall pay all damages." By rule 32, "Any yacht disobeying or infringing any of these rules, which shall apply to all yachts whether sailing in the same or different races, shall be disqualified from receiving any prize she would otherwise have won, and her owner shall be liable for all damages arising therefrom." While sailing under the entry, the Satanita, without the actual fault or privity of the owner, broke the 18th rule and ran into and sank the Valkyrie. The plaintiff and the master and crew of the latter vessel brought an action in the Admiralty Division against the defendant claiming damages. The defendant paid into court a sum as the amount of damages for which he was answerable under the Merchant Shipping Act Amendment Act 1862, c. 63 s. 54, calculated at the rate of £8 per ton on the registered tonnage of the Satanita. Bruce, J., before whom the action was tried, held that even if there was a special contract binding the defendant, the words in the rules, "all damages" were not so express as to override the statutory limitation. The plaintiff appealed.

LORD ESHER, M. R.[16] * * * Was there any contract between the

proposed contract to that person, the latter having acquired knowledge thereof, could not, by acceptance, bring the owner into a contractual relation of sale. The owner might leave his uncommunicated draft in his agent's hands without liability and retract his agency and abandon his plan at any time. Until communication there is no efficacious proposal which could be accepted." Magie, Chancellor, in Jersey City v. Harrison, 72 N. J. L. 185, 189 (1905).

So a vote of the managers of a school accepting the offer of one who had applied for the position of head teacher did not amount to an acceptance where the managers gave no instructions to any one to communicate the vote to the offeror and later rescinded the vote, although one of the managers did telegraph him, without authorization but the day before the vote of rescission, that he had been selected as head master. Powell v. Lee, 99 L. T. R. 284 (1908). See Cozart v. Herndon, 114 No. Car. 252 (1894).

[16] The statement of facts is taken from the report of the case in the House of Lords where it appears as Clarke v. Earle of Dunraven, and Mount-Earl, [1897] A. C. 59. The House of Lords affirmed the judgment of the Court of Appeal.

Portions of the opinion of Lord Esher, M. R., of Lopes, L. J. and of Rigby, L. J. are omitted.

owners of those two yachts? Or it may be put thus: Did the owner of the yacht which is sued enter into any obligation to the owner of the other yacht, that if his yacht broke the rules, and thereby injured the other yacht, he would pay damages? It seems to me clear that he did; and the way that he has undertaken that obligation is this. A certain number of gentlemen formed themselves into a committee and proposed to give prizes for matches sailed between yachts at a certain place on a certain date, and they promulgated certain rules, and said: "If you want to sail in any of our matches for our prize, you cannot do so unless you submit yourselves to the conditions which we have thus laid down. And one of the conditions is that if you do sail for one of such prizes you must enter into an obligation with the owners of the yachts who are competing, which they at the same time enter into similarly with you, that if by a breach of any of our rules, you do damage or injury to the owner of a competing yacht, you shall be liable to make good the damage which you have so done." If that is so, then when they do sail, and not till then, that relation is immediately formed between the yacht owners. There are other conditions with regard to these matches which constitute a relation between each of the yacht owners who enters his yacht and sails it and the committee; but that does not in the least do away with what the yacht owner has undertaken, namely, to enter into a relation with the other yacht owners, that relation containing an obligation.

Here the defendant, the owner of the Satanita, entered into a relation with the plaintiff Lord Dunraven, when he sailed his yacht against Lord Dunraven's yacht, and that relation contained an obligation that, if, by any breach of any of these rules, he did damage to the yacht of Lord Dunraven, he would have to pay the damages.

Now the defendant admits that his yacht, the Satanita, broke the rules. It is not material at present to consider which rule was broken, but, as a consequence of breaking the rule, his yacht ran into Lord Dunraven's yacht and sank it. That is conceded. Now comes the question, What damage is he liable for? * * *

I know that the plaintiff has relied in a sense upon rule 24; but I think the governing rule in this case is rule 32, which runs as follows: "Any yacht disobeying or infringing any of these rules, which shall apply to all yachts, whether sailing in the same or different races,"—I do not construe that part of the rule because I do not think it is material—"shall be disqualified from receiving any prize she would otherwise have won"—that condition by which they have agreed with the committee, the persons who give the prizes, that they shall be disqualified from receiving any prize, does not affect the owners of other yachts. Now we come to this: "And her owner shall be liable for all damages arising therefrom." Can that mean an obligation which they have undertaken to the committee?

If a yacht runs into one of the other yachts as was done on this occa-

sion, how can that damage the committee? The committee have no interest in the yacht, they have not to pay for the loss of the yacht, and have nothing to do with the yacht, except that they have allowed her to run in the race for a prize; and if she won the race the committee has entered into an obligation to give her a cup, or money, or whatever it might be; but the committee is not damaged and cannot be damaged. Then who has the right to claim these damages? It seems to me clear that it is the owner of the yacht which has been sailing against this yacht, or at all events in the regatta. You must read in "to any other yacht which he may damage" for "all damages arising therefrom." If rule 24 is looked at, it seems to me to make it clearer that that must be the meaning, because it says: "If a yacht, in consequence of her neglect of any of these rules, shall foul another yacht,"—that is the thing which does the injury to the other yacht owner—"she shall forfeit all claim to the prize and shall pay all damages." What meaning are we to put upon these words, "all damages"? If it had been "shall pay damages" it would have been a futile rule, because if the rule was broken negligently the yacht owner would be liable to damages. Why is the word "all" put in? Nobody has been able to suggest any meaning to this word "all" except that it must be all the damages caused by the fouling. All the damages to whom? All the damages to the owner whose yacht has been injured. To my mind it is plain and clear. It is all damage caused to the owner of another yacht by reason of an injury having been done to that yacht. On the other hand, as the liability is for injury done to the yacht, if the yacht owner is going to make a present of valuable jewels to a lady after the race is over, and has the box containing them on his yacht at the time, or is allowing a lady to be on board during the race, with boxes of dresses or jewels, or the like, I have no doubt that the loss of these jewels or dresses would be a thing which the other party could not contemplate as a possible result of what he was doing, and therefore he would not be liable.

I cannot see how to construe that word "all" without saying that the effect of it is clearly to do away with the limitation contained in the Merchant Shipping Act. * * * I think, therefore, that this appeal must be allowed.

LOPES, L. J. * * * The questions are, first, was there a contract? secondly, what was the contract? * * *

As to the first question, I have no doubt that there was a contract. Probably a contract with the committee in certain cases, but also a contract between the owners of the competing yachts among themselves, and that contract was an undertaking that the owner of one competing yacht would pay the owner of any other competing yacht injured by his yacht all the damages arising from any infringement or disobedience of the rules.

In my opinion, directly an owner entered his yacht to sail, this contract arose; and it is clear that the owners of the Valkyrie and the Satanita did

enter their respective yachts and did sail. Therefore, there was a contract, and under rule 32 damages became payable. * * *

The case was suggested by counsel for the Satanita of a lady falling into the water and damaging her dress. It is said that, if we give this large construction to the word "all" we should be including a case like that; but the lady would not be a party to this contract, and therefore could not recover under this rule. I am of the opinion that the judgment of the learned judge in the court below must be reversed.

RIGBY, L. J. I am of the same opinion, and out of deference to the learned judge, will shortly state my reasons.

The first question is that of contract or no contract. It appears to me that all that is necessary to constitute a contract between the yacht owners is to bring home to each of them the knowledge that the race is to be run under the Yacht Racing Association rules, and that they, the one and the other, deliberately enter for the race upon these terms. In this case we have a written document signed by each yacht owner, which, if there were any doubt at all, would render it abundantly clear that he was perfectly well aware of the bargain he was entering into. In no other way than that does it appear to me to be material.

The contract did not arise with any one, other than the managing committee, at the moment that the yacht owner signed the document, which it was necessary to sign in order to be a competitor. But when the owner of the Satanita on the one hand, and the owner of the Valkyrie on the other, actually came forward and became competitors upon these terms, I think it would be idle to say that there was not then, and thereby, a contract between them, provided always that there is something in the rule which points to a bargain between the owners of the yachts. Under rule 24, "If a yacht, in consequence of her neglect of any of these rules, shall foul another yacht, or compel other yachts to foul, she shall forfeit all claim to the prize and shall pay all damages." To whom is the owner of that yacht to pay those damages? He cannot pay them to the club, nor do I think the club could recover them. The true and sensible construction is that he must pay the owner of the yacht fouled. * * *

I agree that the judgment below must be reversed.

*Appeal allowed.*

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## ANDERSON et al. *v.* WISCONSIN CENT. RY. CO.

**(Supreme Court of Minnesota, 1909. 107 Minn. 296, 120 N. W. 39, 20 L. R. A. (N. S.) 1133, 131 Am. St. Rep. 462.)**

ELLIOTT, J.[17] The Wisconsin Central Railway Company, having acquired certain real property in the city of Duluth through condemnation

[17] Parts of the opinion are omitted.

proceedings advertised that at a time and place stated the buildings thereon would be sold at public auction. Bids for a certain house had been made until the amount offered amounted to $675. Anderson then increased his bid, $5, making his offer $680. The auctioneer refused to consider this bid, because, as he stated, the amount of the raise was too insignificant. After waiting for a time to give Anderson an opportunity to increase it, the auctioneer announced that the house was sold to the last previous bidder for $675. An entry of this sale was made by the auctioneer in his entry book, as required by section 2815, Rev. Laws 1905. Anderson demanded to know why the auctioneer had not accepted his bid, and on the same day he tendered the $680, and it was refused. Before this tender was made a bill of sale of the building had been executed and delivered to the party to whom the building had been knocked down. Anderson then brought this action for damages, and recovered a verdict for $1,500. The defendant appealed from an order denying its motion for judgment notwithstanding the verdict or for a new trial.

The conflicting contentions of the parties arise out of fundamentally different conceptions of the nature of an auction. The appellant contends that the advertisement of a sale at auction is a mere declaration of intention which does not bind the owner to sell, or to sell to any particular bidder, and that the contract is not made until the bid is accepted. The complaint [of appellee, however,] * * * proceeds upon the theory that * * * a contract has its inception in the announcement or advertisement of the owner's intention to sell the designated property at public auction to the highest bidder; that, unless the contrary is expressly stated in the announcement, the sale is to be without reserve; that the bid of the highest bidder is the acceptance of the offer; that the fall of the hammer is an announcement by the agent of the owner that he will wait no longer for a higher bid; and that the one whose bid was highest when the hammer fell is the purchaser without reference to the action of the auctioneer in announcing that some other bidder is the purchaser. Reduced to its lowest terms, this means that the offer to sell is made in the advertisement of intention to sell at auction, and that the contract is completed by the acceptance of that offer by the bidder. There is some ground for this theory, but the decided weight of authority sustains the view that the announcement is a mere statement of intention to hold an auction, and that no contract of any character is made until the offer to purchase is accepted by the auctioneer.

The jury, under proper instructions, found that the property was offered without express reservations as to the amount of the bids, that the bid of $5 was made in good faith, and that under the circumstances the amount was not so small as to justify the auctioneer in declining to consider it on that ground. No exceptions were taken to the instructions which submitted these questions to the jury, and on this appeal we accept the conclusions of the jury as final. The issue is also simplified by the fact that

the case involves no question of puffing or by-bidding by the owner, or of fraud or misrepresentation in the announcement of the sale. For the purpose of the argument, we assume the correctness of the respondent's claim that an advertisement or announcement of an auction sale which does not state limitations and conditions is equivalent to the announcement that the sale will be without reserve. The issue of law is thus clearly defined.

The custom of selling goods at auction is as old as the law of sale. In Rome military spoils were disposed of at the foot of the spear—*sub hastio*—by auction, or increase. In later times we find a mode of auction called a "sale by the candle," or by the "inch of candle," which consisted of offering the property for sale for such a length of time as would suffice for the burning of an inch of candle. In Holland they inverted the usual process, and put the property up at a price usually greater than its value, and then gradually lowered the price until some one closed the sale by accepting the offer and thus becoming the purchaser. In ancient Babylon the young women were sold at a public auction according to a method which combined the features of the Dutch and ordinary kinds of auctions. The group of prospective wives would ordinarily contain some who, by reason of personal beauty, were thought more desirable than others. The attractive ones were first sold to the highest bidders. When the supply of this quality was exhausted, those less favored by nature were offered and sold to the bidders who would take them with the least dowry, which was payable out of the money received from the sale of the beauties. Herodotus considered this custom very commendable.

In view of the general prevalence of the custom of selling by auction, it is remarkable that no very early cases are found in the English reports. The parent case of Payne v. Cave, 3 Term R. 148, was decided by Lord Kenyon, C. J., sitting at Guildhall in 1788. The plaintiff offered a distilling apparatus for sale, including a pewter worm, at public auction, on the usual conditions that the highest bidder should be the purchaser. There were several bidders for the worm, of whom Cave, who bid £40, was the last. The auctioneer dwelt on this bid for some time, until Cave said: "Why do you dwell? You will not get more." The auctioneer stated that he was informed that the worm weighed at least 1,300 hundredweight, and was worth more than £40. The bidder then asked him if he would warrant it to weigh so much, and, receiving an answer in the negative, he declared that he would not take it. The worm was then resold on a subsequent day for £30, and an action was brought against Cave for the difference. Lord Kenyon ruled that the bidder was at liberty to withdraw his bid at any time before the hammer fell, and nonsuited the plaintiff. On motion to set aside the nonsuit, it was contended that a bidder is bound by the conditions of the sale to abide by his bid, and could not retract; that the hammer is suspended, not for the benefit of the bidder, or to give him an opportunity for repenting, but for the benefit of the seller; and that in the

meantime the person who bid last is a purchaser, conditional upon no one bidding higher. But the court thought otherwise, and held that the auctioneer was the agent of the vendor, and that the assent of both parties was necessary to make the contract binding, and "that is signified on the part of the seller by knocking down the hammer, which was not done here until the plaintiff had retracted." "An auction," said the court, "is not inaptly called a *locus pœnitentiæ*. Every bidding is nothing more than an offer on one side, which is not binding on either side until assented to."

The idea that an action will lie for the breach of an implied undertaking to sell to the highest bidder was advanced in Warlow v. Harrison (1859) 1 El. & El. 309, and *dicta* supporting it will be found in Harris v. Nickerson (1873) L. R. 8 Q. B. 288, Spencer v. Harding (1870) L. R. 5 C. P. 563, Re Agra & Masterman Bank (1867) 2 Ch. App. 391, 397, and Johnson v. Boyes, [1899] 2 Ch. 73. These cases assume that an offer to sell property at auction is indistinguishable from the case of an offer to the general public, such as a reward for the return of lost property, where it is held that contract rights are created in favor of one who complies with the conditions of the offer. Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256; Anson, Contracts, p. 52. Langdell seems to be the only text-writer who takes this view of what the law should be. In his Summary of the Law of Contracts (page 24) it is stated that the correct view is "that the seller makes the offer when the article is put up, namely, to sell it to the highest bidder, and when a bid is made there is an actual sale, subject to the condition that no one else shall bid higher." See note to Tillman v. Dunman in 57 L. R. A. 784, 789.

Warlow v. Harrison, the source of all the uncertainty, was an action against an auctioneer who had advertised that he would sell certain horses, the property of a gentleman, "without reserve," at auction. Warlow bid 60 guineas for one of the horses, whereupon the owner bid 61 guineas. Warlow refused to increase his bid, and the horse was announced as sold for 61 guineas to the owner. Warlow, claiming to be the highest good-faith bidder, tendered the amount of his bid to the auctioneer and demanded the horse, and on this being refused, brought an action against the auctioneer, alleging that the defendant was his agent to complete the contract, that he had refused to do so, and that he had thereby lost certain money in attending the auction and had been deprived of the benefit of his contract. The defendant pleaded (1) not guilty; (2) that the plaintiff was not the highest bidder; and (3) that the auctioneer did not become the bidder's agent to complete the sale. The plaintiff recovered a verdict, but the Common Pleas (Lord Campbell, C. J., Wightman, J., and Erle, J.) ordered a nonsuit on the ground that the plaintiff's allegation as to the agency of the defendant and the duty of the defendant to complete the contract on behalf of the plaintiff was not sustained. * * * In the Exchequer Chamber the decision was affirmed; but, as the plaintiff might amend his declaration, the court discussed the merits of the case which

might be made. Barons Martin, Byles, and Watson were of the opinion that the plaintiff was entitled to recover from the auctioneer, because the auction was announced to be "without reserve," which meant that neither the owner nor any one in his behalf should bid at the auction, and that the property would be sold to the highest bidder, whether the sum bid was equivalent to the real value or not. On the principle which creates a contract between the loser of property who offers a reward for its return and the finder, or a railway company which advertises a time-table and one who purchases a ticket, it was said that an auctioneer who put the property up for sale upon such conditions pledges himself that the sale shall be without reserve, and that a contract is made with the highest bidder, who, in case of a breach thereof, has a right of action against the auctioneer. "We think," said Baron Martin, "that the auctioneer has contracted that the sale shall be without reserve, and that the contract is broken upon a bid being made by or on behalf of the owner, whether it be during the time the property is under the hammer or it be the last bid upon which the article is knocked down. In either case the sale is not 'without reserve' and the contract of the auctioneer is broken. We entertain no doubt that the owner may, at any time before the contract is legally complete, interfere and revoke the auctioneer's authority; but he does so at his peril, and if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner he is entitled to be indemnified." Baron Bramwell and Willes, J., preferred to rest the judgment upon the ground that the auctioneer had undertaken to have, and yet there was evidence that he had not, authority to sell without reserve. * * *

In Harris v. Nickerson (1875) L. R. 8 Q. B. 286, the nature of the advertisement was considered, and it was held that it should be construed as a mere declaration of intention, which did not amount to a contract with any one who might act upon it, or constitute a warranty that the articles advertised would be offered for sale. Certain articles were not offered, and a party who attended for the purpose of bidding brought an action to recover for his loss of time and expense. Blackburn, J., said: "This is certainly a startling proposition, and would be excessively inconvenient if carried out. It amounts to saying that any one who advertises a sale by publishing an advertisement becomes responsible to every one who attends the sale for his cab hire and traveling expenses." * * * The real point in the case was brought out by Justice Archibald, who said: "This is an attempt on the part of the plaintiff to make a mere declaration of intention a binding contract. He has utterly failed to show authority or reason for the proposition. If a false and fraudulent representation had been made. it would have been quite another matter. But to say that a mere advertisement that certain articles are to be sold at auction amounts to a contract to indemnify all who attend, if the sale of any part of the articles does not

take place, is a proposition without authority or ground for supporting it." * * *

In Johnson v. Boyes, [1899] 2 Ch. 73, * * * it was held that the bidder had not complied with the conditions of sale, which required that the deposit should be in cash. This disposed of the case; but the court stated that the action could have been maintained, had the deposit been tendered in cash and the highest bidder been refused the property. "A vendor," said Cozens-Hardy, J., "who offers property for sale by action on the terms of the printed conditions can be made liable to a member of the public who accepts the offer, if these conditions be violated"—citing Warlow v. Harrison, 1 El. & El. 295, and Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256.

But the doctrine of Warlow v. Harrison was never generally acquiesced in, and in Lord Halsbury's Laws of England, vol. 1, p. 511 (n), doubt is expressed as to its correctness. * * *

Sale of Goods Act 1893 (St. 56 & 57 Vict. c. 71) § 58 (2), provides that "* * * (2) a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Until such announcement is made, any bidder may retract his bid." It was held in the Scotch case of Fenwick v. MacDonald, [1904] 6 F. (Ct. of Sess.) 850, that, whatever may have been the law formerly, this statute entitles a bidder to withdraw his bid at any time before the fall of the hammer, and the vendor must be equally free to withdraw his offer to sell, because one party cannot be bound while the other is free. But in the recent case of McManus v. Fortescue, [1907] 2 K. B. 1, some support was again given to Warlow v. Harrison. * * *

In the United States a distinction has sometimes been made between ordinary private and judicial and official sales, but the only difference seems to be that the latter may require the approval of the court. Clifford, J., in Blossom v. Railway Co., 3 Wall. 196, 18 L. Ed. 43. * * *

It has been held that the highest bidder at a judicial sale is entitled, as a matter of law, to the property. State v. Johnston, 2 N. C. 293; McLeod v. McCall, 48 N. C. 89; Gilbert v. Watts-De Golyer Co., 169 Ill. 129, 48 N. E. 430, 61 Am. St. Rep. 154; Morton v. Moore, 4 Ky. Law Rep. 717. But the decided weight of authority is otherwise. Knox v. Spratt, 19 Fla. 833; Rogers Co. v. Cleveland Co., 132 Mo. 458, 34 S. W. 57, 31 L. R. A. 335, 53 Am. St. Rep. 494; Davis v. McCann, 143 Mo. 178, 44 S. W. 795. See, also, Kneightley v. Birch, 3 Camp. 521. * * *

The earnestness with which the respondent contends that the trial court was right in holding that the contract was complete when the bid was made, conditional on there being no higher bid, has induced us to make a somewhat extended examination of the authorities. The result discloses the fact that there has been running through some of the English cases a recognized, but never applied, principle which would sustain the right of action in such a case as the present. But all the cases in which the doctrine is recognized

were decided on other grounds. No substantial support for the doctrine is found in the American cases. * * *

On principle and authority the correct rule is that an announcement that a person will sell his property at public auction to the highest bidder is a mere declaration of intention to hold an auction at which bids will be received; that a bid is an offer which is accepted when the hammer falls, and until the acceptance of the bid is signified in some manner neither party assumes any legal obligation to the other. At any time before the highest bid is accepted, the bidder may withdraw his offer to purchase or the auctioneer his offer to sell. The owner's offer to sell is made at the time through the auctioneer, and not when he advertises the auction sale. A merchant advertises that on a certain day he will sell his goods at bargain prices; but no one imagines that the prospective purchaser, who visits the store and is denied the right to purchase, has an action for damages against the merchant. He merely offers to purchase, and if his offer is refused, he has no remedy, although he may have lost a bargain, and have incurred expense and lost time in visiting the store. The analogy between such a transaction and an auction is at least close. As the advertisement in this case was a mere statement of intention to offer the property for sale at public auction to the highest bidder, the respondent's bid did not complete either a contract of sale or a contract to make a sale. * * *

The order is therefore reversed, with directions to enter judgment for the defendant.[18]

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## COOKE *v.* OXLEY.

**(Court of King's Bench, 1790. 3 Term Reports, 653.)**

This was an action upon the case; and the third count in the declaration, upon which the verdict was taken, stated that on, etc., a certain discourse was had, etc., concerning the buying of 266 hogsheads of tobacco; and on that discourse the defendant proposed to the plaintiff that the former should sell and deliver to the latter the said 266 hogsheads [at a certain

[18] See McPherson Bros. Co. v. Okanogan County, 45 Wash. 285 (1907): Freeman v. Poole, 37 R. I. 489 (1915).

Even if the conditions of sale prescribe that "no person shall retract his or her bid," the bid, being only an offer, may be retracted before it is accepted by the fall of the hammer. Fisher v. Seltzer, 23 Pa. St. 308 (1854).

By § 21 (2) of the Uniform Sales Act at an auction, until the fall of the hammer "any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless theauction has been announced to be without reserve." Local statutes as to auction sales should be consulted.

On right of action by highest bidder at auction sale for refusal of auctioneer to knock down property to him, see 16 Ann. Cas. 386, note.

price]; whereupon the plaintiff desired the defendant to give him (the plaintiff) time to agree to or dissent from the proposal till the hour of four in the afternoon of that day, to which the defendant agreed; and thereupon the defendant proposed to the plaintiff to sell and deliver the same upon the terms aforesaid, *if the plaintiff would agree to purchase them upon the terms aforesaid, and would give notice thereof to the defendant before the hour of four in the afternoon of that day;* the plaintiff averred that he did agree to purchase the same upon the terms aforesaid, and did give notice thereof to the defendant before the hour of four in the afternoon of that day; he also averred that he requested the defendant to *deliver* to him the said hogsheads, and offered to pay to the defendant the said price for the same, yet that the defendant did not, etc.

A rule having been obtained to show cause why the judgment should not be arrested, on the ground that there was no consideration for the defendant's promise.

*Erskine* and *Wood* now showed cause. This was a bargain and sale on condition; and though the plaintiff might have rescinded the contract before 4 o'clock, yet not having done so, the condition was complied with, and both parties were bound by the agreement. The declaration considered this as a complete bargain and sale; for the breach of the agreement is for not *delivering* the tobacco, and not for not selling it.

LORD KENYON, C. J. (stopping Bearcroft, who was to have argued in support of the rule). Nothing can be clearer than that at the time of entering into this contract the engagement was all on one side; the other party was not bound; it was therefore *nudum pactum.*

BULLER, J. It is impossible to support this declaration in any point of view. In order to sustain a promise, there must be either a damage to the plaintiff, or an advantage to the defendant; but there was neither when the contract was first made. Then as to the subsequent time, the promise can only be supported on the ground of a new contract made at 4 o'clock; but there is no pretence for that. It has been argued that this must be taken to be a complete sale from the time when the condition was complied with; but it was not complied with, for it is not stated that the defendant did agree at 4 o'clock to the terms of the sale; or even that the goods were kept till that time.

GROSE, J. The agreement was not binding on the plaintiff before 4 o'clock; and it is not stated that the parties came to any subsequent agreement; there is therefore no consideration for the promise.

*Rule absolute.*[19]

[19] In Routledge v. Grant, 4 Bing. 653, 660-661 (1828), Best, C. J., said:

"Here is a proposal by the defendant to take property on certain terms—namely, that he should be let into possession in July. In that proposal he gives the plaintiff six weeks to consider; but if six weeks are given on one side to accept an offer, the other has six weeks to put an end to it. One party cannot be bound without the other. * * * These cases [Cooke v. Oxley, 3

## THE BOSTON & MAINE RAILROAD *v.* BARTLETT.

**(Supreme Judicial Court of Massachusetts, 1849. 3 Cushing, 224.)**

This was a bill in equity for the specific performance of a contract in writing.

The plaintiffs alleged that the defendants on April 1st, 1844, being the owners of certain land situated in Boston, and particularly described in the bill, "in consideration that said corporation would take into consideration the expediency of buying said land for their use as a corporation, signed a certain writing, dated April 1st, 1844," whereby they agreed to convey to the plaintiffs "the said lot of land, for the sum of $20,000, if the said corporation would take the same within thirty days from that date;" that afterward and within the thirty days, the defendants, at the request of the plaintiffs, "and in consideration that the said corporation agreed to keep in consideration the expediency of taking said land," etc., extended the said term of thirty days, by a writing underneath the written contract above mentioned, for thirty days from the expiration thereof; that, on May 29th, 1844, while the extended contract was in full force, and unrescinded, the plaintiffs elected to take the land on the terms specified in the contract, and notified the defendants of their election, and offered to pay them the agreed price (producing the same in money) for a conveyance of the land, and requested the defendants to execute a conveyance thereof, which the plaintiffs tendered to them for that purpose; and that the defendants refused to execute such conveyance, or to perform the contract, and had ever since neglected and refused to perform the same.

The defendants demurred generally.

FLETCHER, J. In support of the demurrer, in this case, the only ground assumed and insisted on by the defendants is, that the agreement on their part was without consideration, and therefore not obligatory. In the view taken of the case by the court, no importance is attached to the consideration set out in the bill—namely, "that the plaintiffs would take into consideration the expediency of buying the land." The argument for the defendants, that their agreement was not binding, because without consideration, erroneously assumes that the writing executed by the defendants is to be considered as constituting a contract at the time it was made. The decision of the court in Maine in the case of Bean v. Burbank, 4 Shepl. 458, which was referred to for the defendants, seems to rest on the ground assumed by them in this case.

In the present case, though the writing signed by the defendants was but an offer, and an offer which might be revoked, yet while it remained in force and unrevoked, it was a continuing offer during the time limited for acceptance; and, during the whole of that time, it was an offer every instant,

**T. R. 653, and Payne v. Cave, 3 T. R. 148] have established the principle on which I decide—namely, that till both parties are agreed either has a right to be off."**

but as soon as it was accepted, it ceased to be an offer merely, and then ripened into a contract. The counsel for the defendants is most surely in the right, in saying that the writing when made was without consideration, and did not therefore form a contract. It was then but an offer to contract, and the parties making the offer most undoubtedly might have withdrawn it at any time before acceptance.

But when the offer was accepted, the minds of the parties met, and the contract was complete. There was then the meeting of the minds of the parties, which constitutes and is the definition of a contract. The acceptance by the plaintiffs constituted a sufficient legal consideration for the engagement on the part of the defendants. There was then nothing wanting, in order to perfect a valid contract on the part of the defendants. It was precisely as if the parties had met at the time of the acceptance, and the offer had then been made and accepted and the bargain completed at once.

A different doctrine, however, prevails in France and Scotland and Holland. It is there held that whenever an offer is made, granting to a party a certain time within which he is to be entitled to decide, whether he will accept it or not, the party making such offer is not at liberty to withdraw it before the lapse of the appointed time. There are certainly very strong reasons in support of this doctrine. Highly respectable authors regard it as inconsistent with the plain principles of equity, that a person, who has been induced to rely on such an engagement, should have no remedy in case of disappointment. But whether wisely and equitably or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached.

The authorities, both English and American, in support of this view of the subject, are very numerous and decisive; but it is not deemed to be needful or expedient to refer particularly to them, as they are collected and commented on in several reports as well as in the text-books. The case of Cooke v. Oxley, 3 T. R. 653, in which a different doctrine was held, has occasioned considerable discussion, and in one or two instances has probably influenced the decision. That case has been supposed to be inaccurately reported, and that in fact there was in that case no acceptance. But however that may be, if the case has not been directly overruled, it has certainly in later cases been entirely disregarded, and cannot now be considered as of any authority.

As therefore in the present case the bill sets out a proposal in writing, and an acceptance and an offer to perform, on the part of the plaintiffs, within the time limited, and while the offer was in full force, all which is admitted by the demurrer, so that a valid contract in writing is shown to exist, the demurrer must be overruled.

## THOMASON *v.* BESCHER.

**(Supreme Court of North Carolina, 1918. 176 N. C. 622, 97 S. E. 654, 2 A. L. R. 626.)**

Action by C. E. Thomason and J. F. Curry against J. C. and W. M. Bescher for specific performance of a sealed option which, for the expressed consideration of $1.00 the defendants Bescher, who were tenants in common, gave to plaintiff Thomason, and in which the plaintiff Curry acquired prior to suit a one-half interest. The sealed option was given June 18, 1917, and was to purchase a certain tract of timber, roads and sawmill sites for $6,000.00, provided the option was exercised and payment rendered on or before August 18, 1917. The jury found specially that the $1.00 recited in the option was not paid; that the plaintiffs notified one of the defendants prior to June 23, 1917, that they would take the timber, roads and mill sites and would be down the following week to pay the price and take the deed therefor; that the plaintiffs were at all times able and willing to pay the purchase price for the deed; but that the defendants on June 23, 1917, notified the plaintiffs that the option was withdrawn and that they would not convey. On August 7, 1917, plaintiff Thomason tendered the purchase price. The defendants' evidence tended to show that before any acceptance or notice thereof by the plaintiffs, the defendants had in writing notified plaintiffs that they elected to terminate the contract.

Judgment on verdict for plaintiffs, and defendants excepted and appealed.

HOKE, J.[20] It is the accepted principle of the common law that instruments under seal require no consideration to support them. Whether this should rest on the position that a seal conclusively imports a consideration, or that the solemnity of the act imports such reflection and care that a consideration is regarded as unnecessary, such instruments are held to be binding agreements enforceable in all actions before the common-law courts. Speaking to the question in Harrell v. Watson, 63 N. C. 454, Pearson, C. J., said:

"A bond needs no consideration. The solemn act of sealing and delivering is a deed; a thing done, which, by the rule of the common law, has full force and effect, without any consideration. *Nudum pactum* applies only to simple contracts." * * *

While there is much diversity of opinion on the subject, we think it the better position and sustained by the weight of authority that the principle should prevail in reference to these unilateral contracts or options when, as in this case, they take the form of solemn written covenants under seal and its proper application is to render them binding agreements, irrevocable within the time designated, and that the stipulations may be enforced and made effective by appropriate remedies, when such time is reasonable and

[20] The statement of facts is rearranged and abbreviated and parts of the opinion are omitted.

there is nothing offensive and unconscionable in the terms of the principal contract.

In Watkins v. Robertson, 105 Va. 269, 54 S. E. 33, 5 L. R. A. (N. S.) 1194, 115 Am. St. Rep. 880, the question is directly presented, and in a convincing and learned opinion by Judge Cardwell the conclusion of the court on the subject is announced to the effect:

"That an option under seal for the sale of shares in a joint-stock company is a binding offer from which the promiser cannot recede during the time stipulated for in the option, and, if accepted during that time, constitutes a contract the specific performance of which a court of equity will compel. The option is in the nature of a continuing offer to sell, and, being under seal, must be regarded as made upon a sufficient consideration, and no proof to the contrary will be received at law or in equity."

In Willard v. Tayloe, 75 U. S. (8 Wall.) 557, 19 L. Ed. 501, Associate Justice Field delivering the opinion, it was held, among other things:

"A covenant in a lease giving to the lessee a right or option to purchase the premises leased at any time during the term is in the nature of a continuing offer to sell. The offer thus made, if under seal, is regarded as made upon sufficient consideration, and therefore one from which the lessor is not at liberty to recede."

And the position is approved by other courts of the highest authority and by writers of established repute. O'Brien v. Boland, 166 Mass. 481, 44 N. E. 602; Weaver v. Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; McMillan v. Ames, 33 Minn. 257, 22 N. W. 612; Pomeroy on Contracts, § 387, note 1; 9 Cyc. p. 287. * * *

We are not unmindful of the position that, in equity causes, the court looks beyond the form and will usually refuse to exert its powers in aid of a sealed instrument, its collection and enforcement, except when there is a valuable consideration; in our own court the case of Woodal v. Prevatt, 45 N. C. 199, being an apt illustration of the principle. But these options, containing a continuing offer to sell and constituting a contract, binding on the parties because in the form of a covenant under seal, serve their purpose in keeping the offer open for the time specified and preventing a withdrawal by the vendor. On acceptance and offer to perform within the time, a bilateral contract is then constituted, which, on breach, is enforceable by appropriate remedies, legal or equitable. And in case of action for specific performance the consideration is not restricted to the seal or the nominal amount usually present in these bargains, but extends to and includes the purchase price agreed upon. This position is recognized with us in the case of Ward v. Albertson, 165 N. C. 218, 222, 81 S. E. 168. * * * On the same question in McMillan v. Ames, 33 Minn. 257, 22 N. W. 612, *supra*, Vanderburgh, Judge, delivering the opinion, said:

"It is true that equity will not lend its auxiliary remedies to aid in the enforcement of a contract which is inequitable, or is not supported by a substantial consideration, but at the same time it will not on such grounds

interfere to set it aside. But no reason appears why equity might not have decreed specific performance in this case (had the land not been sold), because the substantial and meritorious consideration required by the court in such case would consist in that stipulated in the instrument as the condition of a conveyance, performance of which by the plaintiff would have been exacted as a prerequisite to relief, so as to secure to defendant mutuality in the remedy, and all his rights under the contract."

And see, also, Woodruff v. Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380; 6 Pomeroy's Eq. § 773.

As heretofore stated, there are opposing decisions on the question, holding that a written option without valuable consideration, though under seal, may be recalled at any time before notice of acceptance given.[81] Some of these, as pointed out in Watkins v. Robertson, *supra,* are dependent on statutes which change or modify the effect given to seals under the principles of the common law. In others, there being nothing in the record to present it, the mind of the judges was not specially called to the distinctions existent and usually observable between a mere offer to sell without consideration and without seal and one that is effective as a binding agreement by reason of the seal. * * * So far as examined, we have found no case with us in which the question has been directly considered, and under the principles stated, and on the facts of this record, we are of opinion, and so hold, that the defendants are bound by their covenant under seal and not at liberty to withdraw their offer before the expiration of the

[81] Among the cases holding that in equity, i. e., so far as specific performance is concerned, a sealed option is revocable, see Crandell v. Willig, 166 Ill. 233 (1899); Corbett v. Cronkhite, 239 Ill. 13 (1909); Storch v. Duhnke, 76 Minn. 521 (1899); Graybill v. Brugh, 89 Va. 985 (1893).

In Crandall v. Willig, 166 Ill. 233, 239-240 (1897) Carter, J. said:

"The contract in the case at bar was a mere option given by the Williges to Wickersham to purchase the land in question within the time mentioned, and there was, before its acceptance, no consideration to support the contract. It was therefore within the power of the Williges to withdraw this option at any time before their offer to sell was accepted. True the contract was under seal and purported to be based upon the nominal consideration of one dollar, but the evidence showed that there was in fact no consideration whatever, and it is well settled that in equity the real consideration may be inquired into, and the parties are not concluded by the recitals in the contract, though under seal. * * * It is clearly proved in this case that after the expiration of one year—the period which the Williges claimed they understood the contract was to run—and before its acceptance by Wickersham, the Williges refused to perform but declared it to be at an end, and so notified Wickersham. After they had repudiated it and had declared to him that they would never perform it, he sent them his written acceptance to which they paid no attention, and still later he assigned the contract to appellant. When therefore appellant received the contract, it had [in equity] no binding force."

The Illinois cases were based on a passage in Pomeroy's Equity Jurisprudence, but in the second edition (Vol. 5, p. 4934n) they are repudiated.

A paid for option is irrevocable. Cummins v. Beavers, 103 Va. 230 (1904).

time agreed upon. The verdict having established that, before any attempted withdrawal by defendants, plaintiff [Thomason] had notified one of the parties of acceptance, he would in any event be entitled to judgment as to that interest. And it further appearing that plaintiff has been at all times ready and able to comply, tendering the entire purchase money, at latest, by August 7th, that defendants refused to accept the same and deny any and all obligations under the alleged contract, plaintiff, as held in Ward v. Albertson and other cases of like import, is entitled to have specific performance as to both interests, and the judgment to that effect is affirmed.

*No error.*[22]

[22] The nature of an option has been explained in many cases. The following are a few judicial statements:

"There may be (1) a sale of lands; (2) an agreement to sell lands and (3) what is popularly called an 'option.' The first is the actual transfer of title from grantor to grantee by appropriate instrument of conveyance. The second is a contract to be performed in the future, and if fulfilled results in a sale. It is a preliminary to a sale, and is not the sale. Breaches, rescission, or release may occur by which the contemplated sale never takes place. The third, an option originally, is neither a sale nor an agreement to sell. It is simply a contract by which the owner of property (real estate being the species we are now discussing) agrees with another person that he shall have the right to buy his property, at a fixed price, within a time certain. He does not sell his land; he does not then agree to sell it; but he does then sell something, viz., the right or privilege to buy at the election or option of the other party. The second party gets, *in præsenti*, not lands, or an agreement that he shall have lands, but he does get something of value; that is, the right to call for and receive lands if he elects. The owner parts with his right to sell his lands, except to the second party, for a limited period. The second party receives this right, or rather, from his point of view, he receives the right to elect to buy." De Witt, J., in Ide v. Leiser, 10 Mont. 5, 11 (1890).

"The contract purported to be an option. It contained no promise to be performed by the optionee. It is conceded by plaintiff that nothing was paid therefor. The only consideration contended for * * * is amplified in the reply argument of appellant by a statement that he was promoting an addition which would include the tract in question and adjoining tracts, and that this was known to the contracting parties, and that he was also looking for purchasers for the tract. If a consideration for the option can be thus supplied with mere subsequent voluntary conduct of the optionee, then an option offer would seldom be revocable. It may be fairly presumed that every optionee does something after obtaining his option looking to his possible acceptance thereof. In Axe v. Tolbert, 179 Mich. 556, 146 N. W. 418, it was expressly held that:

" 'Time and money spent by a party in trying to sell property for which he holds an option cannot be construed as a consideration to the party from whom he has secured the option.'

"We agree with that view.

"An option without consideration [or a seal where seals have their common law effect] is a mere offer, and is not binding until its acceptance. It necessarily follows that it may be withdrawn before its acceptance. In Hopwood v. McCausland, 120 Iowa, 218, 94 N. W. 469, we said:

" 'An option is not a sale. It is not even an agreement for a sale. At best, it is but a right of election in the party receiving the same to exercise a priv-

## ADAMS *v.* LINDSELL.

(Court of King's Bench, 1818. Barnewall & Anderson, 681.)

Action for non-delivery of wool according to agreement. At the trial at the last Lent assizes for the county of Worcester, before Burrough, J., it appeared that the defendants, who were dealers in wool at St. Ives, in the county of Huntington, had, on Tuesday, September 2d, 1817, written the following letter to the plaintiffs, who were woollen manufacturers residing in Bromsgrove, Worcestershire. "We now offer you eight hundred tods of wether fleeces, of a good fair quality of our country wool, at 35s. 6d. per tod, to be delivered at Leicester, and to be paid for by two months' bill in two months, and to be weighed up by your agent within fourteen days, *receiving your answer in course of post.*" This letter was misdirected by the defendants, to Bromsgrove, Leicestershire, in consequence of which it was not received by the plaintiffs in Worcestershire till 7 p. m. on Friday, September 5th. On that evening the plaintiffs wrote an answer, agreeing to accept the wool on the terms proposed. The course of the post between St. Ives and Bromsgrove is through London, and consequently this answer was not received by the defendants till Tuesday, September 9th. On Monday, September 8th, the defendants not having, as they expected, received an answer on Sunday, September 7th (which in case their letter had not been misdirected would have been in the usual course of the post), sold the wool in question to another person. Under these circumstances the learned judge held, that the delay having been occasioned by the neglect of the defendants, the jury must take it that the answer did come back in due course of post; and that then the defendants were liable for the loss that

ilege, and only when that privilege has been exercised by acceptance does it become a contract to sell.'

"There was not a moment prior to June 11th when the plaintiff was bound to anything under this option. He had parted with nothing, and had made no promises. There was therefore no consideration, and the option was revocable." Evans, J., in Jester v. Gray, (Ia.) 175 N. W. 758, 760 (1920).

"It is only when the vendee has made his election and complied or in good faith attempted to comply with the terms of the option, that it becomes a contract enforceable by him in equity. And it is strictly speaking, inaccurate to speak of the specific performance of an option; for before the remedy can be invoked it has ceased to be an option and has ripened into a mutually binding and mutually enforceable contract." Helm, J., in Rude v. Levy, 43 Colo. 482, 487-488 (1908).

"It is the established rule, both in law and equity, that time is of the essence of an option." Carroll, J., in Morgan v. Forbes, (Mass.) 128 N. E. 792, 793 (1920).

On rights conferred by a "refusal" or "option", see 21 L. R. A. 127, note. On instrument for purchase of land as a contract or an option, see 3 A. L. R. 576, note. See Arthur L. Corbin, Option Contracts, 23 Yale L. J. 641.

had been sustained, and the plaintiffs accordingly recovered a verdict.

*Jervis* having in Easter Term obtained a rule *nisi* for a new trial, on the ground that there was no binding contract between the parties.

*Dauncey, Puller & Richardson* showed cause. They contended that at the moment of the acceptance of the offer of the defendants by the plaintiffs the former became bound. And that was on the Friday evening, when there had been no change of circumstances. They were then stopped by the court, who called upon

*Jervis & Campbell* in support of the rule. They relied on Payne v. Cave, 3 T. R. 148, and more particularly on Cooke v. Oxley, *Ibid.*, 653. In that case Oxley, who had proposed to sell goods to Cooke, and given him a certain time at his request, to determine whether he would buy them or not, was held not liable to the performance of the contract, even though Cooke, within the specified time, had determined to buy them, and given Oxley notice to that effect. So here the defendants who have proposed by letter to sell this wool, are not to be held liable, even though it be now admitted that the answer did come back in due course of post. Till the plaintiffs' answer was actually received there could be no binding contract between the parties; and before then the defendants had retracted their offer by selling the wool to other persons.

But the court said that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them that the plaintiffs' answer was received in course of post.

*Rule discharged.*[23]

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## DUNLOP *v.* HIGGINS.

**(House of Lords, 1848. 1 House of Lords Cases 381.)**

This was an appeal against a decree of the Court of Session, made under the following circumstances: Messrs. Dunlop & Co. were iron masters in Glasgow, and Messrs. Higgins & Co. were iron merchants in Liverpool.

[23] "It seems to me to have been properly decided that a letter posted in one place and received in another has a continuous effect and speaks in the place where it is received." Lindley, J., in Bennett v. Cosgriff, 38 L. T. R. (N. S.) 177, 178 (1878).

Messrs. Higgins had written to Messrs. Dunlop respecting the price of iron, and received the following answer:

"Glasgow, January 22, 1845.

"We shall be glad to supply you with 2000 tons, pigs, at 65s. per ton, net, delivered here."

Messrs. Higgins wrote the following reply:

Liverpool, January 25, 1845.

"You say 65s. net, for 2000 tons pigs. Does this mean for our usual four months bill? Please give us this information in course of post, as we have to decide with other parties on Wednesday next."

On the 28th Messrs. Dunlop wrote:

"Our quotation meant 65s. net, and not a four months bill."

This letter was received by Messrs. Higgins on January 30th, and on the same day, and by post, but not by the first post of that day, they dispatched an answer in these terms:

"We will take the 2000 tons pigs you offer us. Your letter crossed ours of yesterday, but we shall be glad to have your answer respecting the additional 1000 tons. In your first letter you omitted to state any terms, hence the delay." This letter was dated "January 31st." It was not delivered in Glasgow until 2 o'clock p. m. on February 1st, and, on the same day, Messrs. Dunlop sent the following reply:

"Glasgow, February 1, 1845.

"We have your letter of *yesterday,* but are sorry that we cannot now enter the 2000 tons pig iron, our offer of the 28th not having been accepted in course."

Messrs. Higgins wrote on February 2d to say that they had erroneously dated their letter on January 31st, that it was really written and posted on the 30th, in proof of which they referred to the postmark. They did not, however, explain the delay which had taken place in its delivery.† The iron was not furnished to them, and iron having risen very rapidly in the market, the question whether there had been a complete contract between the parties was brought before a court of law. Messrs. Higgins instituted a suit in the Court of Session for damages, as for breach of contract. The defence of Messrs. Dunlop was, that their letter of the 28th, offering the contract, not having been answered in due time, there had been no such acceptance as would convert that offer into a lawful and binding contract; that their letter having been delivered at Liverpool before 8 o'clock in the morning of January 30th, Messrs. Higgins ought, according to the usual practice of merchants, to have answered it by the first post, which left Liverpool at 3 o'clock p. m. on that day. A letter so dispatched would be due in Glasgow at 2 o'clock p. m. on January 31st; another post left Liverpool for Glasgow every day at 1 o'clock a. m., and letters to be dispatched by

† At the trial it appeared that because of the slippery state of the roads from frost the mail bag did not arrive at the station on the 30th until after the departure of the down train that should have conveyed it.

that post must be put into the office during the preceding evening, and if any letter had been sent by that post on the morning of the 31st, it must have been delivered in Glasgow in the regular course of post at 8 o'clock in the morning of February 1st. As no communication from Messrs. Higgins arrived by either of these posts, Messrs. Dunlop contended that they were entitled to treat their offer as not accepted, and that they were not bound to wait until the third post delivered in Glasgow at 2 o'clock p. m., of Saturday, February 1st (at which time Messrs. Higgins' letter did actually arrive), before they entered into other contracts, the taking of which would disable them from performing the contract they had offered to Messrs. Higgins.

The cause came before Lord Ivory, as Lord Ordinary, who directed an issue. The counsel for Messrs. Dunlop tendered exceptions.

These exceptions were afterward argued before the judges of the First Division, who pronounced an interlocutor, disallowing the exceptions; and that interlocutor was the subject of the present appeal.

The Lord Chancellor [Lord Cottenham].[24] * * * I do not think that, in the facts of the case, there is anything to warrant the appeal. The contest arises from an order sent from Liverpool to Glasgow, or rather a proposition sent from Glasgow to Liverpool, and accepted by the house at Liverpool. It is unnecessary to go earlier into the history of the case than the letter sent from Liverpool by Higgins, bearing date of January 31st. A proposition had been made by the Glasgow house of Dunlop, Wilson & Co., to sell 2000 tons of pig iron. The answer is of that date of January 31st: "Gentlemen, we will take the 2000 tons, pigs, you offer us." Another part of the letter refers to other arrangements; but there is a distinct and positive offer to take the 2000 tons of pigs. To that letter there is annexed a postscript in which they say: "We have accepted your offer unconditionally, but we hope you will accede to our request as to delivery and mode of payment by two months bill."

That, my Lords, therefore, is an unconditional acceptance, by the letter dated January 31st, which was proved to have been put into the post-office at Liverpool on the 30th; but it was not delivered, owing to the state of severe frost at that time, which delayed the mail from reaching Glasgow at the time at which, in the ordinary course it would have arrived there. The letter having been put in on January 30th, it ought to have arrived at Glasgow on the following day, but it did not arrive till the 1st of February.

It appears that between the time of writing the offer and February 1st, the parties making the offer had changed their minds; and instead of being willing to sell 2000 tons of pig iron on the terms proposed, they were anxious to be relieved from that stipulation, and on that day, February 1st, they say: "We have yours of yesterday, but are sorry that we cannot enter the 2000 tons of pig iron, our offer of the 28th not having been accepted in course."

[24] The statement of facts is abbreviated and parts of the opinion are omitted.

Under these circumstances, the parties wishing to buy, and by their letter accepting the offer, instituted proceedings in the Court of Session for damages sustained by the non-performance of the contract. And the first question raised by the first exception applies not to the summing up of the learned judge, but to the admission of evidence by him. * * *

The exception is that the learned judge was wrong in permitting the pursuer to explain his mistake [in dating January 31 the letter written and posted on the 30th]. The proposition is, that if a man is bound to answer a letter on a particular day, and by mistake puts a date in advance, he is to be bound by his error, whether it produces mischief to the other party or not. It is unnecessary to do more than state this proposition in order to induce you to assent to the view I take of the objection, and to come to the conclusion that the learned Judge was right in allowing the pursuer to go into evidence to show the mistake. * * *

The next exception to be considered is the second, and that raises a more important question, though not one attended with much difficulty. The exception is, that his Lordship did direct the jury in point of law, that if the pursuers posted their acceptance of the offer in due time, according to the usage of trade, they are not responsible for any casualties in the post-office establishment.

Now, there may be some little ambiguity in the construction of that proposition. It proceeds on the assumption that, by the usage of trade, an answer ought to have been returned by the post, and that the 30th was the right day on which that answer ought to have been notified. Then comes the question, whether, under those circumstances, that being the usage of trade, the fact of the letter being delayed, not by the act of the party sending it, but by an accident connected with the post, the party so putting the letter in on the right day is to lose the benefit which would have belonged to him if the letter had arrived in due course?

I cannot conceive, if that is the right construction of the direction of the learned judge, how any doubt can exist on the point. If a party does all that he can do, that is all that is called for. If there is a usage of trade to accept such an offer, and to return an answer to such an offer, and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done everything he was bound to do? How can he be responsible for that over which he has no control? It is not the same as if the date of the party's acceptance of the offer had been the subject of a special contract; as if the contract had been, "I make you this offer, but you must return me an answer on the 30th, and on the earliest post of that day." The usage of trade would require an answer on the day on which the offer was received, and Messrs. Higgins, therefore, did on the 30th, in proper time, return an answer by the right conveyance—the post-office.

If that was not correct, and if you were to have reference now to any usage constituting the contract between the parties a specific contract, it is

quite clear to me that the rule of law would necessarily be that which has obtained by the usage of trade. It has been so decided in cases in England, and none has been cited from Scotland which controverts that proposition; but the cases in England put it beyond all doubt. It is not disputed—it is a very frequent occurrence—that a party having a bill of exchange, which he tenders for payment to the acceptor, and payment is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him; if he puts a letter into the post at the right time, it has been held quite sufficient; he has done all that he is expected to do as far as he is concerned; he has put the letter into the post, and whether that letter be delivered, or not, is a matter quite immaterial, because for accidents happening at the post-office he is not responsible. * * *

It was ordered that the interlocutor complained of should be affirmed with costs.

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## THE HOUSEHOLD FIRE AND CARRIAGE ACCIDENT INSURANCE COMPANY (Limited) *v.* GRANT.

**(Court of Appeal, 1879. L. R. 4 Exch. D. 216.)**

Action to recover £94 15s., being the balance due upon 100 shares allotted to the defendant on October 25th, 1874, in pursuance of an application from the defendant for such shares dated September 30th, 1874.

At the trial before Lopes, J., during the Middlesex Sittings, 1878, the following facts were proved. In 1874 one Kendrick was acting in Glamorganshire as the agent of the company for the placing of their shares, and on September 30th the defendant handed to Kendrick an application in writing for shares in the plaintiff's company, which stated that the defendant had paid to the bankers of the company £5, being a deposit of 1s. per share, and requesting an allotment of 100 shares, and agreeing to pay the further sum of 19s. per share within twelve months of the date of the allotment. Kendrick duly forwarded this application to the plaintiffs in London, and the secretary of the company on October 20th, 1874, made out the letter of allotment in favor of the defendant, which was posted addressed to the defendant at his residence, 16 Herbert Street, Swansea, Glamorganshire; his name was then entered on the register of shareholders. This letter of allotment never reached the defendant. The defendant never paid the £5 mentioned in his application, but the plaintiffs' company being indebted to the defendant in the sum of £5 for commission, that sum was duly credited to his account in their books. In July, 1875, a dividend at the rate of 2½ per cent was declared on the shares, and in February, 1876, a further dividend at the same rate; these dividends, amounting altogether to the sum of 5s., were also credited to the defendant's account in the books of the plaintiffs' company. Afterward the company went into

liquidation, and on December 7th, 1877, the official liquidator applied for the sum sued for from the defendant; the defendant declined to pay on the ground that he was not a shareholder.

On these facts the learned judge left two questions to the jury. 1. Was the letter of allotment of October 20th in fact posted? 2. Was the letter of allotment received by the defendant? The jury found the first question in the affirmative and the last in the negative.

The learned judge reserved the case for further consideration, and after argument directed judgment to be entered for the plaintiffs on the authority of Dunlop v. Higgins, 1 H. L. C. 381.

The defendant appealed.

THESIGER, L. J.[25] In this case the defendant made an application for shares in the plaintiffs' company under circumstances from which we must imply that he authorized the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post. The company did allot him the shares, and duly addressed to him and posted a letter containing the notice of allotment, but upon the finding of the jury it must be taken that the letter never reached its destination. In this state of circumstances Lopes, J., has decided that the defendant is liable as a shareholder. He based his decision mainly upon the ground that the point for his consideration was covered by authority binding upon him, and I am of opinion that he did so rightly, and that it is covered by authority equally binding upon this court.

The leading case upon the subject is Dunlop v. Higgins, 1 H. L. C. 381. It is true that Lord Cottenham might have decided that case without deciding the point raised in this. But it appears to me equally true that he did not do so, and that he preferred to rest and did rest his judgment as to one of the matters of exception before him upon a principle which embraces and governs the present case. * * * But if Dunlop v. Higgins were out of the way, Harris's Case, L. R. 7 Ch. 587, would still go far to govern the present. There it was held that the acceptance of the offer at all events binds both parties from the time of the acceptance being posted, and so as to prevent any retractation of the offer being of effect after the acceptance had been posted. Now, whatever in abstract discussion may be said as to the legal notion of its being necessary, in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless therefore a contract constituted by correspondence is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is addressed, it is difficult to see how the two minds are ever to be brought together at one and the same moment. This was pointed out by Lord Ellenborough in the case of Adams v. Lindsell, 1 B. & A. 681,

[25] Parts of the opinion of Thesiger, L. J. and all of the opinion of Baggallay, L. J., are omitted.

which is recognized authority upon this branch of the law. But, on the other hand, it is a principle of law, as well established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communication. An acceptance, which only remains in the breast of the acceptor without being actually and by legal implication communicated to the offerer, is no binding acceptance. How, then, are these elements of law to be harmonized in the case of contracts formed by correspondence through the post? I see no better mode than that of treating the post-office as the agent of both parties, and it was so considered by Lord Romilly in Hebb's Case, L. R. 4 Eq. at p. 12, when in the course of his judgment he said: "Dunlop v. Higgins, 1 H. L. C. 381, decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason of that is, that the post-office is the common agent of both parties." Alderson, B., also in Stocken v. Collin, 7 M. & W. at p. 516, a case of notice of dishonor, and the case referred to by Lord Cottenham, says: "If the doctrine that the post-office is only the agent for the delivery of the notice were correct, no one could safely avail himself of that mode of transmission:" But if the post-office be such common agent, then it seems to me to follow that, as soon as the letter of acceptance is delivered to the post-office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance. What other principle can be adopted short of holding that the contract is not complete by acceptance until and except from the time that the letter containing the acceptance is delivered to the offerer, a principle which has been distinctly negatived? This difficulty was attempted to be got over in the British and American Telegraph Co. v. Colson, L. R. 6 Ex. 108, which was a case directly on all fours with the present and in which Kelly, C. B., (at p. 115,) is reported to have said: "It may be that in general, though not in all cases, a contract takes effect from the time of acceptance and not from the subsequent notification of it. As in the case now before the court, if the letter of allotment had been delivered to the defendant in the due course of the post he would have become a shareholder from the date of the letter. And to this effect is Potter v. Sanders, 6 Hare, 1. And hence, perhaps, the mistake has arisen that the contract is binding upon both parties from the time when the letter is written and put into the post, although never delivered; whereas although it may be binding from the time of acceptance, it is only binding at all when afterward duly notified." But with deference I would ask how a man can be said to be a shareholder at a time before he was bound to take any shares, or to put the question in the form in which it is put by Mellish, L. J., in Harris's Case, L. R. 7 Ch. 586, at p. 596, how there can be any relation back in a case of this kind as there may be in bankruptcy? If, as the Lord Justice said, the contract after the letter has arrived in time is to be treated as having been made from the time the letter is posted, the reason is that the

contract was actually made at the time when the letter was posted. The principle indeed laid down in Harris's Case, L. R. 7 Ch. 586, at p. 596, as well as in Dunlop v. Higgins, 1 H. L. C. 381, can really not be reconciled with the decision in the British and American Telegraph Co. v. Colson, L. R. 6 Ex. 108. James, L. J., in the passage I have already quoted, Harris's Case, L. R. 7 Ch. 592, affirms the proposition that when once the acceptance is posted neither party can afterward escape from the contract, and refers, with approval, to Hebb's Case, L. R. 4 Eq. 9. There a distinction was taken by the Master of the Rolls that the company chose to send the letter of allotment to their own agent, who was not authorized by the applicant for shares to receive it on his behalf, and who never delivered it, but he at the same time assumed that if, instead of sending it through an authorized agent, they had sent it through the post-office, the applicant would have been bound, although the letter had never been delivered. Mellish, L. J., really goes as far, and states forcibly the reasons in favor of this view. The mere suggestion thrown out (at the close of his judgment, at p. 597), when stopping short of actually overruling the decision in the British and American Telegraph Co. v. Colson, L. R. 6 Ex. 108, that although a contract is complete when the letter accepting an offer is posted, yet it may be subject to a condition subsequent that, if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted, can hardly, when contrasted with the rest of the judgment, be said to represent his own opinion on the law upon the subject. The contract, as he says, L. R. 7 Ch. at p. 596, is actually made when the letter is posted. The acceptor, in posting the letter, has, to use the language of Lord Blackburn, in Brogden v. Directors of Metropolitan Ry. Co., 2 App. Cas. 666, 691, "put it out of his control and done an extraneous act which clinches the matter, and shows beyond all doubt that each side is bound." How, then, can a casualty in the post, whether resulting in delay, which in commercial transactions is often as bad as no delivery, or in non-delivery, unbind the parties or unmake the contract? To me it appears that in practice a contract complete upon the acceptance of an offer being posted, but liable to be put an end to by an accident in the post, would be more mischievous than a contract only binding upon the parties to it upon the acceptance actually reaching the offerer, and I can see no principle of law from which such an anomalous contract can be deduced.

There is no doubt that the implication of a complete, final, and absolutely binding contract being formed, as soon as the acceptance of an offer is posted, may in some cases lead to inconvenience and hardship. But such there must be at times in every view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. At the

same time I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. An offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. If he trusts to the post he trusts to a means of communication which, as a rule, does not fail, and if no answer to his offer is received by him, and the matter is of importance to him, he can make inquiries of the person to whom his offer was addressed. On the other hand, if the contract is not finally concluded, except in the event of the acceptance actually reaching the offerer, the door would be opened to the perpetration of much fraud, and, putting aside this consideration, considerable delay in commercial transactions, in which despatch is, as a rule, of the greatest consequence, would be occasioned; for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination.

Upon balance of conveniences and inconveniences it seems to me, applying with slight alterations the language of the Supreme Court of the United States in Tayloe v. Merchants' Fire Insurance Co., 9 How. (U. S.) 390, more consistent with the acts and declarations of the parties in this case to consider the contract complete and absolutely binding on the transmission of the notice of allotment through the post, as the medium of communication that the parties themselves contemplated, instead of postponing its completion until the notice had been received by the defendant.[26]

[26] "But a little reflection will show, that, in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present.

"The position may be illustrated by the case before us. If the contract became complete, as we think it did, on the acceptance of the offer by the applicant, on the 21st of December, 1844, the company, of course, could have no knowledge of it until the letter of acceptance reached the agent, on the 31st of the month; and, on the other hand, upon the hypothesis it was not complete until notice of the acceptance, and then became so, the applicant could have no knowledge of it at the time it took effect. In either aspect, and, indeed, in any aspect in which the case can be presented, one of the parties must be unadvised of the time when the contract takes effect, as its consummation must depend upon the act of one of them in the absence of the other.

"The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence; the acceptance must succeed the offer after the lapse of some interval of time; and, if the process is to be carried further in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other.

"It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into a

Upon principle, therefore, as well as authority, I think that the judgment of Lopes, J., was right and should be affirmed, and that this appeal should therefore be dismissed.

BRAMWELL, L. J. The question in this case is not whether the post-office was a proper medium of communication from the plaintiffs to the defendant. There is no doubt that it is so in all cases where personal service is not required. It is an ordinary mode of communication, and every person who gives any one the right to communicate with him gives the right to communicate in an ordinary manner, and so in this way and to this extent, that if an offer were made by letter in the morning to a person at a place within half an hour's railway journey of the offerer, I should say that an acceptance by post, though it did not reach the offerer till the next morning, would be in time. Nor is the question whether, when the letter reaches an offerer, the latter is bound and the bargain made from the time the letter is posted or despatched, whether by post or otherwise. The question in this case is different. I will presently state what in my judgment it is. Meanwhile I wish to mention some elementary propositions which, if carefully borne in mind, will assist in the determination of this case:

First. Where a proposition to enter into a contract is made and accepted, it is necessary, as a rule, to constitute the contract that there should be a communication of that acceptance to the proposer. Per Brian, C. J., and Lord Blackburn: Brogden v. Metropolitan Ry. Co., 2 App. Cas. at p. 692.

Secondly. That the present case is one of proposal and acceptance.

Thirdly. That as a consequence of or involved in the first proposition, if the acceptance is written or verbal—i. e., is by letter or message—as a rule, it must reach the proposer or there is no communication, and so no acceptance of the offer.

Fourthly. That if there is a difference where the acceptance is by a letter sent through the post which does not reach the offerer, it must be by virtue of some general rule or some particular agreement of the parties. As, for instance, there might be an agreement that the acceptance of the proposal may be by sending the article offered by the proposer to be bought, or hanging out a flag or sign to be seen by the offerer as he goes by, or leaving a letter at a certain place, or any other agreed mode, and in the same

contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties, to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated; instead of postponing its completion till notice of such acceptance has been received and assented to by the company.

"For why make the offer, unless intended that an assent to its terms should bind them? And why require any further assent on their part, after an unconditional assent by the party to whom it is addressed"? Nelson, J., in Tayloe v. Merchants Fire Ins. Co., 9 How. (U. S.) 390, 400-401 (1850).

way there might be an agreement that dropping a letter in a post pillar-box or other place of reception should suffice.

Fifthly. That as there is no such special agreement in this case, the defendant, if bound, must be bound by some general rule which makes a difference when the post-office is employed as the means of communication.

Sixthly. That if there is any such general rule applicable to the communication of the acceptance of offers, it is equally applicable to all communications that may be made by post. Because, as I have said, the question is not whether this communication may be made by post. If, therefore, posting a letter which does not reach is a sufficient communication of acceptance of an offer, it is equally a communication of everything else which may be communicated by post—e. g., notice to quit. It is impossible to hold, if I offer my landlord to sell him some hay, and he writes accepting my offer, and in the same letter gives me notice to quit, and posts his letter, which, however, does not reach me, that he had communicated to me his acceptance of my offer, but not his notice to quit. Suppose a man has paid his tailor by check or bank-note, and posts a letter containing a check or bank-note to his tailor, which never reaches, is the tailor paid?[27] If he is, would he be if he had never been paid before in that way? Suppose a man is in the habit of sending checks and bank-notes to his banker by post, and posts a letter containing checks and bank-notes, which never reaches. Is the banker liable? Would he be if this was the first instance of a remittance of the sort? In the cases I have supposed, the tailor and banker may have recognized this mode of remittance by sending back receipts and putting the money to the credit of the remitter. Are they liable with that? Are they liable without it? The question then is, Is posting a letter which is never received a communication to the person addressed, or an equivalent, or something which dispenses with it? It is for those who say it is to make good their contention. I ask why is it? My answer beforehand to any argument that may be urged is, that it is not a communication, and that there is no agreement to take it as an equivalent for or to dispense with a communication. That those who affirm the contrary say the thing which is not. That if Brian, C. J., had had to adjudicate on the case, he would deliver the same judgment as that reported. That because a man, who may send a communication by post or

[27] In Mitchell-Henry v. Norwich Union Life Insurance Society, Ltd., [1918] 2 K. B. 67, the defendant in asking plaintiff for an instalment payment on a loan wrote: "Please return this notice when remitting." The amount was £48 5s. 8d. and plaintiff put £48 in £1 Treasury notes and the balance in a postal order and stamps in an ordinary envelope and registered it to the defendant. The elevator boy of the building, not employed by the defendant, receipted for the letter and stole the money. The plaintiff claimed a declaration that he had paid the instalment. It was held that though the defendant had impliedly authorized the plaintiff to send the money through the post, it was not usual to send so large a sum by post in notes as small as that and so there was no payment.

otherwise, sends it by post, he should bind the person addressed, though the communication never reaches him, while he would not so bind him if he had sent it by hand, is impossible. There is no reason in it; it is simply arbitrary.[28] I ask whether any one who thinks so is prepared to fol-

[28] "A letter missive is only a series of words fixed upon paper; but these words are addressed to an absent person; it is necessary, therefore, in order that they should have their effect, that the absent person to whom they are addressed should understand them; they are, therefore, without effect so far as he to whom they are addressed has not understood them; as they would be without effect if, being addressed to a person present, that person was, from a physical cause, not in a condition to understand them. Now how can an absent person understand the words that are addressed to him? Certainly he can only understand them by reading the letter which contains them. The letter by which I contract an obligation can therefore only fulfil its object so far as I can be supposed to persist, at the moment when it arrives, in the will which I had in writing it. If, therefore, at the moment when my letter arrives, I have already in another way manifested and notified a contrary will, my letter can no longer bind me; it is paralyzed in advance.

"That is so true that if, at the moment when my letter arrives, I am no longer able to speak to the person to whom it is addressed, or to persist in the will which I had in writing it, that will cannot be opposed to me, it cannot produce any effect against me; and it is upon this foundation that all the doctors teach that if, after having written to a person with whom I was in treaty for a bargain, that I accepted his proposition, I happen to die before my letter reaches that person, there is no contract between him and me. * * *

"And here recurs the comparison, which we made just now, of the consent expressed by a letter addressed to an absent person, with the consent expressed by words addressed to a person present.

"I find myself in the presence of a deaf person who says to me: Will you buy of me such a thing for such a price? I answer him: I will; but he does not hear me; he declares to me that he has not heard me, and he prays me to give him in writing the answer which he judges, by the movement of my lips, that I have made to him. Then I take a pen and trace for him these words: I said that I would, but on further reflection your proposition is not satisfactory. Could this man pretend that, by the answer which I admit that I made to him *viva voce*, I am bound to him irrevocably? Certainly not; and if he prosecuted me, the judge would dismiss him without hesitation.

"Wherefore would it be otherwise in the case of a letter written to an absent person? Because the absent person has become proprietor of my letter from the moment when it left my hands? But let us take another comparison.

"A man has in his cabinet an acoustic vault, constructed in such a manner that, by reason of the various and extremely multiplied windings of the tubes which compose it, the words transmitted through one of the extremities do not reach the other till after a space of five minutes. I am in the presence of that man, and in his cabinet in question. There, after saying to me: Will you buy of me such a thing for such a sum? he adds: Answer me by my acoustic vault. Thereupon we take our places, I at one of the extremities of his vault, he at the other and I say to him by his speaking trumpet: I will. But a minute after I change my resolution; I run to him, and before he has been able to hear my answer, I say to him: I will not. Could he, after having heard the answer which I made to him at first by his acoustic vault, pretend that this answer having been transmitted to him by tubes of which he was pro-

low that opinion to its consequence; suppose the offer is to sell a particular chattel, and the letter accepting it never arrives, is the property in the chattel transferred? Suppose it is to sell an estate or grant a lease, is the bargain completed? The lease might be such as not to require a deed; could a subsequent lessee be ejected by the would-be acceptor of the offer because he had posted a letter? Suppose an article is advertised at so much, and that it would be sent on receipt of a post-office order. Is it enough to post the letter? If the word "receipt" is relied on, is it really meant that that makes a difference? If it should be said let the offerer wait, the answer is, may be he may lose his market meanwhile. Besides, his offer may be by advertisement to all mankind. Suppose a reward for information, information posted does not reach, some one else gives it and is paid, is the offerer liable to the first man?

It is said that a contrary rule would be hard on the would-be acceptor, who may have made his arrangements on the footing that the bargain was concluded. But to hold as contended would be equally hard on the offerer, who may have made his arrangements on the footing that his offer was not accepted; his non-receipt of any communication may be attributable to the person to whom it was made being absent. What is he to do but to act on the negative, that no communication has been made to him? Further, the use of the post-office is no more authorized by the offerer than the sending an answer by hand, and all these hardships would befall the person posting the letter if he sent it by hand. Doubtless in that case he would be the person to suffer if the letter did not reach its destination. Why should his sending it by post relieve him of the loss and cast it on the other party? It was said, if he sends it by hand it is revocable, but not if he sends it by post, which makes the difference. But it is revocable when sent by post, not that the letter can be got back, but its arrival might be anticipated by a letter by hand or telegram, and there is no case to show that such anticipation would not prevent the letter from binding. It would be a most alarming thing to say that it would [not],—that a letter honestly but mistakenly written and posted must bind the writer if hours before its arrival he informed the person addressed that it was coming, but was wrong and recalled. Suppose a false but honest character given, and the mistake found out after the letter posted, and notice that it was wrong given to the person addressed.

prietor, and having consequently become his property at the very instant that it left my mouth, I could not retract it before it had struck his ear? No, emphatically no; a hundred times no!.

"For the same reason, the obligation which I contract by a letter to an absent person does not bind me, so long as the absent person to whom I have addressed that letter has not received it." Merlin's argument in S— v. F—, as reported in 1 Langdell's Cases on Contracts, 2 ed., pp. 160, 162.

Then, as was asked, is the principle to be applied to telegrams?[89] Further, it seems admitted that if the proposer said, "Unless I hear from you by return of post the offer is withdrawn," that the letter accepting it must reach him to bind him. There is, indeed, a case recently reported in the *Times*, before the Master of the Rolls, where the offer was to be accepted

[89] It is applied to telegrams. If the offer is by telegram, a telegram of acceptance, promptly sent prepaid and properly addressed completes a contract.

In Trevor v. Wood, 36 N. Y. 307, 309-311 (1867), Scrugham, J., said for the court: "The sending of a letter accepting the proposition is regarded as an acceptance, because it is an overt act clearly manifesting the intention of the party sending it to close with the offer of him to which it is sent, and thus marking that *aggregatio mentium* which is necessary to constitute a contract. * * *

"It was agreed between these parties that their business should be transacted through the medium of the telegraph. The object of this agreement was to substitute the telegraph for other methods of communication, and to give to their transactions by it the same force and validity they would derive if they had been performed through other agencies. In accordance with this agreement the offer was made by telegraph to the appellants in New York, and the acceptance addressed to the respondents in New Orleans, and immediately despatched from New York by order of the appellants. It cannot, therefore, be said that the appellants did not put their acceptance in a proper way to be communicated to the respondents, for they adopted the method of communication which had been used in the transaction by the respondents, and which had been selected by prior agreement between them as that by means of which their business should be transacted.

"Under these circumstances the sending of the despatch must be regarded as an acceptance of the respondents' offer, and thereupon the contract became complete.

"I cannot conceive upon what principle an agreement to communicate by telegraph can be held to be in effect a warranty by each party that his communication to the other shall be received. On the contrary, by agreeing beforehand to adopt that means of communication the parties mutually assume its hazards, which are principally as to the prompt receipt of the dispatches."

"The fact that there was a valid contract has been found by the referee. The evidence showed that a proposal, in writing, was made by Mr. Daly to the plaintiff for an engagement of her services for the year 1869. The plaintiff testifies that she signed an acceptance on Saturday, April 13th, 1870, and placed it in the letter-box of the defendant, at the theatre. The defendant admits that this letter-box was sometimes used as a place for deposit of the duplicates of contracts made between him and the actors. It is true that he testified that he never received the papers which the plaintiff asserts that she deposited in the box. This, however, is immaterial. The minds of the parties met when the plaintiff complied with the usual, or even occasional, practice, and left the acceptance in a place of deposit recognized as such by the defendant. This doctrine is analogous to that which has been adopted in the case of communication by letter or by telegraph. (Vassar v. Camp, 11 N. Y. 441; Trevor v. Wood, 36 id. 307.) The principle governing these cases is, that there is a concurrence of the minds of the parties upon a distinct proposition, manifested by an overt act. (White v. Corlies, 46 N. Y. 467). The deposit in the box, under the circumstances of the present case, is such an act." Dwight, C., in Howard v. Daly, 61 N. Y. 362, 365, 366 (1875).

within fourteen days, and it is said to have been held that it was enough to post the letter on the 14th, though it would and did not reach the offerer till the 15th. Of course there may have been something in that case not mentioned in the report. But as it stands it comes to this, that if an offer is to be accepted in June, and there is a month's post between the places, posting the letter on June 30th will suffice, though it does not reach till July 31st; but that case does not affect this. There the letter reached, here it has not. If it is not admitted that "unless I hear by return the offer is withdrawn" makes the receipt of the letter a condition, it is to say an express condition goes for naught. If it is admitted, is it not what every letter says? Are there to be fine distinctions, such as, if the words are "unless I hear from you by return of post," etc., it is necessary the letter should reach him, but "let me know by return of post," it is not; or if in that case it is, yet it is not where there is an offer without those words. Lord Blackburn says that Mellish, L. J., accurately stated that where it is expressly or impliedly stated in the offer, "you may accept the offer by posting a letter," the moment you post this letter the offer is accepted. I agree; and the same thing is true of any other mode of acceptance offered with the offer and acted on—as firing a cannon, sending off a rocket, give your answer to my servant the bearer. Lord Blackburn was not dealing with the question before us; there was no doubt in the case before him that the letter had reached. As to the authorities, I shall not re-examine those in existence before the British and American Telegraph Co. v. Colson, L. R. 6 Ex. 108. But I wish to say a word as to Dunlop v. Higgins, 1 H. L. C. 381; the whole difficulty has arisen from some expressions in that case. Mr. Finlay's argument and reference to the case when originally in the Scotch Court has satisfied me that Dunlop v. Higgins, 1 H. L. C. 381, decided nothing contrary to the defendant in this case. Mellish, L. J., in Harris's Case, L. R. 7 Ch. 596, says: "That case is not a direct decision on the point before us." It is true, he adds, that he has great difficulty in reconciling the case of the British and American Telegraph Co. v. Colson, L. R. 6 Ex. 108, with Dunlop v. Higgins, 1 H. L. C. 381. I do not share that difficulty. I think they are perfectly reconcilable, and that I have shown so. Where a posted letter arrives, the contract is complete on the posting. So where a letter sent by hand arrives, the contract is complete on the writing and delivery to the messenger. Why not? All the extraordinary and mischievous consequences which the Lord Justice points out in Harris's Case, L. R. 7 Cr. 569, might happen if the law were otherwise when a letter is posted, would equally happen where it is sent otherwise than by the post. He adds that the question before the Lords in Dunlop v. Higgins, 1 H. L. C. 381, was whether the ruling of the Lord Justice Clerk was correct, and they held it was. Now Mr. Finlay showed very clearly that the Lord Justice Clerk decided nothing inconsistent with the judgment in the British and American Telegraph Co. v. Colson, L. R. 6 Ex. 108. Since the last case there have been two before Vice-Chancellor

Malins, in the earlier of which he thought it "reasonable," and followed it. In the other, because the Lord Justices had in Harris's Case, L. R. 7 Ch. 596, thrown cold water on it, he appears to have thought it not reasonable. He says, suppose the sender of a letter says, "I make you an offer, let me have an answer by return of post." By return the letter is posted, and A. has done all that the person making the offer requests. Now that is precisely what he has not done. He has not let him "have an answer." He adds there is no default on his part. Why should he be the only person to suffer? Very true. But there is no default in the other, and why should he be the only person to suffer? The only other authority is the expression of opinion by Lopes, J., in the present case. He says the proposer may guard himself against hardship by making the proposal expressly conditioned on the arrival of the answer within a definite time. But it need not be express nor within a definite time. It is enough that it is to be inferred that it is to be, and if it is to be it must be within a reasonable time. The mischievous consequences he points out do not follow from that which I am contending for. I am at a loss to see how the post-office is the agent for both parties. What is the agency as to the sender? merely to receive? But suppose it is not an answer, but an original communication. What then? Does the extent of the agency of the post-office depend on the contents of the letter? But if the post-office is the agent of both parties, then the agent of both parties has failed in his duty, and to both. Suppose the offerer says, "My offer is conditional on your answer reaching me." Whose agent is the post-office then? But how does an offerer make the post-office his agent, because he gives the offeree an option of using that or any other means of communication?

I am of opinion that this judgment should be reversed. I am of opinion that there was no bargain between these parties to allot and take shares, that to make such bargain there should have been an acceptance of the defendant's offer and a communication to him of that acceptance. That there was no such communication. That posting a letter does not differ from other attempts at communication in any of its consequences, save that it is irrevocable as between the poster and post-office. The difficulty has arisen from a mistake as to what was decided in Dunlop v. Higgins, 1 H. L. C. 381, and from supposing that because there is a right to have recourse to the post as a means of communication, that right is attended with some peculiar consequences, and also from supposing that because if the letter reaches it binds from the time of posting, it also binds though it never reaches. Mischief may arise if my opinion prevails. It probably will not, as so much has been said on the matter that principle is lost sight of. I believe equal if not greater, will, if it does not prevail. I believe the latter will be obviated only by the rule being made nugatory by every prudent man saying, "Your answer by post is only to bind if it reaches me." But the question is not to be decided on these considerations. What is the law? What is the principle? If Brian, C. J., had had to decide this, a public post

being instituted in his time, he would have said the law is the same, now there is a post, as it was before, viz., a communication to affect a man must be a communication, i. e., must reach him.

*Judgment affirmed.*[30]

[30] McCulloch v. Eagle Fire Ins. Co., 1 Pick. (Mass.) 278 (1822), seemingly the only case *contra* not expressly overruled, has been discredited in Massachusetts and might not be followed there. See Brauer v. Shaw, 168 Mass. 198 (1897) quoted from in note to Byrne & Co. v. Van Tienhoven & Co., *post*, p. 103, and Com. Mut. Fire Ins. Co. v. Knabe & Co., 171 Mass. 265 (1898). In Ashley on Contracts, p. 42, it is stated that while Brauer v. Shaw, *supra*, actually decides nothing more than that a revocation was ineffectual because not communicated before the acceptance was received, "nevertheless the case has been regarded as quietly overruling McCulloch v. Eagle Ins. Co., and conforming the Massachusetts law to that of the rest of the country. The question cannot be regarded as settled, however."

On the time when a contract consisting of letters or telegrams is complete, see 6 Ann. Cas. 378, note; 110 Am. St. Rep. 742, note.

For the contract to be complete on the mailing of the letter of acceptance, the latter must be properly addressed and stamped. Blake v. Hamburg-Bremen Fire Ins. Co., 67 Tex. 160 (1886). If, however, a letter of acceptance not properly addressed, or not stamped so as to be entitled to be forwarded promptly according to the postal regulations, is in fact so forwarded and actually reaches the offerer before the offer has been revoked or has expired, it would seem that there is a contract.

Postal regulations determine when a letter is mailed. Differences in such regulations make delivery to a letter carrier mailing in the United States (Pearce v. Langfit, 101 Pa. St. 507 (1882)) while it is not so in England until the carrier, as the messenger of the sender, deposits the letter in the proper mailing place of the proper post office. In re London & Northern Bank, [1900] 1 Ch. 220.

The fact that by acting promptly and complying with certain postal requirements, the sender of a letter may reclaim it from the post office is not deemed to prevent the mailing of an acceptance of an offer made by mail from completing a contract. "Nor can it be conceded that except on some extraordinary occasion and on evidence satisfactory to the post office authorities, a letter once mailed can be withdrawn by the party who mailed it. When letters are placed in a post office they are within the legal custody of the officers of the government, and it is the duty of postmasters to deliver them to the persons to whom they are addressed." Shiras, J., in McDonald v. Chemical Nat. Bk., 174 U. S. 610, 620 (1898). So the fact that a telegram of acceptance may be intercepted and withdrawn by the accepter is not deemed to prevent a contract from arising on the despatch of the telegram of acceptance. Occasionally, however, a doubt is expressed.

On withdrawal, or right to withdraw letter from the mail as affecting the consummation of a contract, see 9 A. L. R. 386, note.

A letter deposited in the mails, properly addressed and with postage prepaid, will be presumed to have reached its destination in due course of post. Ruder v. National Council of Knights and Ladies of Security, 124 Minn. 431 (1914).

"During the Transvaal war, the holder of an option to buy certain land mailed three letters of acceptance before the expiration of that option. As owing to the war, there was no regular postal communication, only one letter

## BYRNE & CO *v.* VAN TIENHOVEN & CO.

(High Court of Justice, Common Pleas Division, 1880. L. R., 5 C. P. Div. 344.)

LINDLEY, J.[31] This was an action for the recovery of damages for the non-delivery by the defendants to the plaintiffs of 1000 boxes of tinplates, pursuant to an alleged contract, which I will refer to presently. The action was tried at Cardiff before myself without a jury; and it was agreed at the trial that in the event of the plaintiffs being entitled to damages they should be £375.

The defendants carried on business at Cardiff and the plaintiffs at New York, and it takes ten or eleven days for a letter posted at either place to reach the other. The alleged contract consists of a letter [containing an offer to sell 1000 boxes of tin plate branded "Hensol" at 15s. 6d. per box] written by the defendants to the plaintiffs on October 1st, 1879, and received by them on the 11th, and accepted by telegram and letter sent [by the plaintiffs] to the defendants on October 11th and 15th respectively. * * * These letters and telegram would, if they stood alone, plainly constitute a contract binding on both parties. * * * The defendants, however, raise two other defences to the action which remain to be considered. First, they say that the offer made by their letter of October 1st was revoked by them before it had been accepted by the plaintiffs by their telegram of the 11th or letter of the 15th. The facts as to these are as follows: On October 8th the defendants wrote and sent by post to the plaintiffs a letter withdrawing their offer of the 1st. The material part of this letter was as follows: "Confirming our respects of the 1st inst. we hasten to inform you that there having been a regular panic in the tinplate market during the last few days, which has caused prices to run up about 25 per cent, we are reluctantly compelled to withdraw any offer we have made to our constituents, and must therefore also consider our offer to you for 1000 boxes 'Hensols' at 17s. 6d. to be cancelled from this date." This letter of October 8th reached the plaintiffs on October 20th. On the

was delivered, and that after the option had expired. It was held that the acceptance did not take effect when mailed. Bal v. Van Staden, 20 So. Afric. L. J. 407. The decision is doubtless sound. The acceptor ought not to be allowed knowingly to throw any risk upon the offerer which the latter has not, at least by implication, agreed to accept. The same principle applies as in the case of his negligence. Whenever at the time the acceptor mails the letter he knows that he is incurring an unauthorized risk or whenever at that time his negligence has occasioned such a risk, the acceptance should not take effect until received." 17 Harv. L. Rev. 342. But cf. Pead v. Trull, reported *post*, p. 806, which, however, related to performance under an existing contract and not to the acceptance of an offer. What if the offer be paid for? In such case, is inability to find a representative of the other party who has died a stronger reason for extending a period than is inability because of war to get a letter to a living person? Of course time is generally of the essence of options and may not have been of the essence in Pead v. Trull.

[31] Parts of the opinion are omitted.

same day the plaintiffs telegraphed to the defendants demanding shipment, and sent them a letter insisting on completion of the contract. * * * This letter is followed by one from the defendants to the plaintiffs of October 25th refusing to complete. * * *

There is no doubt that an offer can be withdrawn before it is accepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not. Routledge v. Grant, 4 Bing. 653. For the decision of the present case, however, it is necessary to consider two other questions—viz.: 1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent? 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent?

It is curious that neither of these questions appears to have been actually decided in this country. As regards the first question, I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not, in fact, any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. This is the view taken in the United States. See Tayloe v. Merchants' Fire Insurance Co., 9 How. (U. S.) 390, cited in Benjamin on Sales, pp. 56-58, and it is adopted by Mr. Benjamin. The same view is taken by Mr. Pollock in his excellent work on Principles of Contract, ed. ii., p. 10, and by Mr. Leake in his Digest of the Law of Contracts, p. 43. This view, moreover, appears to me much more in accordance with the general principles of English law than the view maintained by Pothier. I pass, therefore, to the next question—viz., whether posting the letter of revocation was a sufficient communication of it to the plaintiff. The offer was posted on October 1st, the withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th, accepting the offer. It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted (Harris's Case, L. R. 7 Ch. 587, Dunlop v. Higgins, 1 H. L. C. 381) even although it never reaches its destination. When, however, these authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or, in other words, he has made the post-office his agent to receive the acceptance and notification of it. But this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs

to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of October 8th is to be treated as communicated to the plaintiff on that day or any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs they had accepted the offer, both by telegram and by post; and they had themselves resold the tin-plates at a profit. In my opinion the withdrawal by the defendants on October 8th of their offer of the 1st was inoperative; and a complete contract binding on both parties was entered into on October 11th, when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn. Before leaving this part of the case it may be as well to point out the extreme injustice and inconvenience which any other conclusion would produce. If the defendants' contention were to prevail, no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principles and practical convenience require that a person who has accepted an offer not known to him to have been revoked shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties. * * *

*Judgment for plaintiffs.*[32]

[32] "At half past 11 the defendants telegraphed, 'Subject prompt reply, will let you May space, fifty-two six.' This was received in New York at 16 minutes past 12, and at 28 minutes past 12 a reply was sent accepting the offer. For some reason this was not received by the defendants until 20 minutes past 1. At 1 the defendants telegraphed, revoking their offer, the message being received in New York at 43 minutes past 1. The plaintiffs held the defendants to their bargain, and both parties stand upon their rights.

"There is no doubt that the reply was handed to the telegraph company promptly, and, at least, it would have been open to a jury to find that the plaintiffs had done all that was necessary on their part to complete the contract. If, then, the offer was outstanding when it was accepted, the contract was made. But the offer was outstanding. At the time when the acceptance was received, even, the revocation of the offer had not been received. It seems to us a reasonable requirement that, to disable the plaintiffs from accepting their offer, the defendants should bring home to them actual notice that it had been revoked. By their choice and act, they brought about a relation between themselves and the plaintiffs, which the plaintiffs could turn into a contract by an act on their part, and authorized the plaintiffs to understand and to assume that that relation existed. When the plaintiffs acted in good faith on the assumption, the defendants could not complain. Knowingly to lead a person reasonably to suppose that you offer, and to offer, are the same thing. O'Donnell v. Clinton, 145 Mass. 461, 463, 14 N. E. 747; Cornish v. Abington, 4 Hurl. & N. 549. The offer must be made before the acceptance, and it does not matter whether it is made a longer or a shorter time before, if, by its express or implied terms, it is outstanding at the time of the acceptance. Whether much or little time has intervened, it reaches forward to the moment of the acceptance, and speaks then. It would be monstrous to allow an inconsistent

## HENTHORN *v.* FRASER.

(Court of Appeal. [1892] 2 Ch. 27.)

In 1891 the plaintiff was desirous of purchasing from the Huskisson Benefit Building Society certain houses in Flamank Street, Birkenhead. In May he, at the office of the society in Chapel Street, Liverpool, signed a memorandum drawn up by the secretary, offering £600 for the property, which offer was declined by the directors; and on July 1st he made in the same way an offer of £700, which was also declined. On July 7th he again called at the office, and the secretary verbally offered to sell to him for £750. This offer was reduced into writing, and was as follows:

"I hereby give you the refusal of the Flamank Street property at £750 for fourteen days."

The secretary, after signing this, handed it to the plaintiff, who took it away with him for consideration.

On the morning of the 8th another person called at the office, and offered £760 for the property, which was accepted, and a contract for purchase signed, subject to a condition for avoiding it if the society found that they could not withdraw from the offer to the plaintiff.

Between 12 and 1 o'clock on that day the secretary posted to the plaintiff, who resided in Birkenhead, the following letter:

"Please take notice that my letter to you of the 7th instant, giving you the option of purchasing the property, Flamank Street, Birkenhead, for £750, in fourteen days, is withdrawn, and the offer cancelled."

This letter, it appeared, was delivered at the plaintiff's address between 5 and 6 in the evening, but, as he was out, did not reach his hands till about 8 o'clock.

On the same July 8th the plaintiff's solicitor, by the plaintiff's direction, wrote to the secretary as follows:

"I am instructed by Mr. James Henthorn to write you, and accept your offer to sell the property, 1 to 17 Flamank Street, Birkenhead, at the price of £750. Kindly have contract prepared and forwarded to me."

This letter was addressed to the society's office, and was posted in Birkenhead at 3.50 p. m., was delivered at 8.30 p. m. after the closing of the office, and was received by the secretary on the following morning. The secretary replied, stating that the society's offer had been withdrawn.

The plaintiff brought this action in the Court of the County Palatine

act of the offerer, not known or brought to the notice of the offeree, to affect the making of the contract; for instance, a sale by an agent elsewhere one minute after the principal personally has offered goods which are accepted within five minutes by the person to whom he is speaking. The principle is the same when the time is longer, and the act relied on a step looking to, but not yet giving, notice." Holmes, J., in Brauer v. Shaw, 168 Mass. 198, 199-200 (1897). See Patrick v. Bowman, 149 U. S. 411 (1893); Stephen M. Weld & Co. v. Victory Mfg. Co., 205 Fed. 770 (1913).

for specific performance. The Vice-Chancellor dismissed the action, and the plaintiff appealed.

LORD HERSCHELL.[88] This is an action for the specific performance of a contract to sell to the plaintiff certain house property situate in Flamank Street, Birkenhead. The action was tried before the Vice-Chancellor of the County Palatine of Lancashire, who gave judgment for the defendants.
* * *

If the acceptance by the plaintiff of the defendants' offer is to be treated as complete at the time the letter containing it was posted, I can entertain no doubt that the society's attempted revocation of the offer was wholly ineffectual. I think that a person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn. This seems to me to be in accordance with the reasoning of the Court of King's Bench in the case of Adams v. Lindsell, 3 B. & W. 681, which was approved by the Lord Chancellor in Dunlop v. Higgins, 1 H. L. C. 381, 399, and also with the opinion of Lord Justice Mellish in Harris's Case, L. R. 7 Ch. 587. The very point was decided in the case of Byrne v. Van Tienhoven, 5 C. P. D. 344, by Lord Justice Lindley, and his decision was subsequently followed by Mr. Justice Lush. The grounds upon which it has been held that the acceptance of an offer is complete when it is posted have, I think, no application to the revocation or modification of an offer. These can be no more effectual than the offer itself, unless brought to the mind of the person to whom the offer is made. But it is contended on behalf of the defendants that the acceptance was complete only when received by them and not on the letter being posted. It cannot, of course, be denied, after the decision in Dunlop v. Higgins, 1 H. L. C. 381, in the House of Lords, that, where an offer has been made through the medium of the post, the contract is complete as soon as the acceptance of the offer is posted, but that decision is said to be inapplicable here, inasmuch as the letter containing the offer was not sent by post to Birkenhead, but handed to the plaintiff in the defendants' office at Liverpool. The question therefore arises in what circumstances the acceptance of an offer is to be regarded as complete as soon as it is posted. In the case of the Household Fire and Carriage Accident Insurance Company v. Grant, 4 Ex. D. 216, Lord Justice Baggallay said (Ibid, 227): "I think that the principle established in Dunlop v. Higgins is limited in its application to cases in which by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized." And in the same case Lord Justice Thesiger based his judgment, 4 Ex. D. 218, on the defendant having made an application for shares under circumstances

[88] The opinion of Lindley, L. J., and parts of the opinions of Lord Herschell and of Kay, L. J., are omitted.

"from which it must be implied that he authorized the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post." The facts of that case were that the defendant had, in Swansea, where he resided, handed a letter of application to an agent of the company, their place of business being situate in London. It was from these circumstances that the Lords Justices implied an authority to the company to accept the defendant's offer to take shares through the medium of the post. Applying the law thus laid down by the Court of Appeal, I think in the present case an authority to accept by post must be implied. Although the plaintiff received the offer at the defendants' office in Liverpool, he resided in another town, and it must have been in contemplation that he would take the offer, which by its terms was to remain open for some days, with him to his place of residence, and those who made the offer must have known that it would be according to the ordinary usages of mankind that if he accepted it he should communicate his acceptance by means of the post. I am not sure that I should myself have regarded the doctrine that an acceptance is complete as soon as the letter containing it is posted as resting upon an implied authority by the person making the offer to the person receiving it to accept by those means. It strikes me as somewhat artificial to speak of the person to whom the offer is made as having the implied authority of the other party to send his acceptance by post. He needs no authority to transmit the acceptance through any particular channel; he may select what means he pleases, the post-office no less than any other. The only effect of the supposed authority is to make the acceptance complete so soon as it is posted, and authority will obviously be implied only when the tribunal considers that it is a case in which this result ought to be reached. I should prefer to state the rule thus: Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted. It matters not in which way the proposition be stated, the present case is in either view within it. The learned Vice-Chancellor appears to have based his decision to some extent on the fact that before the acceptance was posted the defendants had sold the property to another person. The case of Dickinson v. Dodds, 2 Ch. D. 463, was relied upon in support of that defence. In that case, however, the plaintiff knew of the subsequent sale before he accepted the offer, which, in my judgment, distinguishes it entirely from the present case. For the reasons I have given, I think the judgment must be reversed and the usual decree for specific performance made. The respondents must pay the costs of the appeal and of the action.

KAY, L. J. * * * In his judgment, in Household Fire and Carriage Accident Insurance Company v. Grant, Thesiger, L. J., refers to the cases in which the decision in Dunlop v. Higgins, 1 H. L. C. 381, has been ex-

plained by saying that the post-office was treated as the common agent of both contracting parties. That reason is not satisfactory. The post-office are only carriers between them. They are agents to convey the communication, not to receive it. The communication is not made to the post-office, but by their agency as carriers. The difference is between saying "Tell my agent A., if you accept," and "Send your answer to me by A." In the former case A. is to be the intelligent recipient of the acceptance, in the latter he is only to convey the communication to the person making the offer which he may do by a letter, knowing nothing of its contents. The post-office are only agents in the latter sense. All that Dunlop v. Higgins, 1 H. L. C. 381, decided was, that the acceptor of the offer having properly posted his acceptance, was not responsible for the delay of the post-office in delivering it; so that after receipt the said party could not rescind on the ground of that delay. I cannot help thinking that the decision has been treated as going much further than the House of Lords intended. Baggallay, L. J., in his judgment in Household Fire and Carriage Accident Insurance Company v. Grant, 4 Ex. D. 227, treats it as applicable "to cases in which by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized." If for authorized the word "contemplated" is substituted, I should be disposed to agree with this dictum. But I would rather express it thus: "Posting an acceptance of an offer may be sufficient where it can fairly be inferred from the circumstances of the case that the acceptance might be sent by post."

Is that a proper inference in the present case? I think it is. One party resided in Liverpool, the other in Birkenhead. The acceptance would be expected to be in writing, the subject of purchase being real estate. These and the other circumstances to which I have alluded, in my opinion, warrant the inference that both parties contemplated that a letter sent by post was a mode by which the acceptance might be communicated. I think, therefore, that we are bound by authority to hold that the contract was complete at 3.50 p. m. on July 8th, when the letter of acceptance was posted, and before the letter of withdrawal was received.

Then what was the effect of the withdrawal by the letter posted between 12 and 1 the same day, and received in the evening? Did that take effect from the time of posting? It has never been held that this doctrine applies to a letter withdrawing the offer. Take the cases alluded to by Lord Bramwell in the Household Fire and Carriage Accident Insurance Company v. Grant, 4 Ex. D. 234. A notice by a tenant to quit can have no operation till it comes to the actual knowledge of the person to whom it is addressed. An offer to sell is nothing until it is actually received. No doubt there is the seeming anomaly pointed out by Lord Bramwell that the same letter might contain an acceptance, and also such a notice or offer as to other property, and that when posted it would be effectual as to the

acceptance, and not as to the notice or offer. But the anomaly, if it be one, arises from the different nature of the two communications. As to the acceptance, if it was contemplated that it might be sent by post, the acceptor, in Lord Cottenham's language, has done all that he was bound to do by posting the letter, but this cannot be said as to the notice of withdrawal. That was not a contemplated proceeding. The person withdrawing was bound to bring his change of purpose to the knowledge of the said party, and as this was not done in this case till after the letter of acceptance was posted, I am of opinion that it was too late.

The point has been so decided in two cases: Byrne v. Van Tienhoven, 5 C. P. D. 344, and Stevenson v. McLean, 5 Q. B. D. 346, and I agree with those decisions.[34]

[34] "It is to be taken as settled law, both in this country and in England, in cases of contracts between parties distant from each other, but communicating in modes recognized in commercial business, that when an offer is made by one person to another, the minds of the parties meet and a contract is to be deemed concluded, when the offer is accepted in reasonable time, either by telegram duly sent in the ordinary way, or by letter duly posted to the proposer, provided either be done before the offer is withdrawn to the knowledge of or upon notice of the other party." Harlan, J., for the court, in Burton v. U. S., 202 U. S. 344, 384-5. In that case the court regarded the offer as made in conversation in Illinois and accepted by telegram confirmed by letter sent from St. Louis, Mo. to the offeror in Washington, D. C., and the contract as concluded at St. Louis.

Opposed in principle to Henthorn v. Fraser, is Scottish Amer. Mortgage Co. v. Davis, 96 Tex. 504 (1903).

On telegraphed acceptance of oral or written offer, see South Branch Cheese Co. v. American Butter & Cheese Co., 191 Mich. 507 (1916) saying acceptance of written offer complete when telegraphed. Cf. Perry v. Mt. Hope Iron Co., 15 R. I. 380 (1886). But see Lucas v. W. U. Tel. Co., 131 Ia. 669 (1906).

On time and place of consummation of contract when offer by letter is accepted by telegram or *vice versa*, see 6 L. R. A. (N. S.) 1016, note; L. R. A. 1916A, 1302, note.

In Bruner v. Moore, [1904] 1 Ch. 305, it was held that the exercise of an option to purchase patent rights is within the rule of Henthorn v. Fraser. The contract giving the option was entered into in London, but as Farwell, J. said (p. 316): "In the present case the parties are American citizens staying temporarily at London hotels when they signed the contract. That contract obviously contemplates the events that in fact happened—that the two parties would separate and would visit various parts of Europe and would communicate with one another constantly by letter and telegram. If there ever was a case in which the parties contemplated that 'the post might be used as a means of communicating' in all subjects connected with the contract this is that case. I hold therefore that the option was duly exercised."

But where an offer is made by telegram, an acceptance by letter may not complete a contract. In Quenerduaine v. Cole, 32 Weekly Rep. 185 (1883) Grove, J., said that the offer by telegram "implied the expectation of a prompt reply" and the alleged acceptance by letter, which was sent the same day the offer was received but which could not reach the offeror until after the time when the offer was to be kept open, "was not therefore made in reasonable time, even if the parties were ever *ad idem*, which I think they were not." In Phenix

## HALDANE et al. *v.* UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit, 1895. 69 Fed. 819, 16 C. C. A. 447.)

On April 30, 1890, the United States advertised for proposals to furnish hay and straw for certain military posts. A circular issued in connection with the advertisement stated that "proposals * * * will not be entertained unless accompanied by a guaranty * * * that the bidder will not withdraw his proposal within sixty days succeeding the 31st day of May, 1890, and that, if the proposal be accepted in whole or in part, he will enter into a contract and bond agreeably to the terms of his proposal within ten days after the day on which he is notified of such acceptance and award." Peter Haldane and W. D. Moore filed a proposal on May 30, 1890 to furnish and stack hay at Ft. Riley which was among the proposals which were duly opened on May 31, 1890. The chief quartermaster, as it is claimed, duly notified Peter Haldane and W. D. Moore that their proposal of May 30th was accepted by the government. On or about July 22, 1890, the chief quartermaster also transmitted to them, by mail, a contract, to be by them executed in accordance with their proposal. Haldane and Moore claimed that they received no notice, personal or otherwise, of the acceptance by the government of their proposal until July 31, 1890, more than 60 days subsequent to May 31, 1890, and for that reason, and other reasons

Ins. Co. v. Schultz, 80 Fed. 337 (1897) the extended negotiation between the parties seemingly made the court assume that the offer by telegram could be accepted by letter. A similar holding is found in Farmers' Produce Co. v. McAlester Storage & Com. Co., 48 Okla. 488 (1915).

In Robeson v. Pells, 202 Pa. St. 399 (1902) an offer cabled from Hamburg, Germany, to sell 300 tons of Ferro Manganese, then rising in price, was received by the offeree in Philadelphia, shortly after one o'clock on Saturday. At three o'clock the following Monday an acceptance was wired. The Supreme Court approved a charge to the jury which was in part, as follows:

"* * * I suppose everybody understands, I should think the inference is an irresistible one, that a message sent by telegram, in the nature of things, calls for a speedier answer than a message sent by letter. If a man in New York telegraphs to Philadelphia that he has something which he can sell at a certain price, and puts in his telegram 'Answer whether you want it,' it seems to me that the necessary inference to be drawn from such an inquiry made in such a way is that he is expected and ought to have a prompt reply. I cannot say to you as matter of law what would be a prompt reply; whether one hour, five hours, ten hours, twenty-four hours or forty-eight hours would be a prompt reply, but I do say that the reply ought to be prompt, as quick as under the circumstances of the case with reference to the nature of the transaction the reply could be sent. Of course, you would say the man had a right to turn around, had a right to think and decide what would be the proper thing to do under the circumstances, but allowing all that, it would seem to me that the jury ought to say in regard to such an exchange of inquiries and replies by wire that the parties who claim that they have rights fixed by such messages should be held to prompt, quick action in the matter. If you think that this plaintiff did not make such a prompt reply as was reasonable under the circumstances, then he cannot claim that there was any contract."

as well, they declined to sign the contract or deliver the hay. For their refusal to execute said contract, and to deliver the hay according to their proposal of May 30, 1890, the United States brought an action against them in the District Court of the United States for the district of Kansas, and recovered a judgment against them and their guarantors in the sum of $3,572.28. To reverse that judgment, the defendants below sued out the present writ of error.

THAYER, J.† Another error, which we think has been sufficiently assigned to warrant us in noticing it, consists in the action of the trial court in charging the jury, as it did in substance, that the deposit of a notice in the mail by the officers of the government on or about July 24, 1890, addressed to Haldane and Moore, notifying them that their proposal of May 30, 1890, to furnish hay at Ft. Riley, had been accepted, was a good and sufficient notice of acceptance to bind Haldane and Moore to deliver the hay, notwithstanding the fact that the notice did not reach them or either of them until July 31, 1890. The court declined to submit to the jury the question whether the defendants were notified in time of the acceptance of their bid, but decided as a matter of law, and so charged the jury, that the mailing of the notice of acceptance on or about July 24, 1890, addressed to the defendants at their place of residence, bound them to comply with their proposal of May 30, 1890. * * * There was evidence that neither Haldane nor Moore had any intimation of the acceptance of their bid by the government until the morning of July 31, 1890, when Haldane returned to Junction City, and received the notice of acceptance from the mail in a letter which bore date July 24, 1890, but was probably not mailed until a day or two afterwards.

The doctrine is well established that, when a statute requires notice to be given to a person for the purpose of creating a liability, personal notice is intended, unless some other form of notice is expressly authorized by the statute. Rathbun v. Acker, 18 Barb. 393; McDermott v. Board, 25 Barb. 635, 646; Ryan v. Kelley, 9 Mo. App. 396; Corneli v. Partridge, 3 Mo. App. 575; State v. Jacobs, 2 Jones (N. C.) 52; Gorham v. Luckett, 6 B. Mon. 146, 161, 168. The same rule, we think, is applicable to notices required to be given by the terms of an express contract. If a contract requires a notice to be given for the purpose of creating a liability or imposing an obligation, personal notice should be given, unless the parties expressly stipulate that the notice shall be served in some other way, as by mailing it to a designated address. This, we think, is the correct rule, except in those cases where the party to be notified conceals himself or resorts to some trick or artifice to avoid the service of personal notice. In such cases, no doubt, reasonable efforts to serve the notice personally is all that should be required of him whose duty it is to give the notice. In the present case the circular issued by the government for the information of

† The statement of facts is abbreviated and parts of the opinion are omitted.

bidders notified them that they would be expected to enter into a contract and give a bond within 10 days after the day on which the bidder was notified of the acceptance of his bid. No agreement having been made, and no information having been given to them that a notice deposited in the mail would be deemed sufficient to constitute an acceptance by the government, the bidder had the right to expect personal notice, or at least to insist that, if the mail was used to convey notice, the acceptance of the proposal should not be deemed complete or effectual to bind the bidder until the agency employed to convey the notice had delivered it into the hands of the bidder. We think, therefore, that the district court erred in deciding that the deposit of the notice of acceptance in the mail some 5 or 6 days before the expiration of the 60 days during which the proposal was to remain open was a sufficient acceptance to bind the defendants. We think that the jury should have been instructed, under the circumstances heretofore detailed, that if they found that the notice of acceptance did not in fact reach Haldane and Moore, or either of them, until July 31, 1890, they were not bound to abide by and carry out their proposal.

It was suggested in the charge of the learned trial judge, but not decided, that possibly the government had the right to accept the defendants' bid even after the lapse of 60 days; that the stipulation in the circular that the bid should not be withdrawn for 60 days was not tantamount to a statement that it should not be subject to acceptance after that time. We cannot assent to that view. In the absence of the clause not to withdraw the bid for 60 days, it would only have remained open for a reasonable time. By the insertion of the clause in question, the parties to the transaction, in effect, determined how long ought to be allowed for acceptance, and, by inference at least, they agreed that more than 60 days was an unreasonable period for the proposal to remain open and unaccepted.

For the error heretofore pointed out, the judgment of the district court is reversed, and the cause is remanded for a new trial.[35]

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## HORNE et al. *v.* NIVER et al.

**(Supreme Judicial Court of Massachusetts, 1897. 168 Mass. 4, 46 N. E. 393.)**

Action by Horne and others against Niver and others. Judgment for defendants, and plaintiffs except. Exceptions overruled.

HOLMES, J. This is an action on an alleged contract to sell 400 tons of coal at $2.50 a ton. On July 17, 1895, the defendants wrote to the plaintiffs offering "a very low figure on a small lot of our Columbia coal at Salem." The letter continued: "We beg to quote you $2.50 on cars at that place, and, should you deem it wise to favor us with an order of 5 or 600 tons, kindly wire us at our expense on receipt of this." On July 19th

[35] Compare on mailing notice as satisfying requirement of notice under contract, Wheeler v. McStay, 160 Ia. 745 (1913); Hoban v. Hudson, 129 Minn. 335 (1915), and note in L. R. A. 1915B, 181. See, however, Shubert Theatrical Co. v. Rath, 271 Fed. 827 (1921).

the plaintiffs replied, ordering 400 tons. The presiding judge, against the plaintiffs' request and exception, ruled that the answer was not in time to constitute a good acceptance, and found as a fact that the offer was not accepted according to its terms. The ruling was clearly right, as applied to the written offer alone, since the offer did not purport to extend beyond the time for a reply by telegraph (Eliason v. Henshaw, 4 Wheat. 225; Maclay v. Harvey, 90 Ill. 525); and, so far as appears, the finding was justified (Minneapolis & St. L. Ry. Co. v. Columbus Rolling Mill Co., 119 U. S. 149, 152, 7 Sup. Ct. 168). There was conflicting evidence of some conversation between the two letters, which is relied on as showing that the offer was treated as open; but, as the judge found that the only oral agreement made was conditional upon the coal not having been all disposed of, which in fact it had been, the talk cannot help the plaintiffs.

The finding just mentioned made the plaintiffs' other requests for rulings as to a verbal extension of time or consent to an acceptance on July 19th immaterial.

*Exceptions overruled.*[36]

[36] In Maclay v. Harvey, 90 Ill. 525 (1878), Miss Maclay (the appellant), brought *assumpsit* against Harvey (the appellee), on an alleged contract whereby the latter employed the former to take charge of the millinery department of his store in Monmouth, Ill. Appellee's letter of March 21 containing the offer, sent from Monmouth to appellant in Peoria, Ill., ended: "You will confer a favor by giving me your answer by return mail." Appellant claimed to have accepted the offer by a postcard dated March 23. Scholfield, J., for the majority of the court, said:

"The evidence shows that there were two daily mails between Peoria and Monmouth—one arriving at Monmouth at 11 o'clock a. m., and the other at 6 o'clock p. m., and it did not require more than one day's time between the points. Appellee's letter to appellant making the offer, it will be remembered, bears date March 21st. Assuming the date of appellant's postal card (which, she says, was written on the morning after she received appellee's letter) to be correct, she received appellee's letter on the evening of the 22d. Appellee was, therefore, entitled to expect a reply mailed on the 23d, which he ought to have received on that day, or, at farthest, by the morning of the 24th; but appellant's reply was not mailed until the 25th. It does not relieve appellant of fault that she gave the postal card to a boy on the 23d, to have him mail it. Her duty was not to place an answer in private hands, but in the post-office. The boy was her agent, not that of appellee, and his negligence in mailing the postal card was her negligence.

"The question of whether it would not have equally well subserved appellee's object had he treated the postal card of appellant as the consummation of a contract is irrelevant. Appellant seeks to recover upon the strict letter of a special contract, and it is, therefore, incumbent on her to prove such contract. It is required of her, as we have seen, to prove an acceptance of appellee's offer within the time to which it was limited—that is to say, by the placing in the post-office of an answer unequivocally accepting the offer in time for the return mail, which she did not do. Appellee was, thereafter, under no obligation to regard the contract as closed. He might, it is true, have done so, but he was not legally bound in that respect, nor was he legally bound to notify appellant that her acceptance had not been signified within the time to which his offer was limited. She is legally chargeable with knowledge that her acceptance

## UNION NAT. BANK *v.* MILLER et al.

(Supreme Court of North Carolina, 1890. 106 N. C. 347, 11 S. E. 321, 19 Am. St. Rep. 538.)

Action by the Union National Bank of Chicago against John W. Miller and others, to recover personal property alleged to have been wrongfully attached. Judgment for defendants, and plaintiff appeals.

SHEPHERD, J.[37] The only question necessary to be considered in disposing of this appeal involves the correctness of his honor's instruction that the title to the property had, by reason of the telegraphic correspondence, passed out of the plaintiff, and into Van Landingham, at the time of the levy of the attachment. The property was in Charlotte, in the possession of a common carrier, and on the 26th of November, 1888, Van Landingham made the following offer by telegraph to the plaintiff's agent at Chicago: "Charlotte, N. C., Nov. 26, 1888. To Gregg, Garvey & Co.: Nineteen dollars per ton. Must have reply early to-morrow. Jno. Van Landingham." On the next day, at 5.34 p. m., Van Landingham received a telegram from the said agent accepting the offer. This latter telegram was sent from Chicago before, but was not received by Van Landingham until after the levy of the attachment. His honor held that the contract was complete when the telegram was sent from Chicago, and that, the title to the property having passed to Van Landingham before the alleged conversion, the plaintiff could not recover. * * * We are of the opinion that under the peculiar terms of this correspondence, and in view of the testimony, the court was not warranted in charging the jury that the title vested in Van Landingham at the time the telegram was sent. It does not appear that it was sent early in the day, according to the terms of the offer, and it was incumbent on the defendant to have shown this fact before he could avail himself of the principle contended for. "In our own law the effect of naming a definite time in the proposal is simply negative, and for the proposer's benefit; that is, it operates as a warning that an acceptance will not be received after the lapse of the time named. In fact, the proposal so limited comes to an end of itself at the end of that time, and there is nothing for the other party to accept." Pol. Cont. 9; Larmon v. Jordan, 56 Ill. 204; Railroad Co. v. Bartlett, 3 Cush. 224; Mactier's Adm'r v. Frith, 6 Wend. 103; Cheney v. Cook, 7 Wis. 413. * * * The requirement of the offerer, Van Landingham that he "must have a reply early

was not in time, and in order to fix a liability thereby upon appellee, it was incumbent upon her, before assuming that appellee waived this objection, to ascertain that he in fact did so."

"It will be noticed that by its terms the offer demanded an acceptance by return mail, and there is no pretense that such was forthcoming. There was therefore no acceptance, and the offer is eliminated in law from the record and is as if it had never been made." Bruce, J., in Ackerman v. Maddux, 26 No. Dak. 50, 56 (1913)

[37] Parts of the opinion are omitted.

to-morrow," cannot be regarded otherwise than as a stipulation for an acceptance within that time; and, as the defendant has not shown a compliance with such stipulation, it must follow that there was error on the part of his honor in charging the jury that the mere sending of the acceptance before the levy operated to transfer the title. The offer was limited to early in the day. The acceptance was not received until late in the evening. Even conceding that the contract would be complete from the sending of the dispatch, there is, as we have said, no testimony to show that it was sent within the time limited by the offer. The title, therefore, did not pass. Benj. Sales, (3d Amer. Ed.) 48, note. For these reasons we are of the opinion that there should be a new trial.[38]

[38] In Lewis v. Browning, 130 Mass. 176 (1880), Gray, C. J., said: "In any view, the person making the offer may always, if he chooses, make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. Thesiger, L. J., in Household Ins. Co. v. Grant, 4 Ex. D. 223. Pollock on Con. (2d ed.) 17. Leake on Con. 39, note. And in the case at bar, the letter written in the plaintiff's behalf by her husband as her agent on July 8th, 1878, in California, and addressed to the defendant at Boston, appears to us clearly to manifest such an intention. After proposing the terms of an agreement for a new lease, he says: 'If you agree to this plan, and will telegraph me on receipt of this, I will forward power of attorney to Mr. Ware,' the plaintiff's attorney in Boston. 'Telegraph me "yes" or "no." If "no," I will go at once to Boston with my wife, and between us we will try to recover our lost ground. If I do not hear from you by the 18th or 20th, I shall conclude "no."' Taking the whole letter together, the offer is made dependent upon an actual communication to the plaintiff of the defendant's acceptance on or before July 20th, and does not discharge the old lease, nor bind the plaintiff to execute a new one, unless the acceptance reaches California within that time." See Mercer Electric Mfg. Co. v. Conn. Electric Mfg. Co., 87 Conn. 691 (1914); Haas v. Myers, 111 Ill. 421 (1884). But of Vassar v. Camp, 11 N. Y. 441, 447-8 (1854).

In Eliason v. Henshaw, 4 Wheat. (U. S.) 225 (1819), the plaintiffs sent from Harper's Ferry to defendant at Mill Creek by a wagoner an offer to take two or three hundred barrels of flour at $9.50 per barrel, the postscript to the letter of offer stating: "Please write by return of wagon whether you accept our offer." The wagoner not returning to Harper's Ferry, the defendant sent an acceptance addressed to the plaintiffs at Georgetown where by the terms of the offer the flour was to be delivered, and it was in fact received by the plaintiffs at that place. The court held that "by return of wagon" fixed Harper's Ferry as the place to which the answer was to be sent as "an essential part of the plaintiffs' offer" and that "an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them unless they had acquiesced in it, which they declined doing." That is a fanciful construction of the words "by return of wagon" and if the answer reached the plaintiffs in Georgetown at as early a moment as it would have if sent to Harper's Ferry by the first wagon or equally expeditious conveyance, the decision must be disapproved.

## CAROW TOWING CO. *v.* THE "ED. McWILLIAMS."

**(Exchequer Court of Canada, 1919. 46 Dom. L. R. 506.)**

Action for towage by the plaintiffs against the ship "Ed. McWilliams," a British ship registered at Amherstburg, Ont.

The plaintiffs are a partnership, with their head office at Cheboygan, Mich., in the United States of America.

The contract of towage on which the claim herein was based, was arrived at as follows: telegram from Sault Ste. Marie, Ont. by the Lake Superior Paper Co., to the plaintiffs at Cheboygan, Mich. and reply from plaintiffs to the paper company. No contract was made by these telegrams. Subsequently a long distance telephone call was sent by the plaintiff, William Martin, at Cheboygan, to Capt. Thos. R. Climies house at Sault Ste. Marie, where it was answered by Capt. Climie, who by telephone discussed and agreed to the terms of the towage contract.

The subsequent towage service was in accordance with the contract, and consisted in towing the "Ed. McWilliams" a dump barge, from Sault Ste. Marie to Calcite, Michigan, light, and back to Sault Ste. Marie loaded with limestone. The claim $434.38 was admitted to be correct.

At the time of the towage contract and of said towage service, the "Ed McWilliams" was subject to two registered mortgages, both of which are still subsisting. The amount of these mortgages greatly exceeds the value of the ship.

. HODGINS, L. J. A.[39] * * * I think the contract was one made in Ontario, for, when Captain Climie went to his telephone, he then and there received an offer, or discussed terms, which, when accepted, formed the contract. In other words, the plaintiffs at Cheboygan, Mich., by using the long distance telephone, were able to reach Captain Climie in Ontario just as if they had telegraphed to him and he had received the telegram at the Soo. His reply at the telephone is of the same effect as if he had posted a letter or sent off a telegram from an office in Ontario. See Weyburn Townsite Company v. Honsburger (1919) 15 O. W. N. 428.
* * *

*Judgment accordingly.*[40]

[39] The statement of facts is abbreviated and parts of the opinion are omitted.

[40] In Bank of Yolo v. The Sperry Flour Co., 141 Cal. 314, Beatty, C. J. said: "A contract is supposed to be made at some place, and the place where it becomes complete is the place where it is made. If a contract is made by exchange of letters or telegrams, it is held to have been made at the place where the letter is mailed, or telegram filed, containing an unconditional acceptance by one party of the offer of the other. If the communications are oral, either with or without the telephone, between parties on opposite sides of a county line, the same principle would seem to require that the contract should be deemed to have been made in the county where the offer of one is accepted by the other—in this case in Sacramento", where the acceptance was talked into the telephone.

## CARLILL *v.* CARBOLIC SMOKE BALL CO.

(Court of Appeal. [1893] 1 Q. B. 256.)

Appeal from a decision of Hawkins, J. [1892] 2 Q. B. 484.

The defendants, who were the proprietors and vendors of a medical preparation called "The Carbolic Smoke Ball," inserted in the Pall Mall Gazette of November 13, 1891, and in other newspapers, the following advertisement:

"£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £1000 is deposited with the Alliance Bank, Regent Street shewing our sincerity in the matter.

"During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against the disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

"One carbolic smoke ball will last a family several months, making it the cheapest remedy in the world at the price, 10s., post free. The ball can be refilled at a cost of 5s. Address, Carbolic Smoke Ball Company, 27 Princes Street, Hanover Square, London."

The plaintiff, a lady, on the faith of this advertisement, bought one of the balls at a chemist's and used it as directed, three times a day, from November 20, 1891, to January 17, 1892, when she was attacked by influenza. Hawkins, J., held that she was entitled to recover the £100. The defendants appealed.

LINDLEY, L. J.[41] * * * The first observation I will make is that we are not dealing with any inference of fact. We are dealing with an express promise to pay £100 in certain events. Read the advertisement how you will, and twist it about as you will, here is a distinct promise expressed in language which is perfectly unmistakable: "£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the influenza after having used the ball three times daily for two weeks according to the printed directions supplied with each ball."

We must first consider whether this was intended to be a promise to all, or whether it was a mere puff which meant nothing. Was it a mere

While "the place at which a contract is made is necessarily the place of the acceptance of the offer" (Smith, C. J., in Couret v. Conner, 118 Miss. 374, 392 (1918)), the question in the telephone cases is whether the offer is accepted when the acceptor speaks his acceptance or when the offeror hears. Suppose the parties talk from New York to San Francisco over impeded wires and after the acceptor speaks his acceptance and before the offeror hears it, the acceptor dies of heart disease. Would there be a contract?

On contracts by telephone, see 127 Am. St. Rep. 538, note.

[41] The opinion of Smith, L. J., and parts of the opinions of Lindley, L. J. and Bowen, L. J. are omitted.

puff? My answer to that question is "No," and I base my answer upon this passage: "£1000 is deposited with the Alliance Bank, shewing our sincerity in the matter." Now, for what was that money deposited or that statement made except to negative the suggestion that this was a mere puff and meant nothing at all? The deposit is called in aid by the advertiser as proof of his sincerity in the matter that is, the sincerity of his promise to pay this £100 in the event which he has specified. I say this for the purpose of giving point to the observation that we are not inferring a promise; there is the promise, as plain as words can make it.

Then it is contended that it is not binding. In the first place, it is said that it is not made with anybody in particular. Now that point is common to the words of this advertisement and to the words of all other advertisements offering rewards. They are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the condition accepts the offer. In point of law this advertisement is an offer to pay £100 to anybody who will perform these conditions, and the performance of the conditions, is the acceptance of the offer. That rests upon a string of authorities, the earliest of which is Williams v. Carwardine, 4 Barn. & Adol. 621, which has been followed by many other decisions upon advertisements offering rewards.

But then it is said, "Supposing that the performance of the conditions is an acceptance of the offer, that acceptance ought to have been notified." Unquestionably, as a general proposition, when an offer is made, it is necessary in order to make a binding contract, not only that it should be accepted, but that the acceptance should be notified. But is that so in cases of this kind? I apprehend that they are an exception to that rule, or, if not an exception, they are open to the observation that the notification of the acceptance need not precede the performance. This offer is a continuing offer. It was never revoked, and if notice of acceptance is required,—which I doubt very much, for I rather think the true view is that which was expressed and explained by Lord Blackburn in the case of Brogden v. Railway Co., 2 App. Cas. 666, 691,—if notice of acceptance is required, the person who makes the offer gets the notice of acceptance contemporaneously with his notice of the performance of the condition. If he gets notice of the acceptance before his offer is revoked, that in principle is all you want. I, however, think that the true view, in a case of this kind, is that the person who makes the offer shews by his language and from the nature of the transaction that he does not expect and does not require notice of the acceptance apart from notice of the performance.

We, therefore, find here all the elements which are necessary to form a binding contract enforceable in point of law, subject to two observations. First of all it is said that this advertisement is so vague that you can not really construe it as a promise—that the vagueness of the language shows that a legal promise was never intended or contemplated. The

language is vague and uncertain in some respects, and particularly in this, that the £100 is to be paid to any person who contracts the increasing epidemic after having used the balls three times daily for two weeks. It is said, when are they to be used? According to the language of the advertisement no time is fixed, and, construing the offer most strongly against the person who has made it, one might infer that any time was meant. I do not think that was meant, and to hold the contrary would be pushing too far the doctrine of taking language most strongly against the person using it. I do not think that business people or reasonable people would understand the words as meaning that if you took a smoke ball and used it three times daily for two weeks you were to be guaranteed against influenza for the rest of your life, and I think it would be pushing the language of the advertisement too far to construe it as meaning that. But if it does not mean that, what does it mean? It is for the defendants to shew what it does mean; and it strikes me that there are two, and possibly three, reasonable constructions to be put on this advertisement, any one of which will answer the purpose of the plaintiff. Possibly it may be limited to persons catching the "increasing epidemic" (that is, the then prevailing epidemic), or any colds or diseases caused by taking cold, during the prevalence of the increasing epidemic. That is one suggestion; but it does not commend itself to me. Another suggested meaning is that you are warranted free from catching this epidemic, or colds or other diseases caused by taking cold, whilst you are using this remedy after using it for two weeks. If that is the meaning, the plaintiff is right, for she used the remedy for two weeks and went on using it till she got the epidemic. Another meaning, and the one which I rather prefer, is that the reward is offered to any person who contracts the epidemic or other disease within a reasonable time after having used the smoke ball. Then it is asked, what is a reasonable time? It has been suggested that there is no standard of reasonableness; that it depends upon the reasonable time for a germ to develop! I do not feel pressed by that. It strikes me that a reasonable time may be ascertained in a business sense and in a sense satisfactory to a lawyer, in this way: Find out from a chemist what the ingredients are; find out from a skilled physician how long the effect of such ingredients on the system could be reasonably expected to endure so as to protect a person from an epidemic or cold,—and in that way you will get a standard to be laid before a jury, or a judge without a jury, by which they might exercise their judgment as to what a reasonable time would be. It strikes me, I confess, that the true construction of this advertisement is that £100 will be paid to anybody who uses this smoke ball three times daily for two weeks according to the printed directions, and who gets the influenza or cold or other diseases caused by taking cold within a reasonable time after so using it; and if that is the true construction, it is enough for the plaintiff.

I come now to the last point which I think requires attention: that is,

the consideration. It has been argued that this is *nudum pactum*—that there is no consideration. We must apply to that argument the usual legal tests. Let us see whether there is no advantage to the defendants. It is said that the use of the ball is no advantage to them, and that what benefits them is the sale; and the case is put that a lot of these balls might be stolen, and that it would be no advantage to the defendants if the thief or other people used them. The answer to that, I think, is as follows: It is quite obvious that in view of the advertisers a use by the public of their remedy, if they can only get the public to have confidence enough to use it, will react and produce a sale which is directly beneficial to them. Therefore, the advertisers get out of the use an advantage which is enough to constitute a consideration.

But there is another view. Does not the person who acts upon this advertisement and accepts the offer put himself to some inconvenience at the request of the defendants? Is it nothing to use this ball three times daily for two weeks according to the directions at the request of the advertiser? Is that to go for nothing? It appears to me that there is a distinct inconvenience, not to say a detriment, to any person who so uses the smoke ball. I am of opinion, therefore, that there is ample consideration for the promise. * * *

It appears to me, therefore, that the defendants must perform their promise, and, if they have been so unwary as to expose themselves to a great many actions, so much the worse for them.

BOWEN, L. J. I am of the same opinion. We are asked to say that this document was a contract too vague to be enforced.

The first observation which arises is that the document itself is not a contract at all; it is only an offer made to the public. * * * But the main point seems to be that the vagueness of the document shews that no contract whatever was intended. It seems to me that, in order to arrive at a right conclusion, we must read this advertisement in its plain meaning, as the public would understand it. It was intended to be issued to the public and to be read by the public. How would an ordinary person reading this document construe it? It was intended unquestionably to have some effect, and I think the effect which it was intended to have, was to make people use the smoke ball, because the suggestions and allegations which it contains are directed immediately to the use of the smoke ball as distinct from the purchase of it. It did not follow that the smoke ball was to be purchased from the defendants directly or even from agents of theirs directly. The intention was that the circulation of the smoke ball should be promoted, and that the use of it should be increased. The advertisement begins by saying that a reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic after using the ball. It has been said that the words do not apply only to persons who contract the epidemic after the publication of the advertisement, but include persons who had previously con-

tracted the influenza. I cannot so read the advertisement. It is written in colloquial and popular language, and I think that it is equivalent to this: "£100 will be paid to any person who shall contract the increasing epidemic after having used the carbolic smoke ball three times daily for two weeks." And it seems to me that the way in which the public would read it would be this: that if anybody, after the advertisement was published, used three times daily for two weeks the carbolic smoke ball, and then caught cold, he would be entitled to the reward. Then again it was said: "How long is this protection to endure? Is it to go on forever, or for what limit of time?" I think that there are two constructions of this document, each of which is good sense, and each of which seems to me to satisfy the exigencies of the present action. It may mean that the protection is warranted to last during the epidemic, and it was during the epidemic that the plaintiff contracted the disease. I think, more probably, it means that the smoke ball will be a protection while it is in use. That seems to me the way in which an ordinary person would understand an advertisement about medicine, and about a specific against influenza. It could not be supposed that after you have left off using it you are still to be protected for ever, as if there was to be a stamp set upon your forehead that you were never to catch influenza because you had once used the carbolic smoke ball. I think the immunity is to last during the use of the ball. That is the way in which I should naturally read it, and it seems to me that the subsequent language of the advertisement supports that construction. It says: "During the last epidemic of influenza many thousand carbolic smoke balls were sold, and in no ascertained case was the disease contracted by those using" (not, "who had used") "the carbolic smoke ball," and it concludes with saying that one smoke ball will last a family several months (which imports that it is to be efficacious while it is being used), and that the ball can be refilled at a cost of 5s. I, therefore, have myself no hesitation in saying that I think, on the construction of this advertisement, the protection was to enure during the time that the carbolic smoke ball was used. My brother the lord justice who preceded me, thinks that the contract would be sufficiently definite if you were to read it in the sense that the protection was to be warranted during a reasonable period after use. I have some difficulty myself on that point; but it is not necessary for me to consider it further, because the disease here was contracted during the use of the carbolic smoke ball.

Was it intended that the £100 should, if the conditions were fulfilled, be paid? The advertisement says £1000 is lodged at the bank for that purpose. Therefore, it cannot be said that the statement that £100 would be paid was intended to be a mere puff. I think it was intended to be understood by the public as an offer which was to be acted upon.

But it was said there was no check on the part of the persons who issued the advertisement, and that it would be an insensate thing to promise

£100 to a person who used the smoke ball unless you could check or superintend his manner of using it. The answer to that argument seems to me to be that if a person chooses to make extravagant promises of this kind he probably does so because it pays him to make them, and, if he has made them, the extravagance of the promises is no reason in law why he should not be bound by them.

It was also said that the contract is made with the world,—that is, with everybody,—and that you cannot contract with everybody. It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition? It is an offer to become liable to any one who, before it is retracted, performs the condition, and, although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement. It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate, offers to receive offers, offers to chaffer, as, I think, some learned judge in one of the cases has said. If this is an offer to be bound, then it is a contract the moment the person fulfills the condition. * * *

Then it was said that there was no notification of the acceptance of the contract. One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done, the two minds may be apart, and there is not that consensus which is necessary according to the English law—I say nothing about the laws of other countries—to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification. * * *

Now, if that is the law, how are we to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain? In many cases you look to the offer itself. In many cases you extract from the char-

acter of the transaction that notification is not required, and in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition notification is dispensed with. It seems to me that from the point of view of common sense no other idea could be entertained. If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write a note saying that they have accepted my proposal? Why, of course, they at once look after the dog, and as soon as they find the dog they have performed the condition. The essence of the transaction is that the dog should be found, and it is not necessary under such circumstances, as it seems to me, that in order to make the contract binding there should be any notification of acceptance. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it, and a person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that common sense reflection. He does, therefore, in his offer impliedly indicate that he does not require notification of the acceptance of the offer. * * *

Here, * * * if you once make up your mind that there was a promise made to this lady who is the plaintiff, as one of the public,—a promise made to her that if she used the smoke ball three times daily for a fortnight and got the influenza, she should have £100,—it seems to me that her using the smoke ball was sufficient consideration. I cannot picture to myself the view of the law on which the contrary could be held when you have once found who are the contracting parties. If I say to a person, "If you use such and such a medicine for a week I will give you £5," and he uses it, there is ample consideration for the promise. * * *

*Appeal dismissed.*[48]

[48] "The proposition is stated by Chitty * * * that if the one party never was bound on his part to do the fact which forms the consideration for the promise of the other, the agreement is void for want of mutuality (Chitty Contr. 15); but the proposition is too broadly stated. It is confined to those cases where the want of mutuality would leave one party without a valid or available consideration for his promise (Arnold v. Mayor of Poole, 4 Man. & Gr. 860). For there are many valid contracts not mutually binding at the time when made; as where A says to B, if you will furnish goods to C I will pay for them. B is not bound to furnish them, but if he does he may recover on the promise (2 Saund. 137h; Matoon v. Burr, 7 Ad. & E. 19; Kennaway v. Treleavan, 5 M. & W. 498)." Edmonds, J., in L'Amoreux v. Gould, 7 N. Y. 349, 350-351 (1852).

"If there was an agreement, purporting to be made in reference to the defendant's sale of the equity of redemption in the mortgaged property in the form of an offer that the defendant might, if he chose, refrain from paying the note, and from taking measures to secure payment of it out of the proceeds of

## POST *v.* ALBERT FRANK & CO.

**(Supreme Court, Appellate Term, 1912. 75 Misc. 130, 132 N. Y. Supp. 807.)**

Action by Lyman D. Post against Albert Frank & Co. From a judgment for plaintiff, after a trial without a jury, defendant appeals. Affirmed.

PER CURIAM. The action was brought to recover the price alleged to have been agreed to be paid for certain advertising under the following order:

"New York City, Aug. 20, 1909.

"Publisher Paper Mill & Wood Pulp News, New York: Please insert the following order:

| Order Number | Client. | Title of Advertisement. | Space. | Time. | Position. | Rate. |
|---|---|---|---|---|---|---|
| 3808 | | Schlisische Cellulose etc. | 5 in. | every 3 weeks for 15 beg. at once | Good. | $229.50 less 2% cash 15 days |

"Important: If rate or space is incorrect, write us at once and we will be governed according to your acceptance. Copies of each publication must be forwarded same day adv. appears.

"Yours very truly, Albert Frank & Co., per F. R."

After certain insertions had been made, defendant undertook to cancel the order. Plaintiff denied defendant's right so to do, and now sues for the full amount stated in the order, less a sum conceded to have been paid.

The order being for a definite and fixed sum and for a specific number of advertisements of insertions, it must be deemed, in view of the language used, to have been accepted *in toto* by the commencement of the advertisement, and that plaintiff thereby undertook to complete it. Having become a binding bilateral contract, defendant could not cancel it without plaintiff's consent. The part performance of an order for a definite number of insertions and for a definite amount necessarily implies an acceptance and an agreement to complete, as, unless completed, nothing would be earned. Mendell v. Willyoung, 42 Misc. Rep. 210, 85 N. Y. Supp. 647; Humphreys Mfg. Co. v. David Williams Co., 70 Misc. Rep. 354, 128 N. Y. Supp. 680. Cases such as White v. Allen Kingston Motor Car Co, 69 Misc. Rep. 627, 126 N. Y. Supp. 150, are not in

the mortgaged property, and that the plaintiff would look to the property alone for the payment of it, and the defendant, relying upon the offer, did refrain from making any effort to have the property applied to the payment of the note when it became due, and thereby suffered detriment, there would be a sufficient consideration for the agreement. It would be an ordinary case of a unilateral contract growing out of an offer of one party to do something if the other will do or refrain from doing something else. If the party to whom such an offer is made acts upon it in the manner contemplated, either to the advantage of the offerer or to his own disadvantage, such action makes the contract complete, and notice of the acceptance of the offer before the action is unnecessary." Knowlton, J., in First National Bank v. Watkins, 154 Mass. 385, 387-8 (1891).

conflict with this rule, as there the part performance implied only an acceptance of the offer to pay according to the insertions. See *Per Curiam* opinion in North Side News Co. v. Michael Cypres, 132 N. Y. Supp. 806.

*Judgment affirmed, with costs.*[43]

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## IN THE MATTER OF KELLY.

**(Supreme Court of Errors of Connecticut, 1872. 39 Conn. 159.)**

FOSTER, J.[44] This application is based on the 247th section of the Act concerning Crimes and Punishments, Rev. Stat., 294, and the payment of the reward sought to be recovered is resisted on several grounds. * * * The application sets forth that the selectmen of the town offered a reward of $200 to any person or persons who should make discovery and give information against the person or persons guilty of the crime of burning the barn of Mrs. Hepzibah Kelly, October 1st, 1865, so that he or they might be tendered to justice and convicted; that the applicant made discovery and gave information against one Nathaniel B. Goodrich, who was guilty of the crime mentioned, so that he was tendered to justice and convicted before the Superior Court on the third Tuesday of December, 1868. * * * The claim that the right to this reward is barred by lapse of time since the advertisement was published is not well founded.

The case of Loring v. City of Boston, 7 Met., 409, is not applicable. The reward offered in that case was not for the discovery and punishment of crimes already committed; it was wholly prospective, being "for the

[43] In American Publishing Co. v. Walker, 87 Mo. App. 503 (1901), the order signed and duly accepted read:

"It is agreed that the American Publishing and Engraving Company will not be held responsible for any provisions not embodied in writing herein, and that this contract cannot be cancelled without the written consent of the said company.

"The American Publishing and Engraving Company, Syndicate Department, 146 to 150 Nassau Street, and 2 to 6 Spruce Street, New York: You are hereby authorized to furnish the undersigned for my exclusive use one cut and no duplicate and reading matter weekly to illustrate the merchant tailor business in the city of Springfield, State of Missouri, only, for the term of one year from the commencement of service, and until notified in writing to discontinue same, for which I agree to pay to your order at New York, the sum of seventy-five cents and postage for each cut, and twenty-five cents and postage for each duplicate at the end of each calendar month; matter sent is not to be duplicated to any other concern in my line of business in Springfield, Missouri.

(Name) "James Walker,
"Address 220 College Street,
"Dated February 26, 1898. Springfield, Mo."

It was held that one contract, rather than a series, was called for and made.

[44] Part of the opinion is omitted.

apprehension and conviction of any person who shall set fire to any building within the limits of the city." The advertisement was first published on the 26th of May, 1837, and was continued for about a week. In January, 1841, three years and eight months after, there was a fire within the city set by an incendiary, which consumed several buildings. The plaintiff caused the guilty party to be arrested, and he was tried and convicted. On suit brought to recover the reward, the only question was whether said offer of reward continued to be in force at the time of the fire. Chief Justice Shaw, who gave the opinion of the court, said it was manifest that the offer, though not limited in terms, could not have been intended to be perpetual, or to last ten or twenty years, or more; it must have been understood to have some limit. There being no limit in terms, by a general rule of law it must be limited to a reasonable time, and as the court thought three years and eight months not a reasonable time, under the circumstances, they gave judgment for defendants. We make no question as to the entire correctness of this decision, and readily assent to the soundness of the principles on which it rests.[45]

But the case at bar is of a totally different character. Here, a reward was offered to any one who should make a discovery and give information, &c., as to a crime committed on a previous day, especially pointed out. The offer, it is true, is not limited in its terms as to time, but the statute of limitations, which is applicable to the crime in question, necessarily restricts the offer to the period within which the delinquent must be informed against and prosecuted, three years next after the offense was committed. So long as the statute of limitations continued to run against the offender, so long would this offer of a reward hold good. As soon as the statute becomes a bar to the prosecution, all liability to pay the reward of course ceases, for the conviction of the offender is an event necessarily antecedent to the payment of the reward.

We think the petitioner is entitled to recover; and the Superior Court is advised to render judgment in his favor.[46]

[45] In Loring v. City of Boston, cited *supra*, the action was to recover a reward of $1000 under an offer which recited as the occasion of its offer "the frequent and successful repetition of incendiary attempts," which necessitated "that the most vigorous efforts should be made to prevent their occurrence." While the offer covered future as well as past attempts, it might well have been construed as limited to attempts fairly to be deemed within the reign of crime then taking place.

[46] "Whether an offer remains open is a question of fact. Of course the proposer may limit the time for acceptance, as every man has the right to dictate the terms upon which he will sell his property. Where an answer by return mail is requested, or may be expected from the usage of trade, or nature of the business, the making of the offer is accompanied by an implied stipulation that the answer shall be immediate. But unless the time is limited, the proposition is open until it is accepted or rejected, provided an answer is given in a reasonable time." Smith, J., in Kempner v. Cohn, 47 Ark. 519, 525-526 (1886).

"When I offer anything to a person, what I mean is, I will do that if you

## FERRIER *v.* STORER.

(Supreme Court of Iowa, 1884. 63 Ia. 484, 19 N. W. 288, 50 Am. Rep. 752.)

Action upon an account. The defendant pleaded a general denial. He also, by way of counter-claim, pleaded that the plaintiff was indebted to him for interest on money loaned, for the use of certain land, for money paid to remove an incumbrance from land purchased of plaintiff, for labor and lumber furnished plaintiff, and for an overpayment for land. There was a trial to a jury, and verdict and judgment were rendered for the defendant for $208.65. The plaintiff appeals.

ADAMS, J.[47] * * * The instruction given is in these words: "The letters given in evidence—the one from plaintiff to defendant [dated Lincoln, May 1, 1871], proposing to defendant to use defendant's money in plaintiff's hands and allow him interest at the rate of ten per cent, and the other from defendant to plaintiff [dated Depere, Wis., May 29] accepting the proposal or consenting to plaintiff's use of the money,—if written by the respective parties, would constitute a written contract between them as to that matter binding on both, unless the plaintiff immediately, on the receipt of the defendant's letter, gave notice to the defendant that he had withdrawn his offer or declined to accept the money as a loan." The giving of this instruction is assigned as error. * * *

In the instruction the court ruled, in effect, that the acceptance became binding upon the parties unless the plaintiff immediately notified the defendant that he had withdrawn his offer. The rule now supported by the great preponderance of authority, and almost, if not quite universally adhered to, is that when a proposal is accepted by letter the contract is

choose to assent to it; meaning, although it is not so expressed, if you choose to assent to it in a reasonable time. * * * It is an implied term in such an offer that you shall within a reasonable time and promptly, accept it." Lord Chancellor Cranworth in Meynell v. Surtees, 25 L. J. Ch. 257, 259-260 (1856).

"The better opinion is, that what is, or is not, a reasonable time, must depend upon the circumstances attending the negotiation, and the character of the subject matter of the contract, and in no better way can the intention of the parties be determined. If the negotiation is in respect to an article stable in price, there is not so much reason for an immediate acceptance of the offer, and the same rule would not apply as in a case where the negotiation related to an article subject to sudden and great fluctuations in the market. * * *

"It seems clear that the intention of the plaintiff, in making the offer by telegraph, to sell an article which fluctuates so much in price, must have been upon the understanding that the acceptance, if at all, should be immediate, and as soon after the receipt of the offer as would give a fair opportunity for consideration. The delay here [24 hours] was too long, and manifestly unjust to the plaintiff, for it afforded the defendant an opportunity to take advantage of a change in the market, and accept or refuse the offer as would best subserve its interests." Nelson, J., in Minnesota Linseed Oil Co. v. Collier White Lead Co., 4 Dillon 431, 435-436, Fed. Cas. No. 9635 (1876).

[47] Parts of the opinion are omitted.

deemed to become complete when the letter is mailed, provided the offer is standing and the acceptance is made within a reasonable time. Moore v. Pierson, 6 Iowa 292; Mactier's Adm'rs v. Frith, 6 Wend. 103; Brisban v. Boyd, 4 Paige 17; Tayloe v. Merchants' Fire Ins. Co., 9 How. 390; Hallock v. Ins. Co., 2 Dutch. 268; Adams v. Lindsell, 1 Barn. & Ald. 681; Potter v. Sanders, 6 Hare 1. The contract is deemed complete when the letter is mailed, because the mailing constitutes the overt act by which the acceptance is manifested. In Hallock v. Ins. Co., *supra*, Vrendenburgh, J., speaking of the overt act by which acceptance is manifested, said: "The overt act may be as various as the form and nature of contracts. It may be by the fall of the hammer, by words spoken, by letter, by telegraph. * * * The acceptor can no more overtake and countermand his letter mailed than he can his words of acceptance after they have issued from his lips." And he adds: "The bargain, if struck at all, must be *eo instanti* with such overt act. Mailing a letter containing an acceptance, or the instrument itself, intended for the other party, is certainly such overt act." Such we believe to be the well-recognized doctrine as to the point of time when a contract made by correspondence is deemed complete. It will be seen that the rule is sharply defined. The instruction given seems to us to be a departure from it. It assumes that the contract in the case at bar was not necessarily complete when the letter of acceptance was mailed, and that no contract would have been made if the plaintiff immediately upon the receipt of the letter had notified the defendant that the offer was withdrawn. The departure from the recognized rule must have been deemed called for upon the ground that the letter of acceptance was not mailed within a reasonable time. * * * The court doubtless assumed the rule to be that a contract by correspondence is not completed by the mailing of the letter of acceptance where that is not done within a reasonable time. In this the court was unquestionably correct. * * *

Taking this to be the rule, we have to inquire whether an acceptance, after the time limited, or, in the absence of an express limitation, after the lapse of a reasonable time, imposes upon the person who made the offer any obligation. The theory of the court below seems to have been that it does. But in our opinion it does not. The offer, unless sooner withdrawn, stands during the time limited, or, if there is no express limitation, during a reasonable time. Until the end of that time the offer is regarded as being constantly repeated. Chit. Cont. (11th Ed.) 17. After that there is no offer, and, properly considered, nothing to withdraw. The time having expired, there is nothing which the acceptor can do to revive the offer, or produce an extension of time. * * *

As to whether the letter of acceptance was mailed within a reasonable time, we have to say that the burden was upon the defendant, who sets up the contract, to show that it was. We have already seen that the letter of acceptance was dated four weeks later than the letter containing

the offer. One was dated at Lincoln and the other at Depere. These were probably the postoffices of the respective parties. But as to where they are, there is no evidence, and we do not take judicial notice of such matters. Neither is the character of the mail communication shown. We could not say that four weeks was not an unreasonable time, unless we could say so upon a state of facts the most favorable to the plaintiff which we could assume. But it would be useless to go into any such inquiry. It is immaterial as to when the defendant's letter was dated. The question is as to when it was mailed, and on that we find no evidence whatever. In our opinion, therefore, the instruction was erroneous, and not without prejudice. * * *

*Reversed.*[48]

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## MACTIER'S ADMINISTRATORS, APPELLANTS, AND FRITH, RESPONDENT.

**(New York Court of Errors, December, 1830. 6 Wend. 103, 21 Am. Dec. 262.)**

Appeal from Chancery. At New York, in the autumn of 1822, the respondent and Henry Mactier, the intestate, agreed to embark in a

[48] In Phillips v. Moor, 71 Me. 78, 80 (1880) Barrows, J., for the court, said: "It is true that an offer, to be binding upon the party making it, must be accepted within a reasonable time. Peru v. Turner, 10 Maine 185. But if the party to whom it is made, makes known his acceptance of it to the party making it, within any period which he could fairly have supposed to be reasonable, good faith requires the maker, if he intends to retract on account of the delay, to make known that intention promptly. If he does not, he must be regarded as waiving any objection to the acceptance as being too late."

It has been suggested that "More exactly from an analytical standpoint the last clause should read 'if he does not wish his silence to be construed as an acceptance of the counter-offer contained in the late acceptance.'" 1 Williston on Contracts, § 93, p. 175. But is not the real point that in determining what is a reasonable time the action of the one sending the acceptance and the silence of the one receiving it, showing that both think the offer open for acceptance, are facts to be considered? Just as in Mactier v. Frith, *post*, the fact that the offeror regarded his offer as still open could properly be considered by the court in determining whether more than a reasonable time for its continuance had elapsed.

In Morrell v. Studd, [1913] 2 Ch. 648, it was held that negotiations as to security subsequent to acceptance of an offer to purchase an interest in a lease for part cash and the rest secured to the vendor's satisfaction might be deemed to constitute an agreement implied by conduct to treat the acceptance as in time, though it had to be given in a lunar month (28 days) and may not have been given in that time but was given in a calendar month. Asbury, J., said: "I think I am entitled to hold (subject to the question of the Statute of Frauds) that there was an agreement upheld by the defendant's conduct and the circumstances of the case either to enlarge the time for acceptance or to treat the actual acceptance as a proper acceptance" (pp. 657-8). See McCarty v. Heibling, 73 Ore. 356 (1914).

commercial adventure, in which they were to be jointly and equally interested. Frith was to direct a shipment of 200 pipes of brandy from France to New York, to be consigned to Mactier, who was to ship to Frith at Jacmel, in St. Domingo, provisions to the amount of the invoice cost of the brandy, and the respondent was to place the shippers of the brandy in funds by shipments of coffee to France, in French vessels, and the parties were to share equally in the result of the speculation all around.

In pursuance of this arrangement, Frith, on the 5th September, 1822, wrote Firebrace, Davidson, & Co., a mercantile house at Havre, to ship 200 pipes of brandy to New York to the consignment of Mactier. On the 24th of December, Frith, who had returned to Jacmel, where he did business as a merchant, wrote a letter to Mactier on a variety of subjects, in which was contained a paragraph in these words: "I also have the pleasure of handing you copies of Messrs. Firebrace, Davidson, & Co.'s letters regarding the brandy order. By-the-bye, as your brother, before I left New York, declined taking the interest I offered him in this speculation, and wishing to confine myself in business as much as possible, so as to bring my concerns to a certain focus, I would propose to you to take the adventure solely to your own account, holding the value to cover the transaction to my account in New York." On the 17th January, 1823, Mactier wrote to Frith, acknowledging the receipt of his letter of the 24th ult.; thanks him for sending the copy of Firebrace, Davidson, & Co.'s letter on the subject of the brandy order; says that he has received a letter from them, informing that the brandy would be shipped and leave Bordeaux about the 1st of December then past; and adds, "This has been from the first a favorite speculation with me, and am pleased to say it still promises a favorable result; but to render it complete, I am desirous the speculation should go forward in the way first proposed, thereby making it a treble operation. As you have, however, expressed a wish that I should take the adventure to my own account, *I shall delay coming to any determination till I again hear from you.* The prospect of war between France and Spain may defeat the object of this speculation, as far as relates to the shipment of provisions hence to Hayti to be invested in coffee for France, *in which case I will at once decide to take the adventure to my own account.* Our London accounts, down to the 5th of December, speak confidently of a war between France and Spain, —a measure which, if carried into effect, would operate to your disadvantage." Also, "The next arrival from Europe will probably decide the question of peace or war, and I will lose no time in communicating the same to you;" and also, "Let what will happen, I trust you will in no way be a sufferer." On the 7th March, 1823, Frith wrote Mactier, making no other allusion to the last letter of Mactier than the following: "I have received your esteemed favors of the 17th and 31st January, *and note their respective contents.*" [This letter was received by Mactier on the 7th of April. See 1 Paige (N. Y.) 434, 442.] On the twelfth day of

March, 1823, the ship La Claire arrived at New York, laden with the brandy in question, and was at the wharf on the morning of the 13th of March. A clerk of Mactier testified that he had a conversation with Mactier about the time the brandy arrived, perhaps the morning after, and Mactier then said he should take it to himself. A merchant of New York also testified that Mactier consulted with him on the subject of some brandy which he expected to arrive; there was some offer for his taking it on his own account, and he appeared inclined to take it. From the state of things, he advised Mactier to take it, and there was a letter drafted by Mactier upon the subject, in which the merchant made some alterations. The letter stated that he, Mactier, should take the brandy to his own account. On the 17th of March, Mactier entered the brandy at the custom-house *as owner,* and not as consignee, took the usual oath, and gave a bond for the duties. On the twenty-second day of March, he sold 150 pipes of the brandy on the wharf to several commercial houses, and took their notes for the price of the same. The remaining 50 pipes were put in the public store, and remained there in bond, the liquidated duties not having been secured to be paid by Mactier. On the twenty-fifth day of March, Mactier wrote a letter directed to Frith at Jacmel, in which he said: "I have now to advise the arrival of French ship La Claire with the 200 pipes of brandy, and that in consequence of the probability of war between France and Spain, and in compliance with the wish expressed in your regarded favor of the 24th December, and my answer thereto of the 17th January last, *I have decided to take this adventure to my own account.* I therefore credit you with the amount of the invoice," amounting to $14,254.57. To this letter was attached a postscript, dated the 31st of March. On the twenty-eighth day of March, Frith wrote a letter to Mactier, dated at Jacmel, in which, speaking of the brandy in question, he says: "With regard to this adventure, I would wish to confirm, if altogether satisfactory to you, what I mentioned to you some time ago, and which I omitted to repeat to you in my previous letter, in reply to yours of the 17th of January. I find the more one does in this country, in the present state of trade, the more one's affairs get shackled." Previous to the arrival of these two last letters at their respective places of direction, Mactier was dead, he having departed this life on the 10th of April, 1823. On the 21st of April, Frith again wrote a letter addressed to Mactier, in which he acknowledges the receipt of his letter of the 25th of March, says he has noted its contents, and requests Mactier to charter on his account a stanch, first-class vessel, and send out to Jacmel by her 400 barrels of flour, 150 barrels of pork, 150 barrels of beef, 100 barrels of mackerel, &c., &c. In the meantime, however, Mactier having died, administration of his goods, &c., was granted to A. N. Lawrence and another, who, in May, 1823, gave the requisite bonds to secure the duties on the 50 pipes of brandy which had not been bonded for by Mactier in his lifetime, except by the general

bond on entering the goods at the custom-house, and took the 50 pipes from the public store and sold them at public auction.

The respondent, unwilling to come in as a general creditor of Mactier and receive *pro rata* distribution, on the 1st of April, 1824, filed his bill in the Court of Chancery, alleging that the brandy was shipped from France on his sole account, and that Mactier was only the consignee thereof. The respondent in his bill admits that he proposed to Mactier to become the purchaser of the brandy, but avers that, after the receipt of his letter of the 17th January, he considered him as having declined his proposal and that no other offer was subsequently made by the respondent. He sets forth a letter written to him by Mactier, on the thirteenth day of March, 1823, in which, speaking of the brandy ordered from France, he says: "I am looking daily for its arrival; it is to be regretted the order was not more promptly executed, as the delay I fear will operate to our disadvantage. We have London dates to the 30th January; war between France and Spain may now be considered inevitable; France has recalled her minister, and 100,000 Frenchmen have been ordered to march into Spain." He alleges that the letter of Mactier to him, of the 25th March, was not received until several days after the death of Mactier, and that his letter to Mactier of the 21st April was written in ignorance of the death of Mactier, and that he did not intend thereby, and he conceives he did not finally consummate, the sale as claimed. He avers that the promissory notes, received by Mactier from the purchasers of the 150 pipes of brandy, remained in Mactier's possession at the time of his death, not discounted or passed away; and that the same came into the possession of, and were at maturity collected by, the defendants; that the defendants, by wrongfully and collusively representing themselves as entitled to the 50 pipes of brandy remaining in the public store, obtained possession of and sold the same; and that on the 2d July, 1823, he, by his attorney, claimed of the defendants the part of the shipment or invoice of brandy which remained unsold at the decease of Mactier; and also demanded the proceeds of that part of the invoice sold by Mactier, existing in notes or otherwise, and the proceeds of the part sold by the defendants. The bill concludes by praying an account of the sales of the brandy, and a decree directing the defendants to retain in their hands sufficient of the funds belonging to the estate of Mactier to pay and satisfy the respondent when his accounts shall be settled, and adjudged upon by the court.

The defendants put in their answer, insisting that the brandy on its arrival in the port of New York, was the sole and exclusive property of Mactier; and that the portion thereof which came to their hands at his decease, and the proceeds of that part thereof which was sold by him in his lifetime, and which came to their hands, rightfully belonged to his estate, and was subject to be disposed of in due course of administration.

* * *

The cause was heard upon the exceptions [to the master's report] before Chancellor Walworth, who, in March, 1829, * * * decreed that the report be referred back to the master * * * to take and state an account, and report the amount due the complainant, on the principle that he, as survivor, is entitled to the net proceeds of the adventure of brandy, so far as they can be traced and identified, and has a specific lien on the net proceeds of the 50 pipes of brandy sold by the administrators, and on the proceeds of the notes given for the 150 pipes which remained uncollected or not passed away at the time of Mactier's death, or on so much as is necessary to satisfy the balance due complainant for payment and disbursements on account of that adventure, after deducting from those proceeds the balance of the amount paid for duties and expenses, if any, over and above the amount of proceeds of the shipment of brandy which were received by Mactier in his lifetime. From this decree the defendants appealed. For the reasons of the Chancellor for the decree pronounced by him, see 1 Paige 434.

MARCY, J.[49] The object of the bill filed in this case is to obtain from the administrators of Mactier the proceeds of the 50 pipes of brandy which came to their possession after his death, and the amount of such notes taken on the sale of the 150 pipes on the 22d of March, 1823, as were uncollected and undisposed of at the death of Mactier, or at least so much thereof as may be necessary to pay the balance due the respondent for disbursements on account of the adventure. The question on which the decision in this case, as I apprehend, mainly depends, relates to the alleged sale of the brandy to Mactier. There are many definitions of what constitutes a contract, but all of them are of course substantially alike. Powell states a contract to be a transaction in which each party comes under an obligation to the other, and each reciprocally acquires a right to what is promised by the other. Powell on Cont. 4. In testing the validity of contracts many things are to be considered. The contract that the appellants set up in this case is alleged by the respondent to be deficient in several essential requisites. When that was done which, on the assumption of there being parties capable of contracting, was necessary, as the respondent contends, to complete it, Mactier was dead. If the contract was only in progress of execution, and there remained but a single act to be done to complete it, his death rendered the performance of that act impossible; it suspended the proceedings at the very point where they were when it occurred. * * *

I am now to consider whether there was a contract before Mactier's death, which had the consent of the contracting parties so given and made known as to be binding on them. That a consent is necessary, all agree; but what shall constitute it in a given case, may admit of much diversity

[49] The statement of facts is abbreviated and the opinions of Senators Benton, Maynard, Oliver and Throop and parts of the opinion of Marcy, J., are omitted.

of opinion. The consent of the parties in a contract of sale, as explained by Pothier, consists in the concurrence of the will of the vendor to sell a particular thing to the purchaser for a specified price, with the will of the purchaser to buy the same thing for that price. Pothier, *Traité du Contrat de Vente,* p. 1 § 2, art. 3, No. 31. * * * Although the will of the party making the offer may precede that of the party accepting yet it must continue down to the time of the acceptance. Where parties are together chaffering about an article of merchandise, and one expresses a present willingness to accept of certain terms, that willingness is supposed to continue, unless it is revoked, to the close of their interview and negotiation on the same subject; and if during this time, the other party says that he will take the article on the terms proposed, the bargain is thereby closed. * * *

Where the negotiation between the contracting parties, residing at a distance from each other, is conducted, as it usually is, by letters, it is necessary, in order that their minds may meet, that the will of the party making the proposition to sell should continue until his letter shall have reached the other, and he shall have signified, or at least had an opportunity to signify, his acceptance of the proposition. This Pothier holds to be the legal presumption, unless the contrary appears. His language is: *Cette volonté est présumé tant qu'il ne parait rien de contraire.* This doctrine, which presumes the continuance of a willingness to contract after it has been manifested by an offer, is not confined to the civil law and the codes of those nations which have constructed their systems with the materials drawn from that exhaustless store-house of jurisprudence; it is found in the common law; indeed, it exists of necessity wherever the power to contract exists in parties separated from each other. The rule of the common law is, that wherever the existence of a particular subject-matter or relation has been once proved, its continuance is presumed till proof be given to the contrary, or till a different presumption be afforded by the nature of the subject-matter. 16 East, 55; Stark. Ev. 1252. The case of Adams v. Lindsell, 1 Barn. & Ald. 681, proceeds upon and affirms the principle, that the willingness to contract thus manifested is presumed to continue for the time limited, and, if that be not indicated by the offer, until it is expressly revoked or countervailed by a contrary presumption. In that case it was said, "The defendants must be considered in law as making, during every instant of time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is complete by the acceptance of it by the latter." * * *

All the authorities state a contract, or an agreement (which is the same thing), to be *aggregatio mentium.* Why should not this meeting of the minds, which makes the contract, also indicate the moment when it becomes obligatory? I might rather ask, is it not, and must it not be, the moment when it does become obligatory? If the party making the offer is not bound until he knows of this meeting of minds, for the same

reason the party accepting the offer ought not to be bound when his acceptance is received, because he does not know of the meeting of the minds; for the offer may have been withdrawn before his acceptance was received. If more than a concurrence of minds upon a distinct proposition is required to make an obligatory contract, the definition of what constitutes a contract is not correct. Instead of being the meeting of the minds of the contracting parties, it should be a knowledge of this meeting. It was said on the argument, that if concurrence of minds alone would make a valid contract, one might be constructed out of mere volitions and uncommunicated wishes; I think such a result would not follow. The law does not regard bare volitions and pure mental abstractions. When it speaks of the operations of the mind, it means such as have been made manifest by overt acts; when it speaks of the meeting of minds, it refers to such a meeting as has been made known by proper acts; and when thus made known it is effective, although the parties who may claim the benefit of, or be bound by a contract thus made, may for a season remain ignorant of its being made. * * * I think I am therefore warranted in saying that the proposition may be considered as established, that the acceptance of a written offer of a contract of sale consummates the bargain, provided the offer is standing at the time of the acceptance.

What shall constitute an acceptance will depend in a great measure upon circumstances. The mere determination of the mind, unacted on, can never be an acceptance. Where the offer is by letter, the usual mode of acceptance is the sending of a letter announcing a consent to accept; where it is made by a messenger, a determination to accept, returned through him, or sent by another, would seem to be all the law requires, if the contract may be consummated without writing. There are other modes which are equally conclusive upon the parties: keeping silence, under certain circumstances, is an assent to a proposition; any thing that shall amount to a manifestation of a formed determination to accept, communicated or put in the proper way to be communicated to the party making the offer, would doubtless complete the contract; but a letter written would not be an acceptance, so long as it remained in the possession or under the control of the writer.[50] An acceptance is the distinct

[50] "But suppose in the case of an offer by mail, the offeree writes out a proper acceptance and then reads to several associates in his office the offer and his letter of acceptance. On the strength of this, he makes a contract with one of such associates, based upon the proposition contained in the original letter. He then sends the letter of acceptance to be mailed. Suppose further that, while his letter is on the way to the postoffice, but before it is mailed, a telegram of revocation is received and read by the offeree. It would seem that a contract was made when the letters were read in the office." Ashley on Contracts, p. 36.

But Professor Ashley qualifies this case by supplying a condition going to performance under the contract as follows:

"Thus where the offer and acceptance are read to surrounding friends, al-

act of one party to the contract, as much as the offer is of the other; the knowledge, by the party making the offer, of the determination of the party receiving it, is not an ingredient of an acceptance. It is not com-

though the contract arises it is fairly to be implied that mailing a reply promptly is a condition precedent in the contract. Unless this condition happens, the original offeror is not compelled to perform the promise into which his offer has ripened." Ashley on Contracts, p. 38.

See Trounstine & Co. v. Sellers, 35 Kan. 447 (1886). There the plaintiffs, of Cincinnati, Ohio, had sold on credit to Moore & Weaver of Ottawa, Kansas, certain clothing and a dispute arising as to the terms of credit, Moore & Weaver offered to return the goods they had not sold and pay for the rest and expressed the hope that they would hear from the plaintiffs soon. The plaintiffs did not answer but, soon after Moore & Weaver's letter was received, John W. Harper, one of the plaintiffs, started on a business trip, intending to go to Ottawa after attending to some important matters. A month after Moore & Weaver wrote their offer, Mr. Harper reached Ottawa and found that the day before his arrival Moore & Weaver had mortgaged the clothing to creditors who had put defendant in charge. The defendant refused to yield possession, so plaintiffs replevied the goods. Johnston, J., for the court, said:

"The right of possession to the clothing in controversy depends upon whether the proposition made to the plaintiffs by Moore & Weaver on November 16th, 1884, was accepted and became a contract before the execution of the mortgages by Moore & Weaver to their creditors on the 15th day of December, 1884. * * *

"If the plaintiffs intended to accept the proposal it was their duty to have signified their acceptance, either through the mails or by some equally expeditious means. The plaintiffs say that they determined to accept the proposition as soon as the offer was received, and that Mr. Harper's act in starting to Ottawa was an overt act amounting to an acceptance. Every overt act caused by a determination to accept a proposition does not constitute an acceptance. If it was the intention of the plaintiffs to accept the offer, they could and most likely would have written Moore & Weaver a letter, which was the usual mode of communication between the parties, and which is the usual mode of accepting an offer made by letter. Instead of sending a letter or telegram announcing a determination to accept, one of them started on a business trip through the country, intending finally to come to Kansas and take the goods, which trip consumed almost thirty days' time, during which time they were at liberty to change their purpose and reject the proposition. The mere determination to accept an offer does not constitute an acceptance which is binding on the parties. 'The assent must either be communicated to the other party, or some act must have been done which the other party has expressly or impliedly offered to treat as a communication.' (Benjamin on Sales, 54.) Where parties are distant, and the contract is to be made by correspondence, the writing of a letter or telegram containing a notice of acceptance is not of itself sufficient to complete a contract. In such a case the act must involve an irrevocable element, and the letter must be placed in the mail, or the telegram deposited in the office for transmission, and thus placed beyond the power or control of the sender, before the assent becomes effectual to consummate a contract; and not then, unless the offer is still standing. The action of the plaintiffs in sending a member of the firm by a circuitous route to Kansas, was no more than a mere mental assent, which, as we have seen, is insufficient. There was no act of acceptance until Harper arrived at Ottawa and demanded the goods. This was not within a reasonable time, and when the proposition was not met

pounded of an assent by one party to the terms offered, and a knowledge of that assent by the other.

I will now apply this law to the facts of this case. Frith's offer to

within a reasonable time, Moore & Weaver were at liberty to regard their proposition as rejected, and to make other disposition of their property, which they manifestly did do."

See Beckwith v. Cheever, 21 N. H. 41 (1850) where plaintiff said he would accept an offer to cut and take timber if he could get his brother to assist him and the offeror said that plaintiff could give a decided answer later. Gilchrist, C. J., said: "The plaintiff did not notify Bellows, nor did he enter upon the land. He did nothing but engage his brother to assist him. It cannot with propriety be said that this, not brought home to the knowledge of Bellows, can be regarded as an acceptance."

In Cleveland, etc. Rwy. Co. v. Shea, 174 Ind. 303 (1910) an action on an alleged contract to pay a contractor's debt to plaintiff in consideration of plaintiff's refraining from filing a mechanic's lien. Monks, C. J., said: "Appellee may have had it in mind to claim a lien upon the property, he may have had it in mind that appellant's letter to him of February 17 was an offer to pay his claim if he would not file a lien upon the work for such claim, and he may have had it in mind to accept said offer, but if so he announced none of these mental processes to appellant. In order that the mental conclusion of one party to an alleged contract shall affect the other party, such conclusion must be communicated to the party who is to be affected by it; or if it be the mere acceptance of a distinct proposal, the acceptance must be put by the party accepting, in a proper channel to be communicated to the party making the offer" (p. 309). See also O'Donnell v. Clinton, 145 Mass. 461, 463 (1888).

In Brogden v. Metropolitan Railway Co., 2 App. Cas. 666, at pp. 691-2 (1877), Lord Blackburn said: "Mr. Justice Brett, referring to the case of Ex Parte Harris (In re Imperial Land Company of Marseilles, L. R. 7 Ch. App. 587), before the Lords Justices, and other cases, says that, looking to all this, he has come 'to a strong opinion that the moment one party has made a proposition of terms to another, and it can be shewn by sufficient evidence that the other has accepted those terms in his own mind, then the contract is made, before that acceptance is intimated to the proposer.' And he goes on to say, applying that to the present case, that, to his mind, as soon as Burnett put the letter into his drawer, a contract was made, although none was formally entered into.

"My Lords, I must say that that is contrary to what my impression is, and that I cannot agree in it. If the law was as intimated by Mr. Justice Brett, there would be nothing to discuss in the present case. But I have always believed the law to be this, that when an offer is made to another party, and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing, he is bound. If a man sent an offer abroad saying: I wish to know whether you will supply me with goods at such and such a price, and, if you agree to that, you must ship the first cargo as soon as you get this letter, there can be no doubt, that as soon as the cargo was shipped the contract would be complete, and if the cargo went to the bottom of the sea, it would go to the bottom of the sea at the risk of the orderer. So again, where as in the case of Ex Parte Harris, *supra*, a person writes a letter and says, I offer to take an allotment of shares, and he expressly or impliedly says, if you agree with me send an answer by the post, there, as soon as he has sent that answer by the post, and put it out of his control, and done an extraneous act which clenches the matter, and shews beyond all doubt that each side is bound, I agree the contract is perfectly plain and clear.

sell his interest in the brandy certainly continued till his letter of the 24th of December was received at New York, and Mactier had a fair opportunity to answer it. If the answer of the 17th of January had contained an unqualified acceptance, the bargain would have been closed when it was sent away for Jacmel; but the offer was not then accepted. There was a promise to accept upon a contingency; for Mactier says, after alluding to the prospect of a war between France and Spain, "in which case," that is, in case of such war, "I will at once decide to take the adventure to my own account." This concluded nothing. If the event had actually happened, and Frith had insisted on enforcing this conditional acceptance, it would not have been in his power to do so. The most that Mactier said was, that if an expected event happened, he would do an act which would complete the bargain. The happening of the event could not, without the act, complete it. The Roman law regarded the tense of the verb used by the contracting parties to determine whether the bargain was concluded: *Verbum imperfecti temporis rem adhuc imperfectum significat.* There is a wide difference between a promise to give an assent to a proposition for a contract on the happening of a contingency, and the annunciation of a present assent to it. If the expected event happens, and the act promised is performed, the bargain is closed; but it is the promised

"But when you come to the general proposition which Mr. Justice Brett seems to have laid down, that a simple acceptance in your own mind, without any intimation to the other party, and expressed by a mere private act, such as putting a letter into a drawer, completes a contract, I must say I differ from that. It appears from the year books that as long ago as the time of Edward IV. (17 Edw. IV., T. Pasch case, 2), Chief Justice Brian decided this very point. The plea of the defendant in that case justified the seizing of some growing crops because he said the plaintiff had offered him to go and look at them, and if he liked them, and would give 2s. 6d. for them, he might take them; that was the justification. That case is referred to in a book which I published a good many years ago, Blackburn on Contracts of Sale, page 190, *et seq.*, and is there translated. Brian gives a very elaborate judgment, explaining the law of the unpaid vendor's lien, as early as that time, exactly as the law now stands, and he consequently says: 'This plea is clearly bad, as you have not shewn the payment or the tender of the money;' but he goes further, and says (I am quoting from memory, but I think I am quoting correctly), 'moreover, your plea is utterly naught, for it does not show that when you had made up your mind to take them you signified it to the plaintiff, and your having it in your own mind is nothing, for it is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is; but I grant you this, that if in his offer to you he had said, Go and look at them, and if you are pleased with them, signify it to such and such a man, and if you had signified it to such and such a man, your plea would have been good, because that was a matter of fact.' I take it, my Lords, that that which was said 300 years ago and more, is the law this day, and it is quite what Lord Justice Mellish in Ex Parte Harris, *supra*, accurately says, that where it is expressly or impliedly stated in the offer that you may accept the offer by posting a letter, the moment you post the letter the offer is accepted. You are bound from the moment you post the letter, not as it is put here, from the moment you make up your mind on the subject."

acceptance, and not the happening of the event, that gives validity to the contract. If, in this case, the offer of Frith had been to Mactier to take the brandy on the happening of a French and Spanish war, and Mactier had promised to decide to take it in such an event, the simple fact of his taking it after the war would have enabled Frith to treat him as the purchaser of it. Such an act would have been a valid acceptance; but a conditional acceptance of an unconditional offer, followed up by acts of the acceptor, after the condition was fulfilled on which the acceptance depended, might not be considered as completing the bargain, without the acquiescence of the party making the offer in those acts, because the minds of the parties would not have met on the precise terms of the contract.

To conclude the bargain, Mactier must have accepted the offer as tendered to him by Frith, and that acceptance must have been while the offer, in contemplation of law, was still held out to him. That there was an acceptance, or rather that Mactier did all that was incumbent on him to do to effect an acceptance was not denied; but it was insisted, on the part of the respondent, that it was made after the offer was withdrawn. It will be necessary to consider when this acceptance took place, as preparatory to settling the fact of the continuance of the offer down to that time. There is not the slightest evidence of the determination on the part of Mactier to take the brandy before the seventeenth day of March; * * * but if the situation of the parties was changed, and Frith was now endeavoring to set up the contract, I am at a loss to conceive how Mactier's representatives could withstand the force of the facts which took place on the 17th of March. In answer to the offer, Mactier delayed coming to a determination thereon, but promised to accept it if there should be a war; on the 17th of March, when that event was considered settled, he entered the brandy as his own property, and told his clerk that he had determined to take it. But if there should be any doubt as to the effect of this conduct, there can be none as to his subsequent acts. By a letter dated the 25th, with a postscript of the 31st of March, he accepts the offer. This letter was immediately transmitted to Frith, and as soon as the 28th of March entries were made in his books, showing that he had become the purchaser. Enough was done by the 31st to constitute an acceptance of Frith's offer and to complete the bargain, if the offer can be considered as standing till that day.

An offer, when once made, continues, as I have heretofore shown, to the satisfaction of my own mind at least, until it is expressly revoked, or until circumstances authorize a presumption that it is revoked. The offer itself may show very clearly when the presumption of revocation attaches. Where it is made to be replied to by return mail, the party to whom it is addressed must at once perceive that it is not to stand for an acceptance to be transmitted after the mail. If an offer stands until it is expressly withdrawn, or is presumed to be withdrawn, whether it

is held out to a party at a particular period or not, is a matter of fact. Then we are to determine, as a matter of fact, whether Frith's offer was held out for Mactier's acceptance until the 31st of March; if Frith intended it should stand so, and he viewed himself as tendering it to Mactier down to that time, we are bound to regard it as standing, unless his intention was the result of the fraudulent conduct of Mactier. The acts of Frith, after the death of Mactier, could do nothing towards completing an unfinished contract; but I think they may be fairly adverted to for the purpose of ascertaining his intentions in relation to the continuance of his offer. On the 7th of March he acknowledges Mactier's letter of the 17th of January, which did not decline, as it has been construed to do, the offer, but apprised him that it was kept under advisement; and by using the expression, "noting the contents," Frith is, I think, to be understood as yielding to the proposed delay. If a doubt as to this construction of that letter could spring up in the mind, it would be at once removed by the perusal of the letter of the 28th of the same month. In that he expresses a wish to confirm what he had said in the letter making the offer to sell, and declares that he had in a previous letter, which must mean that of the 7th, omitted to communicate the same thing. In answering Mactier's letter which contained the acceptance of his offer, he recognizes the bargain as closed, and gives directions as to investing the proceeds of the brandy. All the subsequent correspondence acquiesces in the sale. It appears to me to be impossible to say, after reading the letters of Frith written subsequent to his knowledge of Mactier's acceptance, that he did not consider the offer as held out to Mactier down to the time when it was accepted, and the bargain closed by that acceptance; and I think we must adjudge it to have been closed, unless the agreement was nugatory by reason that the thing to which it related had not an actual or potential existence when the contract was consummated. * * *

The decree of the Chancellor was accordingly reversed with costs.[51]

[51] "Langdell, Summary, sec. 14, suggests that in this case no promise was necessary, because a debt would arise on Mactier's acceptance of the brandy; but the writer believes that such an acceptance necessarily involves a promise to pay, in fact, and that without such a promise the offeror did not intend title to pass." Arthur L. Corbin, Offer and Acceptance and Some of the Resulting Legal Rélations, 26 Yale L. J. 169, 174, n.

## AVERILL AND ANOTHER *v.* HEDGE.

**(Supreme Court of Errors of Connecticut, 1838. 12 Conn. 424.)**

This was an action of assumpsit, alleging that the defendant, who conducted business at Wareham, Mass., under the name of the "Washington Iron Company," promised to deliver to the plaintiffs a quantity of rods, shapes, and band-iron, in March, 1836.

The whole correspondence between the parties was read in evidence; the substance of which was as follows:—

HARTFORD, 29th February, 1836. DEAR SIR,—Regarding the future disposal of your nails as settled, it would be improper to importune you further on that point. Perhaps, however, you will not object to sending us a supply of rods and shapes for our spring sales. Please to say on what terms you will send us ten or fifteen tons, assorted, by first packet in the spring. We shall also be glad to purchase our hollow ware of you on the same terms as heretofore. Shall be pleased to hear from you soon. [Signed, "J. & H. AVERILL," the plaintiffs; and addressed to JOHN THOMAS, Esq.]

WAREHAM, 2d March, 1836. On the writer's return from the South last evening, he found your favor of the 29th ult., to which we now reply. We will deliver to you in Hartford ten or fifteen tons of rods, shapes, and band-iron, as follows: say—shapes and band-iron, at $110 per gross ton, six months; and old sable rods, at $116, six months. Old sable iron is now quick at $110 per ton in Boston; and there is but very little iron there at any price. We will deliver you at Hartford a common assortment of hollow ware, at $28 per ton, six months. [Signed "WASHINGTON IRON COMPANY, per JOHN THOMAS, Agent;" and addressed to the plaintiffs.]

HARTFORD, 14 March, 1836. DEAR SIR,—We have bought of Ripley & Averill their stock of hollow ware, with the understanding that we were to receive the benefit of their orders given you last July. The balance of this order we believe was in readiness last fall; but, owing to the early closing of our navigation, was not shipped. Will you ship us this lot of ware by first packet, on terms then agreed on with R. & A.? Please advise us by return mail if we may expect it. [Signed by plaintiffs, and addressed to JOHN THOMAS, Esq.]

WAREHAM, March 14, 1836. DEAR SIRS,—Your favor of the 14th inst. is at hand, and contents noted. We shall most cheerfully comply with your request to ship to you the balance of Ripley & Averill's order of hardware, not filled in consequence of the early frost last autumn; such being the understanding between yourselves and Mr. Ripley. We learn from our neighbors, engaged in the manufacture of this article, that they

now hold it at $30 per ton, and shall not sell it at a less price through the season; and consequently we shall not consider ourselves holden to the offer made to you on the 2d inst., unless you signify your acceptance thereof by return mail, but shall furnish the balance of Ripley & Averill's order in conformity with the contracts made with them.

Do you accept of our proposal for supplying you with rods, shapes, and band-iron; and if so, what quantity of each shall we send you? [Signed, "WASHINGTON IRON COMPANY, per JOHN THOMAS, Agent;" and addressed to the plaintiffs.]

HARTFORD, March 19th, 1836. DEAR SIR,—Your favor of the 17th came to hand last evening, too late to be answered before this morning. We note and duly appreciate your prompt assent to send us the balance of R. & A.'s order for hollow ware, at old prices. In our future purchases of that article, we will buy of you at $28 per ton, six months, as offered in your favor of the 2d. We will also take the following shapes, &c., on your terms there given: 160 bundles of new sable or Swedes, different shapes, specified; also 40 bundles smaller shapes, to be of old sable, assorted; 120 bundles band-iron, assorted; 60 bundles half-inch spike rods; 200 bundles P S I horse-nail rods, or a ton, if convenient, in 28lb. bundles, sending 5 tons in all. [Signed by the plaintiffs, and addressed to JOHN THOMAS, Esq.]

In a letter dated March 21st, 1836, addressed to John Thomas, Esq., the plaintiffs alter their order for band-iron, varying the sorts.

WAREHAM, April 2d, 1836. Your favors of the 19th and 21st reached here in the absence of the writer. We regret that you had not sooner signified your acceptance of our proposition of the 2d of March, touching supplies of shapes, band-iron, &c., as we had, prior to the reception of your favors above alluded to, entered into such engagements in other markets as rendered it impossible for us to supply you with those articles on any terms. [Signed "WASHINGTON IRON COMPANY, per JOHN THOMAS, Agent;" and addressed to the plaintiffs.]

On the 6th of April, 1836, the plaintiffs addressed a letter to the defendant's agent, remonstrating against his conduct in refusing to send them the iron ordered. The defendant's agent replied, by a letter dated the 8th of April, as follows:—

On 29th February you ask our terms for 10 or 15 tons of rods and shapes. On 2d March we give them to you per mail. On 14th March you again address us upon another subject; but although our proposition, in ordinary course of mail, must have been in your hands 10 to 12 days, yet no allusion was made to it. On 16th, after replying to yours of 14th, we ask if you accede to our proposition of the 2d. After this, we waited

for your reply until the 22d, when, not having heard from you, we made such other arrangements as made it impossible for us to fill your orders of the 19th or 21st, both which came together in the same mail on 23d. We did not intend the question proposed to you in ours of 16th as a renewal of our proposals of the 2d ult., nor do we believe that it will bear that construction; but nevertheless we should have filled your order had it been seasonably received.

This correspondence was conducted through the mail; upon the part of the defendant, by his avowed agent, John Thomas, and by the plaintiffs themselves on their part. The plaintiffs resided in the city of Hartford, near the post-office.

The letter written by the defendant on the 16th of March, dated 14th, arrived at Hartford on the 18th of March, about 2 o'clock p. m. The plaintiff's answer to the letter, dated the 19th of March, was post-marked the 20th; and the letter written by the plaintiffs on the 21st of March was post-marked on the day of its date; and both letters arrived at Wareham at the same time, viz., on the 23d of March.

The plaintiffs claimed that during said month of March the price of the article, which was the subject of controversy, was constantly advancing in the market; and that they had sustained loss in their business by the non-compliance of the defendant with his contract.

The defendant introduced a witness to prove that letters mailed at Hartford for Wareham were, by the usual course of mail, sent by Providence, and would reach that place on the evening of the day after leaving Hartford,—but might be sent by Boston; although, when sent by Boston, on the days that both mails went, a letter would be one day longer in reaching Wareham; that a mail was sent every day from Hartford to Boston, and every day but Sunday from Hartford to Providence; that the Providence mail usually left the post-office in Hartford about 5 o'clock every morning, except Sunday, when no mail was sent, and Monday, when it left about 10 o'clock a. m. The mails were, in the course of business, closed one hour before they left the office. Upon the 19th of March, 1836, the Providence mail left the office at 25 minutes past 5 o'clock in the morning, and on the 21st at 6 minutes past ten in the morning. The 20th was Sunday; and letters put into the office on Saturday evening and on Sunday evening would be forwarded by the same mail. The usual course of business at the post-office in Hartford was to stamp or post-mark all letters, not on the day they were forwarded, but the day they were received into the office,—unless received after 9 o'clock in the evening. when they were post-marked as of the succeeding day.

Upon the facts so proved and disclosed in the correspondence, the plaintiffs claimed that the proposal of the defendant, in his letter of the 2d of March, to furnish the plaintiffs with rods, shapes, and band-iron, was renewed by his letter written 16th of March, and dated 14th;

and that the plaintiffs, by their answer of the 19th of March, in due time signified their assent to the proposal therein contained; and thus was the contract stated in the declaration completed.

These claims of the plaintiffs were all resisted and denied by the defendant.

The court charged the jury, that in mercantile transactions of this character, affected as they must be by the constant fluctuations of markets, the utmost promptitude must be exacted consistent with a due regard to ordinary business; and that if the letter written by the plaintiffs, accepting the proposal of the defendant relative to said rods, bands, &c., was not delivered into the post-office in Hartford before the day it was post-marked, viz., the 20th of March, it was not sent in such reasonable time as to make their acceptance obligatory upon the defendant.

A verdict was thereupon returned for the defendant; and the plaintiffs moved for a new trial.

BISSELL, J.† * * * The great question in the case is, whether upon these facts there has been such an acceptance of the defendant's offer as that he is bound by it.

The jury were instructed that if the letter written by the plaintiffs, accepting the proposal of the defendant, was not delivered into the post-office at Hartford until the 20th of March, it was not sent in such reasonable time as to make their acceptance obligatory on the defendant.

Several questions, not immediately growing out of the charge, but which, if decided in favor of the defendant, make an end of the case, have been much discussed at the bar.

1. It has been contended that the proposal of the defendant, in his letter of the 2d, was not renewed by his letter of the 16th of March. Upon this point no opinion was given by the judge on the circuit, unless an opinion may be inferred from the ground on which he rested the case in his instructions to the jury. Nor is it essential that a decided opinion on the question should be expressed by this court; because there are other grounds on which we are unanimously of opinion that the ruling of the judge below must be sustained.

Were this, however, a turning point in the case, we should probably be prepared to say that the defendant's letter of the 16th of March does contain a distinct renewal of his former proposal. His language is certainly very strong to show that such was his intention. He says: "Do you accept of our proposal for supplying you with rods, shapes, and band-iron; and if so, what quantity of each shall we send you?" Now we cannot but think that the fair and obvious construction of this language is that the defendant then stood ready to supply the articles upon

† Parts of the opinion are omitted.

the terms already specified.[52] And such appears to have been his own view of the case, as is manifest from his subsequent letter of the 8th of April.

2. It has been urged, that admitting this letter to contain a renewal of the former proposal, yet by the terms of it, the plaintiffs were bound to signify their acceptance by return of mail. The question, in this aspect of it, is manifestly independent of any mercantile usage. That the defendant had a right to attach this condition to his offer is undeniable. The question is, whether he has done so · and whether such is the true construction of his letter.

In his letter of the 2d of March, the defendant had offered to supply the plaintiffs an assortment of hollow ware at certain prices; and in regard to this offer, in his letter of the 16th, he says: "We shall not consider ourselves holden to the offer made you on the 2d inst., unless you signify your acceptance thereof by return of mail;" and he then puts the inquiry with regard to rods, shapes, and band-iron, that has been already mentioned. Now, it should be borne in mind, that the defendant's proposal, in regard to these articles, had already been before the plaintiffs for at least ten or twelve days; and one claim put forth by them on the trial was, that during the month of March the price of these articles was constantly advancing in the market. The question then arises, whether under these circumstances it was the intention of the defendant to give them further time; and whether such intention can be fairly inferred from the language of his communication. In regard to the hollow ware, there can be no question. The plaintiffs were positively required to signify their acceptance by return mail. And when, in the same letter and under similar circumstances, they are also required to decide upon the proposal in regard to the rods, &c., it is certainly not easy to see why the defendant should have made, or should have intended to make, a distinction between these classes of articles. Had the judge directed the jury that the defendant was not bound, unless the plaintiffs signified their acceptance by return of mail, we are by no means satisfied that the direction would have been wrong. As, however, he placed the case on grounds more favorable to the plaintiff's claim, a decision upon

[52] "We think we may paraphrase the observation of Dr. Paley and say that each letter should be taken in that sense in which the writer apprehended at the time that the recipient understood it. Id. [1 Chit. Con.] 104. Another and important canon of construction is that the writings should be so construed, if possible, as to effectuate the manifest purpose of the parties to come together in an agreement; that such a construction should be adopted, if possible, as to constitute an agreement rather than defeat an agreement. * * * We must not be unmindful of the rule that a written instrument is to be taken most strongly against the writer, but this being a rule of some strictness and rigor, the established doctrine is that it is the last to be resorted to—a rule never to be relied upon except where other rules of construction fail." Pitney, J., in Empire Rubber Mfg. Co. v. Morris, 73 N. J. L. 602, 610 (1905).

this point is unnecessary. Any further discussion of it is therefore waived.

3. We come then to the inquiry, whether the instruction actually given to the jury is correct in point of law. And here it may be remarked, that it is very immaterial when the letter of the plaintiffs was written: until sent, it was entirely in their power and under their control, and was no more an acceptance of the defendant's offer than a bare determination, locked up in their own bosoms and uncommunicated, would have been. And it surely will not be claimed that mere volitions, a mere determination to accept a proposal, constitute a contract. The plaintiffs then did not accept the defendant's proposition until the 20th, and for aught that appears [did not accept] until the evening of that day. That they were bound to accept within a reasonable time was distinctly admitted in the argument; and if not admitted, the position is undeniable. The case of the plaintiffs then comes to this, and this is the precise ground of their claim: That they had a right to hold the defendant's offer under advisement for more than forty-eight hours, and to await the arrival of three mails from New York, advising them of the state of the commodity in the market; and having then determined to accept, the defendant was bound by his offer; and that this constitutes a valid mercantile contract. Now, in regard to such a claim, we can only say, that it appears to us to be in the highest degree unreasonable; and that we know of no principle, of no authority, from which it derives the slightest support.

Indeed, it seems to us to be subversive of the whole law of contracts. For it is most obvious, that, if during the interval the defendant was bound by his offer, there was an entire want of mutuality: the one party was bound, while the other was not. Had the proposition been made at a personal interview between the parties, there can be no pretense that it would have bound the defendant beyond the termination of the interview. * * *

An offer then, made through a letter, is not continued beyond the time that the party has a "fair opportunity" to answer it. This is substantially the doctrine of the charge. And it is not only highly reasonable, but is supported by all the analogies of the law. Once establish the principle that a party to whom an offer is made may hold it under consideration more than forty-eight hours, watching in the meantime the fluctuations of the market, and then bind the other party by his acceptance, and it is believed that you create a shock throughout the commercial community, utterly destructive of all mercantile confidence. No offers would be made by letter. It would be unsafe to make them.

It is only necessary to apply these principles to the case before us; and their application is exceedingly obvious. The proposal of the defendant, which had already been several days before the plaintiffs, was renewed early on the afternoon of the 18th. They show no act done by them signifying their acceptance, until the evening of the 20th. Was

this within a reasonable time? Was this the first fair opportunity of manifesting their acceptance? We think this can hardly be claimed. Had the defendant had an agent in Hartford, through whom the offer was made, might the plaintiffs thus have delayed the communication of their acceptance to him? This would not be pretended. And can it vary the principle, that the offer, instead of being thus made, was made through the agency of the post-office? Had the offer of the defendant been promptly accepted, information of the acceptance would have reached the defendant on the evening of the 20th, in due course of mail. He waited until the 22d; and hearing nothing from the plaintiffs, he then virtually retracted his offer, by making such arrangements as made it impossible for him to fill their order. We think he was fully justified in so doing; and that upon every sound principle the rule in this case must be discharged.

*New trial not to be granted.*

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## HYDE *v.* WRENCH.

**(Court of Chancery, 1840. 3 Beavan, 334.)**

This case came on upon general demurrer to a bill for specific performance, which stated to the effect following:

The defendant being desirous of disposing of an estate, offered, by his agent, to sell it to the plaintiff for £1200, which the plaintiff, by his agent, declined; and on June 6th the defendant wrote to his agent as follows: "I have to notice the refusal of your friend to give me £1200 for my farm; I will only make one more offer, which I shall not alter from—that is, £1000 lodged in the bank until Michaelmas, when title shall be made clear of expenses, land tax, etc. I expect a reply by return, as I have another application." This letter was forwarded to the plaintiff's agent, who immediately called on the defendant; and, previously to accepting the offer, offered to give the defendant £950 for the purchase of the farm, but the defendant wished to have a few days to consider.

On June 11th the defendant wrote to the plaintiff's agent as follows: "I have written to my tenant for an answer to certain inquiries, and the instant I receive his reply will communicate with you, and endeavor to conclude the prospective purchase of my farm. I assure you I am not treating with any other person about said purchase."

The defendant afterward promised he would give an answer about accepting the £950 for the purchase on June 26th; and on the 27th he wrote to the plaintiff's agent, stating he was sorry he could not feel disposed to accept his offer for his farm at Luddenham at present.

This letter being received on June 29th, the plaintiff's agent on that day wrote to the defendant as follows: "I beg to acknowledge the receipt

of your letter of the 27th instant informing me that you are not disposed to accept the sum of £950 for your farm at Luddenham. This being the case, I at once agree to the terms on which you offered the farm—viz., £1000 through your tenant, Mr. Kent, by your letter of the 6th instant. I shall be obliged by your instructing your solicitor to communicate with me without delay, as to the title, for the reason which I mentioned to you."

The bill stated that the defendant "returned a verbal answer to the last-mentioned letter, to the effect, he would see his solicitor thereon;" and it charged that the defendant's offer for sale had not been withdrawn previous to its acceptance.

To this bill, filed by the alleged purchaser for a specific performance, the defendant filed a general demurrer.

MASTER OF THE ROLLS, [LORD LANGDALE]. Under the circumstances stated in this bill, I think there exists no valid binding contract between the parties for the purchase of the property. The defendants offered to sell it for £1000, and if that had been at once unconditionally accepted, there would undoubtedly have been a perfect binding contract; instead of that, the plaintiff made an offer of his own, to purchase the property for £950, and he thereby rejected the offer previously made by the defendant. I think that it was not afterward competent for him to revive the proposal of the defendant, by tendering an acceptance of it; and that, therefore, there exists no obligation of any sort between the parties; the demurrer must be allowed.[58]

[58] In Minneapolis, &c. Railway v. Columbus Rolling Mill, 119 U. S. 149 (1886), where defendant offered to sell 2000 to 5000 tons of iron rails and plaintiff first sent an order for 1200 tons and then, when notified that defendant could not book that order at the price of an order for 2000 tons, tried to accept, Gray, J., said:

"The defendant, by the letter of December 8th, offered to sell to the plaintiff two thousand to five thousand tons of iron rail on certain terms specified, and added that if the offer was accepted the defendant would expect to be notified prior to December 20th. This offer, while it remained open, without having been rejected by the plaintiff or revoked by the defendant, would authorize the plaintiff to take at his election any number of tons not less than two thousand nor more than five thousand, on the terms specified. The offer, while unrevoked, might be accepted or rejected by the plaintiff at any time before December 20. Instead of accepting the offer made, the plaintiff on December 16, by telegram and letter, referring to the defendant's letter of December 8, directed the defendant to enter an order for twelve hundred tons on the same terms. The mention, in both telegram and letter, of the date and the terms of the defendant's original offer, shows that the plaintiff's order was not an independent proposal, but an answer to the defendant's offer, a qualified acceptance of that offer, varying the number of tons, and therefore in law a rejection of the offer. On December 18, the defendant by telegram declined to fulfil the plaintiff's order. The negotiations between the parties was thus closed, and the plaintiff could not afterwards fall back on the defendant's original offer.

## NEER *v.* LANG.

(Circuit Court of Appeals, Second Circuit, 1918. 252 Fed. 575, 164 C. C. A. 491.)

Suit by William A. Neer against Frank R. Lang to recover damages in the amount of $17,000 for the breach of an alleged contract to sell plaintiff 20 shares of the capital stock of a corporation known as the Saxon Motor Company. Judgment for defendant, and plaintiff brings error. Affirmed.

ROGERS, J. The right to maintain this action depends upon whether a contract was ever made as alleged. The plaintiff relies on certain cor-

The plaintiff's attempt to do so, by the telegram of December 19, was therefore ineffectual and created no rights against the defendant."

But a genuine though unsuccessful attempt to accept in writing may not preclude a subsequent valid oral acceptance. "The evidence also warranted the judge in finding as a fact that, in addition to the unsuccessful attempt to accept it in writing, the plaintiff through its president verbally instructed the broker to accept it and ratified his action in accepting it when notified that he had done so. There is nothing inconsistent in the plaintiff's accepting a written offer both by word of mouth and in writing. And if it turns out that, through an unguarded expression in the writing, the writing is not, although it was intended to be, an acceptance, the oral acceptance which is not open to that objection is good. The difficulty with the defendant's argument here is that in it he assumes that, if there is an attempt to make a written acceptance of a written offer, the result is the same as it is when the parties have reduced their agreement into a written contract. That assumption however is a mistake. When one attempts to accept in writing an offer made in writing there is no mutual agreement that certain specific written words shall stand as a statement of the trade ultimately struck between them. The question and the sole question is: Did the person to whom the offer was made accept it? A dozen unsuccessful attempts to accept it do not affect the validity of one which is successful, at any rate where the intention in case of all the attempts was to accept it." Loring, J., in Metropolitan Coal Company v. Boutell Transf. & Towing Co., 196 Mass. 72, 82-3 (1907).

And of course, a mere inquiry as to whether the offeror will insert different terms in his offer is not a conditional acceptance or counter offer. Stevenson v. McLean, 5 Q. B. D. 346 (1880).

"It is certain that an acceptance which varies from the offer will not conclude a contract. Davenport v. Newton, 71 Vt. 11, 21, 42 Atl. 1087. But the reply may go beyond the terms of the proposal without qualifying the acceptance. The addition may be such as fairly to import a request instead of a condition. In determining what one party intended and the other ought to have understood, regard must be had to the situation and purpose of the parties and the subject-matter and course of the negotiations." Munson, J., in Purrington v. Grimm, 83 Vt. 466, 469-470 (1910).

In Turner v. McCormick, 56 W. Va. 161 (1904) where the owner of land executed to the plaintiff two options of sale of a vein of coal underlying two separate tracts of land under which the plaintiff was given until a certain time "to accept the coal," the plaintiffs' notice of acceptance read:

"Morgantown, W. Va., Feb. 21, 1902. Mr. William McCormick: I hereby notify you that your coal will be accepted according to terms of the option given to me on same and respectfully request you to make delivery of deed,

respondence which passed between defendant and himself, and which he claims constituted a contract, and involves a breach. The plaintiff on October 9, 1915, received the following letter from the defendant:

"Fort Leavenworth, Kansas, Oct. 7, 1915.

"Wm. A. Neer & Co., Detroit—My Dear Mr. Neer: Will you keep me posted on the Saxon Motor common market. Would like to buy 10 or 15 shares at around 300, subject to confirmation, or would sell 20 shares at 400, subject to previous sale.

"Sincerely, [Signed] F. R. Lang, Major, U. S. Army."

with abstract of title, to me, in Morgantown, W. Va., on Saturday, June 28th, 1902, hour and place to be decided later. Yours truly, E. D. Turner."

In holding that the letter constituted an acceptance of the offer of sale, rather than a promise to accept, and that the request that the deed with abstract of title, be delivered at the time and place mentioned, did not make the acceptance conditional, the court reviewed the cases at length, Poffenbarger, P., writing the opinion, and said that the review "seems to establish the following propositions: First, a request for a change or modification of a proposed contract, made before an acceptance thereof, amounts to a rejection of it; second, a mere inquiry as to whether the proposer will alter or modify its terms, made before acceptance or rejection, does not amount to a rejection, and, if the offer be not withdrawn before acceptance made within a reasonable time, the offer becomes a binding contract; third, a request, suggestion, or proposal of alteration or modification, made after unconditional acceptance, and not assented to by the opposite party, does not affect the contract put in force and effect by the acceptance, nor amount to a breach thereof, giving right of rescission; fourth, acceptance of a formal and carefully prepared option of sale of land, within the time by it allowed, and according to its terms, although accompanied by a request for a departure from its terms as to the time and place of performance, is an unconditional acceptance, and converts the option into an executory contract of sale, provided the request be not so worded as to limit or qualify the acceptance."

So a mere suggestion that one ought to change the terms of the proposed contract, even though made before the acceptance, does not amount to a rejection of the offer. Foster v. West Publishing Co., (Okla.) 180 Pac. 1083 (1920). So objections to certain provisions of the offer and an expression of opinion that the offeror should not ask such conditions will not prevent the acceptance from being unqualified if a favor only is being sought. Bleecher v. Miller, 40 Okla. 374 (1914).

"Suppose, in reply to an offer by A, B writes: 'I shall want to consider your offer for more of the time which you have allowed me for that purpose because I am so situated now that I cannot return an immediate answer. However, the situation is such that if you want to settle the matter at once. I will close with you now at 5% less than the price you name.' It seems clear that A could conclude a contract by accepting the lower price, but this reply should not, under ordinary circumstances, be held to terminate the original offer." Herman Oliphant, The Duration and Termination of an Offer, 18 Mich. L. Rev. 201, 209.

"Does a rejection in the ordinary sense of that term always terminate an offer? Suppose the offerer says when making an offer, 'I expect you to reject this offer upon first consideration, but I want you to consider it further because I think you will accept when you have thought about it a while.' The

The plaintiff, upon the receipt of the letter, sent the following telegram to defendant:

"Western Union Telegram.

"10—9—1915.

"To Major F. R. Lang, Fort Leavenworth, Kansas: We accept twenty Saxon at four hundred ship with draft attached and wire when you have done this.

"Wm. A. Neer & Co."

This telegram plaintiff followed with a letter as follows:

"10—9—1915.

"Major F. R. Lang, Fort Leavenworth, Kansas—Dear Sir: Upon receipt of your letter offering us 20 Saxon Motor common at 400, we immediately wired you as follows: 'We accept 20 Saxon at 400 ship with draft attached and wire when you have done this.' We trust we will receive your confirmation on this transaction very soon.

"Very truly yours, Wm. A. Neer & Co."

The defendant, upon receipt of plaintiff's telegram, sent to plaintiff the following letter:

offeree immediately sends a rejection which the offerer ignores. On further thought, the offeree sends an acceptance. It is believed the courts would hold the offerer bound. He has been taken at his word. His objective will is decisive. Possibly it may be useful to confine the term, rejection, to a meaning more limited than its ordinary one." Id., 209, n.

On "right" to accept offer after submitting counter proposition, see L. R. A. 1915D, 145, note.

A question has been raised, not settled by authority, as to when a rejection by mail or telegram to an offer by the same means of communication takes effect. See Clarence D. Ashley, Must the Rejection of an Offer be Communicated to the Offeror? 12 Yale L. J. 419; 1 Williston on Contracts, § 52. It would seem as if an outright rejection would take effect when mailed or telegraphed, but as if a counter-offer is not a counter-offer and therefore not an effective implied rejection until received. See *dictum* in Harris v. Scott, 67 N. H. 437, 439 (1893) to the effect that the offeror authorizes the means of communication for an unqualified answer; but under the doctrine of Henthorn v. Fraser, reported *ante*, p. 106, what the offeror intends is not of primary importance and courts agreeing with that decision conceivably might hold the counter-offer effective as a rejection when mailed though not effective as an offer until received. As Professor Williston has said: "It may seem odd to suggest the possibility that a letter containing a rejection of an offer and also a new offer might become effective as to the rejection immediately, but as to the offer not until communication was complete; but if it is remembered that a letter revoking one offer and accepting another unquestionably takes effect at two different times there will seem less reason for surprise. The acceptance and revocation, however, though in the same letter are two distinct things whereas the counter-offer is itself the rejection." 1 Williston on Contracts, § 52, p. 89, n.

"Fort Leavenworth, Kansas, October 9, 1915.

"Wm. A. Neer & Co., Detroit—Gentlemen: Saxon stock sold before receipt of your telegram. Seems to be much demand for it. Think I may be able to locate ten and possibly twenty-five shares more. What is best offer you would make for this and for how long a period is bid open?

"Very truly, [Signed] F. R. Lang, Major, U. S. Army."

The statement in the above letter, "Saxon stock sold before receipt of your telegram," plaintiff claims was false, and was made with the purpose of taking advantage of the condition in his letter of October 7th that the offer there of 20 shares at 400 was subject to previous sale. The court below held that the correspondence disclosed no contract and dismissed the complaint.

If a contract exists, it is to be found in the letter of October 7th and the telegram of October 9th. The letter contains an offer to "sell 20 shares at 400, subject to previous sale." The telegram "accepts twenty Saxon at four hundred." If nothing more had been added, a valid contract would have resulted, provided the defendant had not previously sold the shares. But the telegram contained something more, and that was, "Ship with draft attached and wire when you have done this." This imported a new item into the acceptance and prevented a contract from being made. Every agreement is the result of an offer and an acceptance thereof. An offer must not be uncertain or ambiguous, and it was not in this case as respects the 20 shares of Saxon, for it is not impossible for a court to say just what the language used meant. But an acceptance is required to be identical with the offer, or there is no meeting of the minds, and no agreement; and in this case the offer and the acceptance are not identical.

Every trade or business has its usages, and persons who make offers relating thereto assume that all the customary incidents of such callings shall be part of the agreement, and they do not need to be expressly stated in the written or oral offer, as the law implies them. The law implies that the place of delivery of the stock shall be at the place of the seller, nothing appearing to the contrary; that is to say, in this case the place of delivery under the offer as made was Ft. Leavenworth, Kan. But under the acceptance delivery was to be made at Detroit, Mich., where plaintiff resided. The law implies from the terms of the offer that payment was to be made in cash on delivery at Ft. Leavenworth. But the acceptance provided for a payment by draft on delivery at Detroit. The defendant was required to part with possession of his stock before actual payment.

In Cameron v. Wright, 21 App. Div. 395, 47 N. Y. Supp. 571, an offer was made to sell stock at 33 cents on the dollar, subject to the right to sell to other parties. The alleged acceptance was in a telegram reading, "I accept offer: 33 for all your stock; draw three days' sight draft with stock attached." This was held to be a variance from

the offer, and the interposition of a term not embraced in the original offer, and therefore not binding. And see Greenwalt v. Este, 40 Kan. 418, 19 Pac. 803; Sharp v. West (D. C.) 150 Fed. 458; Lacey v. Thomas (C. C.) 164 Fed. 623.

As there was no contract, and therefore no right to sue for a breach, the other questions raised need not be considered.

*Judgment affirmed.*[54]

[54] "The vendee in his letter of acceptance may not attach any condition to such acceptance, even to the extent of undertaking to dictate the place where payment shall be made. If his attempted acceptance is coupled with any condition that varies or adds to the offer to sell, it is not an acceptance, but is in reality a counter proposition." Barnes, J., in Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 345-6 (1908).

In Seymour v. Armstrong, 62 Kans. 720 (1901), in an attempted acceptance of an offer to supply defendants eggs by the case, plaintiff added: "The eggs are all packed in new No. 2 white wood cases and I will accept fifteen cents each for them or you can return them or new ones in place of them." The court said that this acceptance "affixed conditions not comprehended in the proposal" in that it "required the defendants" to pay for the cases or return them or new ones, whereas by the usages of the business the cases went with the eggs, and hence, the acceptance not being unconditional, there was no contract.

"An acceptance incorporating a term, condition, or reservation not embraced within the terms of the offer is equivalent to a rejection." Aspinall, J., in Stanley v. Gannon, 180 N. Y. Supp. 602, 606 (1919).

"Where an offer is made by one party, and the other annexes a condition to his acceptance, there is no completed contract till the party making the first offer assents to the condition." Allen, J., in Putnam v. Grace, 161 Mass. 237, 245 (1894).

In Corcoran v. White, 107 Ill. 118 (1886) an acceptance of an offer of sale of real property "provided the title is perfect" was held conditional. Compare Von Hatzfeldt-Wildenburg v. Alexander, [1912] 1 Ch. 284, where an acceptance of an offer of sale of a leasehold house was on condition that the purchaser's solicitors should "approve the title to, and covenants contained in the lease, the title from the freeholder and the form of contract" and where Parker, J., said: "There is some authority for saying that where a purchaser stipulates that his solicitor shall approve the title of the property such stipulation may possibly be construed as a recognition that the title will be examined in the usual way and need not be construed as a condition at all. But such a construction is impossible in this case, for the plaintiff's solicitors have to approve also the freehold title, which cannot be called for on an open contract for the sale of a lease."

"An acceptance which in terms is conditioned on what the law implies is a good acceptance, as it introduces nothing new into the contract. See Anglo-American etc. Co. v. Prentiss, 157 Ill. 506." Rogers, J., in Morse v. Tillotson & Wolcott Co., 253 Fed. 340, 348 (1918). See McCleskey & Whitman v. Howell Cotton Co., 147 Ala. 573 (1906). See also 1 A. L. R. 1508, note.

And it has even been held that adding to an acceptance a demand for some performance to which the acceptor will not be entitled under the contract will not invalidate the acceptance, if it goes only to performance and is not a condition of the acceptance. Horgan v. Russell, 24 No. Dak. 490 (1913).

In Earle v. Angell, 157 Mass. 294 (1892) there was a question whether an oral acceptance did not vary from the oral offer, both occurring on the one occa-

## THURBER *v.* SMITH.

**(Supreme Court of Rhode Island, 1903. 25 R. I. 60, 54 Atl. 790.)**

Assumpsit heard on defendants exceptions.

STINESS, C. J.* The plaintiff gave a mortgage to the defendant for $200, due March 19, 1902. August 1, 1901, the defendant wrote to the plaintiff as follows:

"Providence, R. I., August 1, 1901.

"Walter Thurber—

"Dear Sir:

"Your mtge. calls for interest less than I generally get, and knowing I can let the money out to better advantage if I could get it in, I am willing to allow you $20 discount, if you can raise the money or find somebody else to take it up this month. I have offered this same com. elsewhere, and give you the same opportunity.

"Very truly, H. N. Smith."

The plaintiff replied on the 8th day of August, A. D. 1901, by letter: "I would like to accept the offer, and expect to have the money for it in about two weeks."

August 21, 1901, the defendant notified the plaintiff, by letter, that he had sold the mortgage for its face.

August 30, 1901, the plaintiff went to the defendant and offered to pay the $180.00. * * *

Upon these facts the court * * * gave judgment for the plaintiff in the sum of $32.00. * * *

The ruling that the plaintiff's letter was not an acceptance was not excepted to by the defendant, being in his favor, and is not before us on exception. It is proper to add, however, for further proceedings in this case, that we think that this ruling was correct. The letter did not accept the offer expressly or impliedly. The words, "I would like to accept," and "expect to have the money for it in about two weeks," imply a willingness to accept, but a doubt as to ability. Suppose, upon the ground of a completed contract for earlier payment, the defendant had sought to foreclose his mortgage or to sue upon the note. The defendant could have urged with much force that he had not accepted the offer, but had simply expressed a desire to do so. An acceptance of an offer must be definite, unambiguous, and unqualified; such as to complete a contract.

In Martin v. Northwestern Co. (C. C.), 22 Fed. 596, an offer of coal upon specified terms was replied to as follows: "Telegram received.

**sion, but Holmes, J., said: "But the parties were face to face, and separated seemingly agreed. The jury might well have found, if that was the only question, that the variation, if any, was assented to on the spot" (p. 296).**

*** Part of the opinion is omitted.**

You can consider the coal sold. Will be in Cleveland and arrange particulars next week." This was much more definite than the letter in this case, but it was held that there was no definite contract and acceptance thereof. Brewer, J., said: "It is not 'I accept your offer,' but 'You may consider the coal sold.' It is not, perhaps, a natural expression when a definite acceptance of an offer is intended. It is more equivalent to this: 'There is so little to be settled, and I am so sure that all can be arranged, that you are safe in looking at the sale as closed, and prepare to make your arrangements accordingly.'"

In Potts v. Whitehead, 23 N. J. Eq. 512, to an offer to sell land the reply was: "Have twice attempted the tender of the first payment of $500 upon the agreement made between us on the 7th December last. I will meet you," etc., "when I shall be ready to make tender of the money and execute the proper agreements thereupon." It was held that this letter was not, either in terms or substantially, an acceptance of an offer, and concluded no contract.

In Myers v. Smith, 48 Barb. (N. Y.) 614, an offer of malt "delivered on boat" was accepted as "deliverable on boat," and it was held that this was not an acceptance of the offer.

In Havens v. American Co., 11 Ind. App. 315, 39 N. E. 40, the words, "I am prepared to make the arrangement with you," were held not to be an unqualified and unequivocal acceptance.

In Carr v. Duval, 4 Pet. (U. S.) 77, the rule is stated that if it be doubtful whether an agreement has been concluded, or is a mere negotiation, chancery will not decree a specific performance.

In Hutchinson v. Bowker, 5 M. & W. 535, an offer was made of a quantity of good barley, with terms stated. The reply was: "Of such offer we accept, expecting you will give us fine barley and full weight." The jury found that there was a distinction in the trade between *good* and *fine* barley, but that it was not applied in the letter in that particular sense. The court held that the meaning was ambiguous, and hence no acceptance. See also, Isham v. Therasson, 53 N. J. Eq. 10; Marschall v. Eisen, 7 N. Y. Misc. 674.

We think the terms of the letter in the case at bar were ambiguous, and so no acceptance, from which it follows that the defendant had the right to revoke his offer, which he did by his notice of sale of the mortgage, and therefore, judgment should have been for the defendant.

Exceptions sustained and case remitted * * * with direction to enter judgment for the defendant.

## TINN *v.* HOFFMAN & CO.

**(Court of Exchequer Chamber, 1873. 29 Law Times [N. S.] 271.)**

This was an action brought by the plaintiff against the defendant to recover damages in respect of a breach of contract to deliver 800 tons of iron; and by the consent of the parties, and by order of Martin, B., dated May 30th, 1872, the facts were stated for the opinion of the Court of Exchequer in the following

### SPECIAL CASE.

1. The plaintiff, Mr. Joseph Tinn, is an iron manufacturer, carrying on business at the Ashton Row Rolling Mills, near Bristol; and the defendant, who trades under the name and style of Hoffmann & Co., is an iron merchant, carrying on business at Middlesbro'-on-Tees.

2. In the months of November and December, 1871, the following correspondence passed between the plaintiff and the defendant relating to the proposed purchase and sale of certain iron, the particulars of which fully appear in the letters hereinafter set forth:

The plaintiff to the defendant:

**22nd Nov., 1871.**

**Messrs. Hoffmann & Co.:**

**"Dear Sirs: Please quote *your lowest price for* 800 *tons* No. 4 Cleveland, or other equally good brand, delivered at Portishead at the rate of 200 tons per month, March, April, May, and June, 1872. Payment by four months' acceptance.**

**Yours truly,**

**J. Tinn.**

3. The defendants' reply:

**Royal Exchange Buildings, Middlesbro'-on-Tees,**

**24th Nov., 1871.**

**Joseph Tinn Esq., Bristol:**

**Dear Sir: We are obliged by your inquiry of the 22d inst., and by the present beg to offer you 800 tons No. 4 forge Middlesbro' pig iron (brand at our option, Cleveland if possible), at 69s. per ton delivered at Portishead, delivery 200 tons per month, March, April, May, and June, 1872, payment by your four months' acceptance from date of arrival.**

**We shall be very glad if this low offer would induce you to favor us with your order, and waiting your reply by return, we remain, dear sir, yours truly.**

**A. Hoffmann & Co.**

4. The plaintiff to the defendant:

**Bristol, 27th, Nov., 1871.**

**Messrs. Hoffmann & Co.:**

**Dear Sirs: The price you ask is high. If I made the quantity 1200 tons, delivery 200 tons per month for the first six months of next year I suppose you would make the price lower? Your reply per return will oblige**

**J. Tinn.**

5. The defendant to the plaintiff in reply:

Royal Exchange Buildings, Middlesbro'-on-Tees,
28th Nov., 1871.

Joseph Tinn, Esq., Bristol:

Dear Sir: In reply to your favor of yesterday, we beg to state that we are willing to make you an offer of further 400 tons No. 4 forge Middlesbro' pig iron, 200 tons in January, 200 tons in February, at the same price we quoted you by ours of the 24th inst., though the rate of freight at the above-named time will doubtless be considerably higher than that of the following months.

Our to-day's market was very firm again, and we feel assured we shall see a further rise ere long.

Kindly let us have your reply by return of post as to whether you accept our offers of together 1200 tons and oblige yours truly,

A. Hoffmann & Co.

6. The plaintiff to the defendant:

Bristol, 28th Nov., 1871.

Messrs. Hoffmann & Co.:

No. 4 Pig iron.

Dear Sirs: You can enter me 800 tons on the terms and conditions named in your favor of the 24th inst., but I trust you will enter the other 400, making in all 1200 tons, referred to in my last, at 68s. per ton. Yours faithfully,

Joseph Tinn.

7. The defendants' reply:

Royal Exchange Buildings, Middlesbro'-on-Tees,
29th Nov., 1871.

Joseph Tinn, Esq.:

Dear Sir: We are obliged by your favor of yesterday, in reply to which we are sorry to state that we are not able to book your esteemed order for 1200 tons No. 4 forge at a lower price than that offered to you by us of yesterday—viz., 69s., and even that offer we can only leave you on hand for reply by to-morrow before twelve o'clock. Waiting your reply, we remain, dear sir, yours truly,

A. Hoffman & Co.

8. On December 1st, 1871, the plaintiff sent a telegram to the defendant, of which the following is a copy:

From Tinn, Ashton.
To Hoffmann & Co., Middlesbro'-on-Tees.
Book other 400 tons pig iron for me, same terms and conditions as before.

And on the same day the plaintiff sent a letter to the defendant, of which the following is a copy:

1st Dec., 1871.

Messrs. Hoffmann & Co.:

Dear Sirs: I have your favor of the 29th ult. Please enter the remaining 400 tons No. 4 Forge Pig at 69s. ex-ship Portishead, delivery to commence January, 1872, payment by four months' acceptance against delivery. Kindly send me sold note for the 800 and 400 tons, and oblige, yours truly,

J. Tinn.

9. The following correspondence then took place between the plaintiff and the defendants' clerk duly authorized in that behalf.

The defendants' clerk to the plaintiff:

Royal Exchange Building, Middlesbro'-on-Tees.

1st Dec., 1871.

Joseph Tinn, Esq., Bristol:

Dear Sir: We have your telegram of this day, "Book other 400 tons Pig iron, same terms and conditions as before," which we note and shall lay before our Mr. Hoffman on his return next week. Yours truly, for A. Hoffman & Co.

C. Jerveland.

10. Memorandum:

2d Dec., 1871.

From A. Hoffmann & Co., Middlesbro'-on-Tees.

To Joseph Tinn, Esq., Bristol:

"The contents of your yesterday's favor is noted, and we shall lay same before our principal on his return next week.

11. The defendants to the plaintiff:

The Queen's Hotel, Manchester.

4th Dec., 1871.

Joseph Tinn, Esq., Bristol:

Dear Sir: I am in receipt of telegram "Book other 400 tons, same terms and conditions as before," and favor of 1st inst. addressed to my firm, in reply to which I very much regret to state that I am not able to book the 1200 tons in question, as your reply to ours of November 28th and 29th did not reach us within the stipulated time; and as I had other offers for the same lot, I disposed of the latter previous to my leaving Middlesbro' and receiving your decision.

Trusting to be more fortunate in future, I remain, dear sir, yours truly,

A. Hoffman & Co.

12. The plaintiff to the defendant:

5th Dec., 1871.

Messrs. Hoffmann & Co.:

Dear Sirs: I regret you cannot enter me the 400 tons No. 4 Forge Pig on the same terms as the 800 tons. Please send me sold note for 800 tons per return. Yours truly,

J. Tinn.

13. The reply of the defendants:

Royal Exchange Buildings, Middlesbro'-on-Tees,

6th Dec., 1871.

Joseph Tinn, Esq., Bristol:

Dear Sir: Your favor of yesterday to hand, in reply to which we have to state that we cannot send you contract for pig iron, having sold you none.

The quotation for 1200 tons in our respect of 29th ult. was for your acceptance by 12 o'clock the 30th; and failing to receive such we disposed of the iron, being under other offers, as already intimated to you by our Mr. Hoffmann, and it is now utterly impossible for us to book you the quantity you require, or you may rest assured that we willingly would do so. We are, dear sir, yours truly,

Pro A. Hoffmann & Co. C. Jerveland.

14. It is agreed that all the facts and circumstances mentioned in the above correspondence are true, and that the court are to have power to draw all inferences of facts in the same way as a jury might do.

15. The course of post between Bristol and Middlesbrough is one day.

16. The plaintiff contends that he has a binding contract with the defendant whereby the defendants are bound to deliver to him 800 tons of iron. The defendants, on the other hand, contend that there is no such contract, and refuse to deliver any of the said iron.

The questions for the opinion of the court are, first, whether, upon the facts stated and documents set out in the case, there is any binding contract on the part of the defendants to deliver 800 tons of iron to the plaintiff; secondly, whether, upon the facts and documents set out in the case, there is any binding contract on the part of the defendants to deliver any quantity of iron to the plaintiff, and if yea, what quantity and on what terms and conditions.

If the court shall be of opinion in the affirmative on either of these questions, then it has been agreed between the parties in writing in accordance with the provisions of the Common Law Procedure Act 1852, that the amount of damages for breach of such contract shall be ascertained by reference to an arbitrator to be appointed by the said plaintiff and defendants, or in case of difference by any judge of one of the Superior Courts of Common Law, and judgment for the amount entered up for the plaintiffs with costs of suit.

If the court shall be of opinion in the negative, then judgment of *nol. pros.* with costs of defense shall be entered up for the defendants.

A majority of the Court of Exchequer gave judgment for the defendants, whereupon the plaintiff brought error.

HONYMAN, J.[55] I am of opinion that the judgment of the court below was wrong, and that judgment ought to be entered for the plaintiff in respect of 800 tons. * * * On November 28th, the defendants wrote the following letter, on the construction of which I believe the difference of opinion among the members of the court mainly arises. [Reads letter of that date.] What is the meaning of that letter? It amounts to this: On November 24 we offered you 800 tons for delivery at 69s: we now repeat to you that offer, and in addition to that, we make a further offer of 400 tons more—that is, we renew the offer of November 24th, and we make you a further offer of 400 tons, provided you accept those offers, "by return of post." That does not mean exclusively a reply by letter by return of post, but you may reply by telegram or by verbal message, or by any means not later than a letter written and sent by return of post would reach us. If that is so, then comes the plaintiff's letter, written on the same day, November 28th, which crosses the defendants' letter of the same date, in which the plaintiffs said, "You can enter me 800 tons on the terms and conditions

[55] The opinions of Archibald, Grove, Keating and Quain, JJ., and parts of the opinions of Honyman, Brett and Blackburn, JJ. are omitted.

named in your favor of the 24th inst., but I trust you will enter the other 400, making in all 1200 tons, referred to in my last, at 68s, per ton, ex ship Portishead." I cannot agree in the opinion said to have been expressed by my Brothers Pigott and Channell in the court below. As I understand, my Brother Piggott certainly says this is not a clean offer, or a clean acceptance, of 800 tons, but that it is 800 tons on the condition or hope or trust that they would lower the price of the other 400 tons. I cannot accede to that view of the case. I assume that it plainly amounts to this, "I will take your 800 tons on the terms and conditions mentioned in the letter of the 24th inst., but I hope you will let me have the other lot at 68s. per ton; if you choose to do that, well and good." I cannot understand how it can be said that that is not an absolute acceptance of the 800 tons, supposing it was competent to the plaintiff to accept that quantity. In the court below it seems to have been treated as if the offer of November 28th was one offer of 1200 tons. I do not think so. I think it is a repetition of the offer of 800 tons coupled with a further offer of 400 tons, and that it was competent to the plaintiff to accept one and not accept the other. My Brother Bramwell appears to have thought that it was not material to consider whether it was two separate offers of 400 tons and 800 tons, or an offer of 1200 tons, because in either view of the case, the plaintiff could not accept the one and reject the other. If it is to be construed as strictly one offer of 1200 tons, I can understand it, and then of course he could not accept the one and reject the other. But I do not think it is one offer of 1200 tons, nor two offers, one of 400, and the other of 800 tons, but that it is a repetition of the offer of 800 tons, with a further offer of further 400 tons. To say that he could not accept the 400 tons without the 800 tons seems, in my view of the matter, to throw no light on the question whether he might accept the 800 tons without the 400 tons. That being so, it being in my judgment a separate offer of 800 tons, and 400 tons in addition, I should have thought, had the plaintiff's letter of the 28th been written on November 29th that nobody, but for the opinions which have been expressed here today, could have entertained a doubt that it would have been an acceptance. What, then is the effect when the two letters are written on the same day and crossed each other in the post? Does that make any difference? * * * I cannot see why the fact of the letters crossing each other should prevent their making a good contract. If I say I am willing to buy a man's house on certain terms, and he at the same moment says that he is willing to sell it, and these two letters are posted so that they are irrevocable with respect to the writers, why should not that constitute a good contract? The parties are *ad idem* at one and at the same moment. On these grounds it appears to me that the judgment of the court below was wrong, and ought to be reversed. I speak with some hesitation in this case when I find that the opinion of the majority of my brothers is against me, and also when the question

turns entirely on the construtions of a somewhat ambiguously written letter.

BRETT, J. The question is, whether upon a true construction of this correspondence, there is a binding contract between the plaintiff and the defendant for the 800 tons of iron at 69s. It is argued on the one side that such a contract is disclosed because it is said that the defendants' letter of November 24th is an offer for the sale of 800 tons of iron, and this letter of November 28th leaves open the time for accepting that offer of November 24th, and makes a new offer with regard to another 400 tons; and that the defendants' offer of November 24th being thus opened by their letter of the 28th, the plaintiff's letter of the 28th is an acceptance of the defendant's offer of the 24th. On the other side it is argued that the defendants' letter of November 28th is not an opening of their offer of the 24th, but that it is an offer with regard to 1200 tons; and that even it if were a separate offer with regard to 800 tons and 400 tons, still that the true view of the matter is not that it reopens the letter of the 24th, but that it makes a new offer with regard to the 800 tons, and another separate offer, with regard to 400 tons; and that, upon such a view, the renewed offer with regard to 800 tons is not accepted, because the letter of the plaintiff of November 28th was not in answer to that offer, but was a letter crossing it. Now with regard to the construction of the defendant's letter of November 28th, it seems to me that we must consider that the defendant's letter of November 24th is in answer to a request of the plaintiffs of November 22d for an offer with regard to 800 tons, and is therefore an offer by them with regard to 800 tons. That offer left it open to the plaintiff to accept it within a period which is to be computed by the return of post. I agree that the words, "Your reply by return of post" fixes the time for acceptance, and not the manner of accepting. But that time elapsed; there was no acceptance within the limited time. So far from there being an acceptance, it seems to me that the plaintiff's letter of November 27th rejects that offer; it rejects it on the ground that the price is higher than the plaintiff is willing to give. That offer is, therefore, not accepted within the limited time, but is rejected, and it seems to me is at once dead. The letter of the 27th then asks for an offer with respect to 1200 tons, and the letter of November 28th is a letter written "In reply to your favor of yesterday," that is, In reply to your request for an offer with regard to 1200 tons. "I now make you this offer." That seems to me to show that the letter of November 28th of the defendants is an offer with regard to 1200 tons, and not with regard to 800 tons and 400 tons separately. The way in which the offer with regard to the 1200 tons is made is this. "With regard to the first 800 of them, I make you a new offer upon the same terms as I made in the former offer on the 24th. With regard to the remaining 400 tons, I offer you to deliver them at the same price, but at different periods of deliv-

ery." I think that the defendants' letter of November 28th, being a letter in answer to a request with regard to 1200 tons, is an offer with regard to 1200 tons, and that no such offer was ever accepted; but even if it could be taken that it was a separate offer with regard to 800 tons and 400 tons, I cannot accede to the view that it reopened the offer of November 24th. That offer was dead, and was no longer binding upon the defendants at all, and therefore it seems to me to be a wrong phrase to say that it reopened the offer of November 24th. The only legal way of construing it is to say that it is a new offer with regard to 800 tons. If it were a separate offer, which I should think it was not, it then would be a new offer with regard to 800 tons, and a separate offer with regard to 400 tons, but, even if it were so, I should think that the new offer with regard to the 800 tons had never been accepted, so as to make a binding contract. The new offer would not, in my opinion, be accepted, by the fact of the plaintiff's letter of November 28th crossing it. If the defendants' letter of November 28th is a new offer of the 800 tons, that could not be accepted by the plaintiff until it came to his knowledge, and his letter of November 28th could only be considered as a cross offer. Put it thus: If I write to a person and say, "If you can give me £6000 for my house, I will sell it you," and on the same day, and before that letter reaches him, he writes to me saying, "If you will sell me your house for £6000 I will buy it," that would be two offers crossing each other, and cross offers are not an acceptance of each other, therefore there will be no offer of either party accepted by the other. That is the case where the contract is to be made by the letters, and by the letters only. I think it would be different if there were already a contract in fact made in words, and then the parties were to write letters to each other, which crossed in the post, those might make a very good memorandum of the contract already made, unless the Statute of Frauds intervened. But where the contract is to be made by the letters themselves, you cannot make it by cross offers, and say that the contract was made by one party accepting the offer which was made to him. It seems to me, therefore, in both views, that the judgment of the court below was right.

BLACKBURN, J. I also think that the judgment should be affirmed. * * * If, in answer to that letter of November 28th, written by the defendants to the plaintiff, in which they ask for an answer by return of post, there had been a letter sent saying. "I will accept the 800 tons and not take the 400 tons," and that had been relied upon as a binding contract, and the defendants had resisted that, and said: "We did not offer you 800 tons, we offered you 1200 tons if you would take them, but not 1200 tons that you might split into two quantities, taking the 800 and rejecting the 400 tons," the question would have been raised whether this letter of the defendants, of November 28th, read as it must be read, with the plaintiff's letter of the 27th, was an offer of that sort which my brothers Honyman and Quain think it was, or whether it was,

as the majority of the court have already said, an offer of 1200 tons, and 1200 tons only? I am of opinon that it was an offer of the 1200 tons, and the 1200 tons only. * * * But then there arises another question; on that same November 28th the plaintiff, before he received or knew of the defendants' letter of November 28th, had written a letter which I read to be an offer on his part, "I will take 800 tons, at the price of 69s." That letter crossed the letter of the defendants, and I think my brothers Honyman and Quain, necessarily, as part of their judgment, are of opinion, that that offer crossing the other offer, and being *ad idem,* according to their construction of the first contract, did make a binding engagement between the parties. It is not necessary in the present case for the Court of Exchequer Chamber to decide that point, and therefore what I am now going to say is not to be considered at all as part of the judgment of the court of error, but as my own individual opinion. When a contract is made between two parties, there is a promise by one, in consideration of the promise made by the other; there are two assenting minds, the parties agreeing in opinion, and one having promised in consideration of the promise of the other—there is an exchange of promises; but I do not think exchanging offers would, upon principle, be at all the same thing. There is, I believe, a total absence of authority on the point.[56] I do not think, though I am not sure, that the question has ever been raised before. The promise or offer being made on each side in ignorance of the promise or the offer made on the other side, neither of them can be construed as an acceptance of the other. * * *

*Judgment of the majority of the court below affirmed.*

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## FARMERS' HANDY WAGON CO. *v.* NEWCOMB.

**(Supreme Court of Michigan, 1916. 192 Mich. 634, 159 N. W 152.)**

The plaintiff is a corporation engaged in the business of manufacturing silos at Saginaw, and the defendant is a farmer living near Traverse City. On the 8th day of June, 1907, the defendant gave plaintiff a written order for a silo, to be delivered f. o. b. at Saginaw and to be consigned to defendant at Traverse City. The purchase price of the silo was to be $141.21. Below the signature of the defendant to the order was written: "Remarks: This man reserves until Aug. 1, 1907, to reconsider the buying of this silo." On the 14th day of June, 1907, the plaintiff wrote to the defendant, accepting the order, and defendant admits receiving the letter. The reason given by defendant for not taking possession of the silo when it was shipped to him is that he canceled the order by a letter written

[56] Compare Ratterman v. Campbell (Ky.) 80 S. W. 1155 (1904).

to plaintiff on July 10th. He testified that he mailed the letter to plaintiff's address with postage fully prepaid. Plaintiff denied receiving the letter.

The circuit judge instructed the jury, in substance, that the order, together with the acceptance, made a completed contract, and that upon the shipment of the silo to defendant and its receipt at Traverse City the defendant became indebted to the plaintiff for the agreed purchase price, unless defendant had canceled and retracted the order as he claimed; * * * and that to show a cancellation or retraction of the order it was necessary that the letter of cancellation should not only have been mailed by defendant, but that it should also have been received by, or come to the knowledge of, plaintiff.

The jury returned a verdict for the plaintiff, and defendant brings the case to this court by writ of error.

PERSON, J.[57] The trial judge correctly construed the meaning of the underwriting appended to defendant's order. To "reconsider" is defined by Webster as the right "to consider again; review with care, especially with a view to a reversal of previous action; as, to reconsider a determination."

The order with the acceptance by plaintiff became a contract subject to a right, on the part of defendant, to withdraw from it within the time stated. It did not require an express confirmation by defendant.

It was also necessary that notice of the withdrawal or cancellation should have reached plaintiff in order to be effective and sufficient. Anson on Contracts (2d Am. Ed.) 32, 33; 1 Elliott on Contracts, 37, 38; Mechem on Sales, § 258. Placing such a notice in the mails, properly addressed and with postage prepaid, undoubtedly creates a presumption that it is duly received; but the receipt of the notice by plaintiff was denied by such officers and agents of the company as usually received its mail, and whether it was received, if sent, became a question for the jury. * * *

*The judgment is affirmed.*[58]

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## McMANUS *v.* FORTESCUE, and another.

**(Court of Appeal. [1907] 2 K. B. 1.)**

Action against an auctioneer for refusing to sign a memorandum of contract of sale. At an auction sale, where the catalogue recited that "each lot will be offered subject to a reserve price," a lot of property

[57] Parts of the statement of facts and of the opinion are omitted.

[58] "Imagine the following case: A, a deaf man, said to B, 'Will you buy my watch for $25?' B replied: 'I will.' A did not hear and asked him to write out the answer. B then wrote, 'No, I will not.' Or suppose this case:

was knocked down to the plaintiff for £85, but the auctioneer then discovered or recollected that the reserve in regard to it was £200 and consequently withdrew the lot and refused to sign a memorandum or to accept a deposit from the plaintiff. On appeal from a judgment for defendant.

COLLINS, M. R.[59] * * * The sale took place under conditions of which the second is that each lot would be offered subject to a reserve price, and the fact lies at the root of the discussion, that every bid is made subject to that condition. What, then, is the meaning in such case of the fall of the hammer? Under the authorities that have been cited it appears that it amounts to an acceptance of the offer of the bidder, but that offer was, as I have said, conditional on the reserve price being reached, and a conditional offer cannot be treated as a general and unconditional one. The condition cannot be lost sight of, and a conditional acceptance by the auctioneer of the conditional offer by the bidder cannot amount to a

Jones had a phonograph on his desk. Upon leaving his office, he spoke into it an offer to sell his horse to Brown for $500. Brown coming in soon after, received the offer from the phonograph and spoke into it an acceptance. Upon leaving the office he changed his mind, and meeting Jones on the street before the latter knew what had taken place, said: 'I don't care to buy your horse, and I withdraw the acceptance which I spoke into your phonograph.' Or suppose, after Brown has spoken his acceptance into the machine, he changes his mind and smashes the machine.

"There would seem to be a contract in all three cases, and this appears to be the legitimate conclusion to be drawn from most of the decisions.

"If one sends to a man on the opposite side of the river a letter containing a proposal calling for a counter promise, and says, 'signify your acceptance by lighting a fire,' and the offeree does so in such a manner as unequivocally to indicate an intention to accept, surely a contract arises. This would be so even though a fog prevents the fire from being seen." Ashley on Contracts, pp. 37-38. But Professor Ashley was in favor of finding contracts from any overt acts evidencing intention, but of protecting the other party by requiring compliance with conditions precedent as to notice, non-interference with acceptance, etc. In the phonograph smashing case, for instance, he finds a violation of a condition precedent that the acceptance shall not be interfered with by the acceptor and concludes: "Thus, although the original offeror would be bound in contract, he would not have to perform his part because of the non-happening of a condition precedent. Whether he could hold the acceptor without performing himself, depends entirely upon the character of the contract. In any case it could certainly be enforced by him according to its terms." Id., p. 39.

On the fog illustration, compare Bal v. Van Staden, 20 So. African Law J. 407, where an attempt was made by an offeree to accept by mail an offer by mail when he knew that the letter of acceptance could not go through on time because of war conditions which blocked the mails and it was held that the contract was not completed by the mailing, though ordinarily it would have been.

[59] The statement of facts is abbreviated and the opinions of Cozens-Hardy, L. J., and Fletcher-Moulton, L. J., are omitted.

binding contract to sell, unless some custom is proved that it shall be so treated, and of that there was no evidence. No authority has been cited to shew that the fall of the hammer could do away with a condition expressly stipulated for the conditions of the sale. * * *

*Appeal dismissed.*

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## EBEN D. JORDAN *v.* ELIZABETH DOBBINS.

**(Supreme Judicial Court of Massachusetts, 1877. 122 Mass. 168, 23 Am. St. Rep. 305.)**

Contract upon the following guaranty: "For value received, the receipt whereof is hereby acknowledged, the undersigned does hereby guaranty to Jordan, Marsh & Co. the prompt payment by George E. Moore to Jordan, Marsh & Co., at maturity, of all sums of money and debts which he may hereafter owe Jordan, Marsh & Co., for merchandise, which they may from time to time sell to him, whether such debts be on book account, by note, draft or otherwise, and also any and all renewals of any such debt. The undersigned shall not be compelled to pay on this guaranty a sum exceeding $1000, but this guaranty shall be a continuing guaranty, and apply to and be available to said Jordan, Marsh & Co., for all sales of merchandise they may make to said George E. Moore until written notice shall have been given by the undersigned to said Jordan, Marsh & Co. and received by them, that it shall not apply to future purchases. Notice of the acceptance of this guaranty and of sale under the same, and demand upon said George E. Moore for payment, and notice to me of non-payment, is hereby waived. In witness whereof I, the undersigned, have hereunto set my hand and seal this twenty-eighth day of February, A. D. 1873. William Dobbins. (Seal.)" Annexed to the declaration was an account of goods sold to Moore.

The case was submitted to the Superior Court, and, after judgment for the plaintiffs, to this court, on appeal, on an agreed statement of facts in substance as follows:

The plaintiffs are partners under the firm name of Jordan, Marsh & Co., and the defendant is the duly appointed administratrix of the estate of William Dobbins.

William Dobbins, on February 28th, 1873, executed and delivered to the plaintiffs the above written contract of guaranty. The plaintiffs thereafter, relying on this contract, sold to said Moore the goods mentioned in the account annexed to the declaration, at the times and for the prices given in said account, all of the goods having been sold and delivered to Moore between January 16th and May 28th, 1874. All the amounts claimed were due from Moore, and payment was duly demanded of him and of the defendant before the date of the writ. Other goods

had been sold by the plaintiffs to Moore between the date of the guaranty and the first date mentioned in the account, but these had been paid for.

William Dobbins died on August 6th, 1873, and the defendant was appointed administratrix of his estate on September 2d, 1873. The plaintiffs had no notice of his death until after the last of the goods mentioned in the account had been sold to Moore.

If upon these facts the defendant was liable, judgment was to be entered for the plaintiffs for the amount claimed; otherwise judgment for the defendant.

MORTON, J. An agreement to guarantee the payment by another of goods to be sold in the future, not founded upon any present consideration passing to the guarantor, is a contract of a peculiar character. Until it is acted upon, it imposes no obligation and creates no liability of the guarantor. After it is acted upon, the sale of the goods upon the credit of the guaranty is the only consideration for the conditional promise of the guarantor to pay for them.

The agreement which the guarantor makes with the person receiving the guaranty is not that I now become liable to you for anything, but that if you sell goods to a third person, I will then become liable to pay for them if such third person does not. It is of the nature of an authority to sell goods upon the credit of the guarantor, rather than of a contract which cannot be rescinded except by mutual consent. Thus such a guaranty is revocable by the guarantor at any time before it is acted upon.

In Offord v. Davis, 12 C. B. (N. S.) 748, the guaranty was of the due payment for the space of twelve months of bills to be discounted, and the court held that the guarantor might revoke it at any time within the twelve months, and that the plaintiff could not recover for bills discounted after such revocation. The ground of the decision was that the defendant's promise by itself created no obligation, but was in the nature of a proposal which might be revoked at any time before it was acted on.[60]

[60] Offord v. Davies (1862), cited *supra*, was an action upon a guarantee addressed to the plaintiff, and signed by the defendants, as follows:

"We, the undersigned, in consideration of your discounting, at our request, bills of exchange for Messrs. Davies & Co., of Newton, Montgomeryshire, drapers, hereby jointly and severally guaranty for the space of twelve calendar months the due payment of all such bills of exchange, to the extent of £600. And we further jointly and severally undertake to make good any loss or expenses you may sustain or incur in consequence of advancing Messrs. Davies & Co. such moneys."

Erle, C. J., for the court said: "The demurrer [to the plea] raises the question whether the defendants had a right to revoke the promise. We are of opinion that they had, and that consequently the plea is good.

"This promise by itself creates no obligation. It is in effect conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendants,

Such being the nature of a guaranty, we are of opinion that the death of the guarantor operates as a revocation of it, and that the person holding it cannot recover against his executor or administrator for goods sold after the death. Death terminates the power of the deceased to act, and revokes any authority or license he may have given, if it has not been executed or acted upon. His estate is held upon any contract upon which a liability exists at the time of his death, although it may depend upon future contingencies. But it is not held for a liability which is created after his death, by the exercise of a power or authority which he might at any time revoke.

Applying these principles to the case at bar, it follows that the defendant is entitled to judgment. The guaranty is carefully drawn, but it is in its nature nothing more than a simple guaranty for a proposed sale of goods. The provision, that it shall continue until written notice is given by the guarantor that it shall not apply to future purchases, affects the mode in which the guarantor might exercise his right to revoke it, but it cannot prevent its revocation by his death. The fact that the instrument is under seal cannot change its nature or construction. No liability existed under it against the guarantor at the time of his death, but the goods for which the plaintiffs seek to recover were all sold afterward.

We are not impressed by the plaintiff's argument that it is inequitable to throw the loss upon them. It is no hardship to require traders, whose business it is to deal in goods, to exercise diligence so far as to ascer-

or to the detriment of himself. But, until the condition has been at least in part fulfilled, the defendants have the power of revoking it. In the case of a simple guarantee for a proposed loan, the right of revocation before the proposal has been acted on did not appear to be disputed. Then, are the rights of the parties affected either by the promise being expressed to be for twelve months, or by the fact that some discounts had been made before that now in question, and repaid? We think not.

"The promise to repay for twelve months creates no additional liability on the guarantor, but, on the contrary, fixes a limit in time beyond which his liability cannot extend. And, with respect to other discounts, which had been repaid, we consider each discount as a separate transaction, creating a liability on the defendant till it is repaid, and, after repayment, leaving the promise to have the same operation that it had before any discount was made, and no more." See Grob v. Gross, 83 N. J. L. 430 (1912).

If, however, the guaranty is not an offer of a series of contracts and revocable so far as not already accepted, but is an offer of one bilateral contract, acceptance makes it irrevocable. See Lascelles v. Clark, 204 Mass. 362 (1910). So if it is an offer of one unilateral contract. In Lloyd's v. Harper, 16 Ch. D. 290, at 319-320 (1880) Lush, L. J., speaks of (1) the unilateral contract guarantee where the doing of the act, as employing the person whose fidelity is guaranteed, or granting the lease to the lessee, the performance of whose covenants is guaranteed, completes the contract, and (2) the guarantee that is divisible in nature, accepted from time to time and revocable at any time in so far as not accepted, as where it is given to secure the balance of a running account at a banker's or a balance of a running account for goods supplied.

tain whether a person upon whose credit they are selling is living.[61]

The decision in Bradbury v. Morgan, 1 H. & C. 249, upon which the plaintiffs rely, was rested upon reasoning which appears to us to be unsatisfactory and inconsistent with the opinion of the same court a year before, in Westhead v. Sproson, 6 H. & N. 728, and with the decision in Offord v. Davies, *ubi supra,* at the argument of which Bradbury v. Morgan was cited; and it has not since been treated as settling the law of Eng-

[61] While the common law rule is that the death of the offeror or that of the offeree will terminate the offer, those who favor the objective rather than the subjective test of a contract, which is the up-to-date view, believe that not until notice of the death should the offer terminate. See Herman Oliphant, The Duration and Termination of an Offer, 18 Mich. L. Rev. 201. As the writer cited said of the case of the death of the offeror (Id. p. 210): "The courts say that the reason the offer is terminated by the death of the offerer is obvious. A contract cannot be made with a dead man. If an actual concurrence of wills is necessary for the formation of a contract, this is true, since in our law the *persona* of the deceased is not continued. But no concurrence of wills is necessary. The offerer by his offer aroused a reasonable expectation in the mind of the offeree upon which, by hypothesis, he has reasonably acted. As between the gratuitous takers of the offerer's property and the offeree, it is perfectly clear which should suffer the consequences of the casualty of the offerer's death." In a footnote he added: "It is believed that one adopting a subjective analysis would be troubled to find grounds for holding a contract to have been formed by an acceptance subsequent to death when the offerer had expressly stated that his death was not to terminate the offer."

Insanity occurring after an offer presents even more difficulty. Subsequent known insanity of the offeror, and similarly of the offeree, would of course terminate the offer. In Beach v. The First Methodist Episcopal Church, 96 Ill. 177 (1880), the action was brought for the balance of a subscription promised for the erection of a church. The subscriber became, and was adjudged, insane before the church acted on the faith of the subscription, and Dickey, C. J., for the court, said:

"The subscription made by Dr. Beach was, in its nature, a mere offer to pay that amount of money to the church upon the condition therein expressed.

"There is nothing in the record tending to show that the church, in this case, took any action, upon the faith of this subscription, until after Dr. Beach was adjudged insane, or that the church paid money or incurred any liability. His insanity, by operation of law, was a revocation of the offer. In Pratt, Administratrix, etc., v. The Trustees of the Baptist Society of Elgin, 93 Ill. 475, this court said, in relation to such a subscription: 'The promise, in such case, stands as a mere offer, and may, by necessary implication, be revoked at any time before it is acted upon. It is the expending of money, etc., or incurring of legal liability on the faith of a promise, which gives the right of action, and without which there is no right of action. Until acted upon, there is no mutuality, and, being only an offer, and susceptible of revocation at any time before being acted upon, it follows that the death of the promisor, before the offer is acted upon, is a revocation of the offer. * * * The continuance of an offer is in the nature of its constant repetition, which, of course, necessarily requires some one capable of making a repetition. Obviously this can no more be done by a dead man than a contract can, in the first instance, be made by a dead man.'

"The ground upon which the court rested its judgment in the Pratt Case was

land. Harris v. Fawcett, L. R. 15 Eq. 311, and L. R. 8 Ch. 866. The reasons of the similar decision in Bank of South Carolina v. Knotts, 10 Rich. 543, are open to the same objections.

*Judgment for the defendant.*

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## CHARLES A. BISHOP *v.* FRANK H. EATON.

(Supreme Judicial Court of Massachusetts, 1894. 161 Mass. 496, 37 N. E. 665.)

Contract, on a guaranty. Writ dated February 2d, 1892. Trial in the Superior Court without a jury, before Braley, J., who found the following facts:

The plaintiff in 1886 was a resident of Sycamore in the State of Illinois, and was to some extent connected in business with Harry H. Eaton, a brother of the defendant. In December, 1886, the defendant in a letter to the plaintiff said, "If Harry needs more money, let him have it, or assist him to get it, and I will see that it is paid."

On January 7th, 1887, Harry Eaton gave his promissory note for two hundred dollars to one Stark, payable in one year. The plaintiff signed the note as surety, relying on the letter of the defendant, and looked to the defendant solely for reimbursement, if called upon to pay the note. Shortly afterward the plaintiff wrote to the defendant a letter stating that the note had been given and its amount, and deposited the letter in the mail at Sycamore, postage prepaid, and properly addressed

the want of capacity on the part of the promisor to continue his promise or offer. The insanity of Dr. Beach rendered him, in law, as incapable of making a contract or of continuing or repeating an offer to the church as if he had been actually dead."

Where the insanity is not known, the solution under the cases depends on whether an insane person's contract is valid, if fair to him, voidable, or void. That it is voidable by the insane person seems to be the more common American doctrine, but there is considerable to be said for the English law as summarized by Lopes, L. J., in The Imperial Loan Company v. Stone, [1892] 1 Q. B., 599, 602-603, as follows: "A contract made by a person of unsound mind is not voidable at that person's option if the other party to the contract believed at the time he made the contract that the person with whom he was dealing was of sound mind. In order to avoid a fair contract on the ground of insanity, the mental incapacity of the one must be known to the other of the contracting parties. A defendant who seeks to avoid a contract on the ground of his insanity must plead and prove not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed." For an English criticism of the doctrine of Imperial Loan Co. v. Stone, see W. H. G. Cook, Mental Deficiency and the English Law of Contract, 21 Col. L. Rev. 424.

On capacity to contract as affected by mental conditions, see 3 L. R. A. (N. S.) 174, note. See also W. J. Leofric Ambrose, Contracts of Insane Persons, 27 Law Quar. Rev. 313.

to the defendant at his home in Nova Scotia. The letter, according to the testimony of the defendant, was never received by him. At the maturity of the note the time for its payment was extended for a year, but whether with the knowledge or consent of the defendant was in dispute. In August, 1889, in an interview between them, the plaintiff asked the defendant to take up the note still outstanding, and pay it, to which the defendant replied: "Try to get Harry to pay it. If he don't, I will. It shall not cost you anything."

On October 1st, 1891, the plaintiff paid the note, and thereafter made no effort to collect it from Harry Eaton, the maker. The defendant testified that he had no notice of the payment of the note by the plaintiff until December 22d, 1891. * * *

The judge * * * ruled, as matter of law upon the findings of fact, that the plaintiff was entitled to recover, and ordered judgment for him; and the defendant alleged exceptions.

KNOWLTON, J.[62] * * * The defendant requested many rulings in regard to the law applicable to contracts of guaranty, most of which it becomes necessary to consider. The language relied on was an offer to guarantee, which the plaintiff might or might not accept. Without acceptance of it there was no contract, because the offer was conditional and there was no consideration for the promise. But this was not a proposition which was to become a contract only upon the giving of a promise for the promise, and it was not necessary that the plaintiff should accept it in words, or promise to do anything before acting upon it. It was an offer which was to become effective as a contract upon the doing of the act referred to. It was an offer to be bound in consideration of an act to be done, and in such a case the doing of the act constitutes the acceptance of the offer and furnishes the consideration. Ordinarily there is no occasion to notify the offerer of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance. In such a case it is implied in the offer that, to complete the contract, notice shall be given with due diligence, so that the promisor may know that a contract has been made. But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act so far that the promisee cannot be affected by a subsequent withdrawal of it, if within a reasonable time afterward he notifies the promisor. In accordance with these principles, it has been held in cases like the present, where the guarantor would not know of

[62] The statement of facts is slightly abbreviated and part of the opinion is omitted.

himself, from the nature of the transaction, whether the offer has been accepted or not, that he is not bound without notice of the acceptance, seasonably given after the performance which constitutes the consideration. Babcock v. Bryant, 12 Pick, 133; Whiting v. Stacy, 15 Gray 270; Schlessinger v. Dickinson, 5 Allen 47.

In the present case the plaintiff seasonably mailed a letter to the defendant, informing him of what he had done in compliance with the defendant's request, but the defendant testified that he never received it, and there is no finding that it ever reached him. The judge ruled, as matter of law, that upon the facts found, the plaintiff was entitled to recover, and the question is thus presented whether the defendant was bound by the acceptance when the letter was properly mailed, although he never received it.

When an offer of guaranty of this kind is made, the implication is that notice of the act which constitutes an acceptance of it shall be given in a reasonable way. What kind of a notice is required depends upon the nature of the transaction, the situation of the parties, and the inferences fairly to be drawn from their previous dealings, if any, in regard to the matter. If they are so situated that communication by letter is naturally to be expected, then the deposit of a letter in the mail is all that is necessary. If that is done which is fairly to be contemplated from their relations to the subject-matter and from their course of dealing, the rights of the parties are fixed, and a failure actually to receive the notice will not affect the obligation of the guarantor.

The plaintiff in the case now before us resided in Illinois, and the defendant in Nova Scotia. The offer was made by letter, and the defendant must have contemplated that information in regard to the plaintiff's acceptance or rejection of it would be by letter. It would be a harsh rule which would subject the plaintiff to the risk of the defendant's failure to receive the letter giving notice of his action on the faith of the offer. We are of opinion that the plaintiff, after assisting Harry to get the money, did all that he was required to do when he seasonably sent the defendant the letter by mail informing him of what had been done.

How far such considerations are applicable to the case of an ordinary contract made by letter, about which some of the early decisions are conflicting, we need not now consider.

The plaintiff was not called upon under his contract to attempt to collect the money from the maker of the note, and it is no defense that he did not promptly notify the defendant of the maker's default, at least in the absence of evidence that the defendant was injured by the delay. This rule in cases like the present was established in Massachusetts in Vinal v. Richardson, 13 Allen 521, after much consideration, and it is well founded in principle and strongly supported by authority.

We find one error in the rulings which require us to grant a new trial. It appears from the bill of exceptions that when the note became due the

time for the payment of it was extended without the consent of the defendant. The defendant is thereby discharged from his liability, unless he subsequently assented to the extension and ratified it. Chace v. Brooks, 5 Cush. 43; Carkin v. Savory, 14 Gray 528. The court should therefore have ruled substantially in accordance with the defendant's eighth request, instead of finding for the plaintiff, as matter of law, on the facts reported. Whether the judge would have found a ratification on the evidence if he had considered it, we have no means of knowing.

*Exceptions sustained.*[68]

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## BIGGERS et al. *v.* OWEN et al.

(Supreme Court of Georgia, 1887. 79 Ga. 658, 5 S. E. 193.)

BLANDFORD, J. McMichael and Owens brought their action of assumpsit against B. A. Biggers, P. J. Biggers, Jr., and T. J. Pearce (the plaintiff in error here) in the City Court of Columbus, to recover a reward of $500, which they alleged had been offered by the defendants. The offer of reward was printed as an advertisement in a newspaper in Columbus, as follows:—

"We will pay $500, the above reward, for the delivery to the sheriff of Muscogee County of the party or parties, with evidence to convict, who administered the poison in the meal which proved fatal to J. W. Biggers and J. F. Burgess and wife on the 11th of November."

Signed B. A. Biggers, P. J. Biggers, Jr., T. J. Pearce.

Upon the trial of the case, the jury rendered a verdict in favor of the plaintiffs for the amount of the reward, $500.

It appeared from the evidence that when this reward was offered, the plaintiff arrested a certain woman, and delivered her to the sheriff of Muscogee county; that a committing trial was had before a justice of the peace and the woman discharged for the want of sufficient evidence to commit. The reward was then withdrawn; but McMichael testifies that after it was withdrawn, Pearce told him to go on, that he would pay

[68] In Black, Starr & Frost v. Grabow, 216 Mass. 516, 518 (1914), Rugg, C. J., said:

"Although it may be that there is no universal doctrine in this commonwealth that "acceptance of an offer must be communicated in order to make a valid simple contract" (Lennox v. Murphy, 171 Mass. 370, 373, 50 N. E. 644), yet it is true that where a guaranty is in the nature of an offer and not pursuant to some previous understanding or arrangement, and no consideration is acknowledged in the instrument and none moves directly to the guarantor, and the circumstances of the parties and the transaction are not such as to indicate that knowledge of acceptance quickly will come to the guarantor, notice of acceptance must be given within a reasonable time in order that the guarantor may be held."

See authorities in 16 L. R. A. (N. S.) 353, note.

him what his services were worth. After this, a warrant was sued out for the same woman by Mr. Pearce. McMichael, being a bailiff in the court, executed the warrant and arrested her. She was indicted for the poisoning, was tried and convicted. The judge in the court below charged the jury that if this reward was offered, and the plaintiffs thereupon furnished evidence going to show that this woman was guilty of the crime, they were entitled to recover for the amount of the reward. The court was requested to charge that if, after this reward was offered, it was withdrawn before the plaintiffs performed the services contemplated by the reward, then no recovery could be had, under the declaration in this case. The court refused to give this in charge as requested, but charged to the contrary.

We think the court erred in declining to charge as requested, and in charging as he did. An offer of reward is nothing more than a proposition; it is an offer to the public; and until some one complies with the terms or conditions of that offer, it may be withdrawn. This is well-settled law, as to which there can be no dispute, and counsel in this case did not contend otherwise. When this offer of reward was withdrawn, and Pearce afterwards told McMichael to go on with the case, that he would pay him for his services, Pearce did not thereby become liable to pay him the amount of this reward, but only to pay him for the value of his services. And this is not an action upon a *quantum meruit* to recover the value of such services; but is an action to recover specifically the amount of this reward, $500. There was no evidence introduced in the court below to show what the value of the services were, and the record does not distinctly show what services were performed.

The court having erred in failing to charge as requested, and in charging the jury as above set out, we consider it unnecessary to say more about the case; and we therefore reverse the judgment.

*Judgment reversed.*[64]

[64] "Suppose for example, the following case:

"A desires to have his safe moved from his old office to a new one. He asks B to do this act, and says he will pay him $25. When the safe has been carried to the door of the new building, A appears and tells B that he withdraws his offer, directing him to leave the safe there. Nevertheless B proceeds and completes the moving. Under such circumstances how can a contract be found, or how can A be held to any liability?

"Or suppose another case:

"A merchant is anxious to have a cart-load of goods placed upon an outgoing steamer, and there is barely time to accomplish this. He asks a cartman to take the goods to the steamer and offers $25 for the act. The cartman loads the goods, and proceeds towards the wharf. On the road, another merchant hails him and offers $100 for the immediate cartage of his goods. The cartman thereupon places the first merchant's goods in a safe place and proceeds to carry the second load. As the cartman has never obligated himself to take the first load, he cannot be held liable for failure to perform, and the first merchant suffers his loss without remedy.

## BRACKENBURY et al. *v.* HODGKIN et al.

**(Supreme Judicial Court of Maine, 1917. 116 Me. 399, 102 Atl. 106.)**

Suit by Joseph A. Brackenbury and another against Sarah D. P. Hodgkin and Walter C. Hodgkin. From a decree for plaintiffs, defendants appeal. Appeal dismissed, and decree affirmed as to Walter C. Hodgkin.

CORNISH, C. J.[65] The defendant Mrs. Sarah D. P. Hodgkin on the 8th day of February, 1915, was the owner of certain real estate—her home farm, situated in the outskirts of Lewiston. She was a widow and was living alone. She was the mother of six adult children, five sons, one of whom, Walter, is the codefendant, and one daughter, who is the coplaintiff. The plaintiffs were then residing in Independence, Mo. Many letters had passed between mother and daughter concerning the daughter and her husband returning to the old home and taking care of the mother, and finally on February 8, 1915, the mother sent a letter to the daughter and her husband which is the foundation of this bill in equity. In this

"In each of these cases it is assumed as a fact that the offer calls for an act. But as in the safe case the offer is revoked before the consideration is furnished, that is, before the act requested is completed, and as in the cartage case the offeree ceases performance, there can be no contract in either". Ashley on Contracts, pp. 78-80. See Clarence D. Ashley, Offers Calling For a Consideration Other Than a Counter Promise, 23 Harv. L. Rev. 159.

Compare 1 Williston on Contracts, §§ 60 and 60a. See also Henry W. Ballantine, Acceptance of Offers for Unilateral Contracts by Partial Performance of Service Requested, 5 Minn. L. Rev. 94, and the articles mentioned in the next paragraph.

"The recognition of merely objective test implied-in-fact contracts throws the light of understanding on many otherwise dark decisions, even if it does not lead to sympathetic appreciation of them. It may even supply the proper solution of the troublesome problem of what shall be the effect of an attempted revocation of an offer of unilateral contract where the notice of revocation comes after the offeree has started to accept and while he is still continuing to perform the acts of acceptance. See Williston's Wald's Pollock on Contracts, 34, note 39; McGovney, 'Irrevocable Offers,' 27 Harv. L. Rev. 644, 654-663; Wormser, 'The True Conception of Unilateral Contracts,' 26 Yale L. J. 136; Corbin, 'Offer and Acceptance and Some of the Resulting Legal Relations,' 26 Yale L. J. 169, 195-196. The case of an attempted revocation of an offer to an indefinite number of persons by advertisement in the newspapers is, perhaps, one which must be handled, as Sir Frederick Pollock says it was in Shuey v. United States, 92 U. S. 73 (1875) by judicial legislation (Williston's Wald's Pollock on Contracts, 23), but the case of an offer to a known person or to known persons might well be disposed of, without violation of principle, by permitting the offer of unilateral contract to be revoked prior to substantially complete performance of the acts called for and yet preventing real hardship to the offeree, in cases where an adequate quasi-contractual obligation cannot be found, by enforcing an implied-in-fact contract to compensate the offeree for what he has done for the offeror at the latter's request." George P. Costigan, Jr., Implied in Fact Contracts and Mutual Assent, 33 Harv. L. Rev. 376, 399, n.

[65] Parts of the opinion are omitted.

letter she made a definite proposal, the substance of which was that if the Brackenburys would move to Lewiston, and maintain and care for Mrs. Hodgkin on the home place during her life, and pay the moving expenses, they were to have the use and income of the premises, together with the use of the household goods, with certain exceptions, Mrs. Hodgkin to have what rooms she might need. The letter closed, by way of postscript, with the words, "you to have the place when I have passed away."

Relying upon this offer, which was neither withdrawn nor modified, and in acceptance thereof, the plaintiffs moved from Missouri to Maine late in April, 1915, went upon the premises described and entered into the performance of the contract. Trouble developed after a few weeks, and the relations between the parties grew most disagreeable. The mother brought two suits against her son-in-law on trifling matters, and finally ordered the plaintiffs from the place, but they refused to leave. Then on November 7, 1916, she executed and delivered to her son, Walter C. Hodgkin, a deed of the premises, reserving a life estate in herself. Walter, however, was not a *bona fide* purchaser for value without notice, but took the deed with full knowledge of the agreement between the parties and for the sole purpose of evicting the plaintiffs. On the very day the deed was executed he served a notice to quit upon Mr. Brackenbury, as preliminary to an action of forcible entry and detainer which was brought on November 13, 1916. This bill in equity was brought by the plaintiffs to secure a reconveyance of the farm from Walter to his mother, to restrain and enjoin Walter from further prosecuting his action of forcible entry and detainer, and to obtain an adjudication that the mother holds the legal title impressed with a trust in favor of the plaintiffs in accordance with their contract.

The sitting justice made an elaborate and carefully considered finding of facts and signed a decree, sustaining the bill with costs against Walter C. Hodgkin, and granting the relief prayed for. The case is before the law court on the defendants' appeal from this decree.

Four main issues are raised.

1. As to the completion and existence of a valid contract.

A legal and binding contract is clearly proven. The offer on the part of the mother was in writing, and its terms cannot successfully be disputed. There was no need that it be accepted in words, nor that a counter promise on the part of the plaintiffs be made. The offer was the basis, not of a bilateral contract, requiring a reciprocal promise, a promise for a promise, but of a unilateral contract requiring an act for a promise. "In the latter case the only acceptance of the offer that is necessary is the performance of the act. In other words, the promise becomes binding when the act is performed." 6 R. C. L. 607. This is elementary law.

The plaintiffs here accepted the offer by moving from Missouri to the mother's farm in Lewiston and entering upon the performance of the specified acts, and they have continued performance since that time so

far as they have been permitted by the mother to do so. The existence of a completed and valid contract is clear. * * *

The plaintiffs are entitled to the remedy here sought, and the entry must be:

*Appeal dismissed. Decree of sitting justice affirmed, with costs against Walter C. Hodgkin.*[66]

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## SHUEY *v.* UNITED STATES.

**(Supreme Court of the United States, 1875. 92 U. S. 73, 23 L. Ed. 697.)**

Appeal from the Court of Claims.

Henry B. Ste. Marie filed his petition in the Court of Claims to recover the sum of $15,000, being the balance alleged to be due him of the reward of $25,000 offered by the Secretary of War, on April 20th, 1865, for the apprehension of John H. Surratt, one of Booth's alleged accomplices in the murder of President Lincoln.

The court below found the facts as follows:

[66] Professor Corbin has suggested in 27 Yale L. J. 384-385, that the court in the principal case probably viewed the defendant's offer as "I promise to convey my land to you *in return* for your moving to Maine and *on condition* that you support me during my life" and on that assumption agrees with it. But was that the court's theory?

"The contract at the date of its making was unilateral, a mere offer [to pay 30 days after the completion by plaintiff of a double track street railway to a certain point for which plaintiff would have to secure a franchise] that if subsequently accepted and acted upon by the other party to it would ripen into a binding enforceable obligation. When the respondent purchased and paid upwards of $1,500 for a franchise it had acted upon the contract, and it would be manifestly unjust thereafter to permit the offer that had been made to be withdrawn. The promised consideration had then been partly performed, and the contract had taken on a bilateral character. * * * The notice of withdrawal from the contract was ineffectual. * * * Again, it came too late, after the obligations of the parties had become fixed. * * * The consideration for appellants' agreement was fully performed when the road was completed." Gray, C., in Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 658 (1902).

"It is true as a general proposition that a party making an offer of a reward may withdraw it before it is accepted. But persons offering rewards must be held to the exercise of good faith and cannot arbitrarily withdraw their offers for the purpose of defeating payment, when to do so would result in the perpetration of a fraud upon those who in good faith attempted to perform the service for which the reward was offered." Barnes, J., in Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 525 (1912). In that case the plaintiff had done all the work required of him in the time specified and only needed to remain in the defendant's employ to January 1 to meet all the terms of the unilateral contract offer of reward. The defendant discharged him on Dec. 30 and the evidence would have supported a finding by the jury that the sole object of the discharge of plaintiff was to prevent him from receiving the reward.

See also the circulation prize contest case, Wachtel v. National Alfalfa Journal Co., (Ia.) 176 N. W. 801 (1920).

1. On April 20th, 1865, the Secretary of War issued, and caused to be published in the public newspapers and otherwise, a proclamation, whereby he announced that there would be paid by the War Department "for the apprehension of John H. Surratt, one of Booth's accomplices," $25,000 reward, and also that "liberal rewards will be paid for any information that shall conduce to the arrest of either of the above-named criminals or their accomplices;" and such proclamation was not limited in terms to any specific period, and it was signed "Edward M. Stanton, Secretary of War." On November 24th, 1865, the President caused to be published his order revoking the reward offered for the arrest of John H. Surratt. 13 Stat. 778.

2. In April, 1866, John H. Surratt was a zouave in the military service of the Papal Government, and the claimant was also a zouave in the same service. During that month he communicated to Mr. King, the American Minister at Rome, the fact that he had discovered and identified Surratt, who had confessed to him his participation in the plot against the life of President Lincoln. The claimant also subsequently communicated further information to the same effect, and kept watch, at the request of the American Minister, over Surratt. Thereupon certain diplomatic correspondence passed between the Government of the United States and the Papal Government relative to the arrest and extradition of Surratt; and on November 6th, 1866, the Papal Government, at the request of the United States, ordered the arrest of Surratt, and that he be brought to Rome, he then being at Veroli. Under this order of the Papal Government, Surratt was arrested; but, at the moment of leaving prison at Veroli, he escaped from the guard having him in custody, and, crossing the frontier of the Papal territory, embarked at Naples, and escaped to Alexandria in Egypt. Immediately after his escape, and both before and after his embarkation at Naples, the American Minister at Rome, being informed of the escape by the Papal Government, took measures to trace and rearrest him, which was done in Alexandria. From that place he was subsequently conveyed by the American Government to the United States; but the American Minister, having previously procured the discharge of the claimant from the Papal military service, sent him forward to Alexandria to identify Surratt. At the time of the first interview between the claimant and the American Minister, and at all subsequent times until the final capture of Surratt, they were ignorant of the fact that the reward offered by the Secretary of War for his arrest had been revoked by the President. The discovery and arrest of Surratt were due entirely to the disclosures made by the claimant to the American Minister at Rome; but the arrest was not made by the claimant, either at Veroli, or subsequently at Alexandria.

3. There has been paid to the claimant by the defendants, under the Act of July 27th, 1868 (15 Stat. 234 § 3), the sum of $10,000. Such

payment was made by a draft on the Treasury payable to the order of the claimant, which draft was by him duly indorsed.

The court found as a matter of law that the claimant's service, as set forth in the foregoing findings, did not constitute an arrest of Surratt within the meaning of the proclamation, but was merely the giving of information which conduced to the arrest. For such information the remuneration allowed to him under the Act of Congress was a full satisfaction, and discharges the defendants from all liability.

The petition was dismissed accordingly, whereupon an appeal was taken to this court.

Ste. Marie having died *pendente lite,* his executor was substituted in his stead.

STRONG, J. We agree with the Court of Claims, that the service rendered by the plaintiff's testator was, not the apprehension of John H. Surratt, for which the War Department had offered a reward of $25,000, but giving information that conduced to the arrest. These are quite distinct things, though one may have been a consequence of the other. The proclamation of the Secretary of War, treated them as different; and, while a reward of $25,000 was offered for the apprehension, the offer for information was only a "liberal reward." The findings of the Court of Claims also exhibit a clear distinction between making the arrest and giving the information that led to it. It is found as a fact, that the arrest was not made by the claimant, though the discovery and arrest were due entirely to the disclosures made by him. The plain meaning of this is, that Surratt's apprehension was a consequence of the disclosures made. But the consequence of a man's act are not his acts. Between the consequence and the disclosure that leads to it there may be, and in this case there were, intermediate agencies. Other persons than the claimant made the arrest—persons who were not his agents, and who themselves were entitled to the proffered reward for his arrest, if any persons were. We think, therefore, that at most the claimant was entitled to the "liberal reward" promised for information conducing to the arrest; and that reward he has received.[67]

[67] While it is clear that to earn a reward one must do the precise thing called for, it is frequently a matter of some difficulty to determine just what is called for. Interpretations vary widely. In Juniata County v. McDonald, 122 Pa. St. 115 (1888), for instance, where the reward was for the capture and delivery of a criminal to jail, the court said:

"A mere reading of this paper settles the whole controversy. The reward was not offered for information as to the prisoner's whereabouts, but for his capture and delivery. How, then, could one be entitled to that reward who neither captured nor delivered him? Admitting, then, that the plaintiff gave the sheriff accurate information as to where the culprit could be found, and that he went with him and acted as one of his posse, yet on that officer fell the duty of arrest and the plaintiff was relieved of all responsibility."

In Smith v. State, 38 Nev. 477 (1915), on the other hand, an offer for the

But, if this were not so, the judgment given by the Court of Claims is correct.

The offer of a reward for the apprehension of Surratt was revoked on November 24th, 1865; and notice of the revocation was published. It is not to be doubted that the offer was revocable at any time before it was accepted, and before anything had been done in reliance upon it. There was no contract until its terms were complied with. Like any other offer of a contract, it might, therefore, be withdrawn before rights had accrued under it; and it was withdrawn through the same channel in which it was made.[68] The same notoriety was given to the revocation that was given to the offer; and the findings of fact do not show that any information was given by the claimant, or that he did anything to entitle him to the reward offered, until five months after the offer had been withdrawn. True, it is found that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made.

*Judgment affirmed.*[69]

arrest and conviction of the persons who committed a certain murder was deemed earned by members of a posse who killed the Indians guilty of the crime.

[68] See Sullivan v. Phillips, 178 Ind. 164 (1912).

"In other words, the proposal is treated as subject to a tacit condition that it may be revoked by an announcement made by the same means. This may be a convenient rule and may perhaps be supported as a fair inference of fact from the habits of the newspaper-reading part of mankind; yet it seems a rather strong piece of judicial legislation." Pollock on Contracts, 8 ed., p. 23.

"Suppose A makes an offer to B, saying that it is to remain open for two weeks, but is to end at once if A's factory is destroyed by fire within the two weeks. Suppose the factory burns within the period limited and A thereafter, accepts, not knowing that it has burned. No contract arises, not because the offer has been revoked, but because it has lapsed upon the happening of this contingency. The contingency qualified the expectation. When one reads an offer of a reward in a newspaper, the expectation aroused is similarly qualified. It is a matter of common experience that, after offers of this kind have been made in this way the offerers publish their change of mind in the same manner. 'As a fair inference of fact from the habits of the newspaper reading part of mankind,' it can be said that unless the expectation aroused by an offer of a reward so communicated is thus limited and qualified, it is not a reasonable expectation [Author's note: For the same reason, the contingency has not happened unless the second publication is substantially as widespread as was the publication of the reward]. The second publication does not need to be relied upon as a revocation. The expectation is contingent and this publication is the contingency." Herman Oliphant, The Duration and Termination of an Offer, 18 Mich. L. Rev. 201, 206.

[69] "A person may, doubtless, publicly offer a reward by oral statement as well as by hand bill, poster or newspaper. The latter mode has the advantage of being likely to make the offer more generally known, but it is no more

## FORTUNE SYMMES *v.* JOHN B. FRAZIER.

**(Supreme Judicial Court of Massachusetts, 1810. 6 Mass. 344, 4 Am. Dec. 142.)**

This was an action of assumpsit, with divers counts, to recover the sum of two hundred dollars, or a part thereof, as a compensation for finding and causing to be restored, a large sum of money in bank bills, which the defendant had lost from his pocket.

A trial was had upon the general issue, at the last November term, before Parker, J., from whose report it appears that the defendant, having lost from his pocket a large number of bank bills, contained in a paper wrapper, amounting to more than fifteen hundred dollars, published an advertisement in the Boston Gazette, in which he described, as nearly as he could the money lost, and offered a reward of two hundred dollars to any person who should find and restore the same. The plaintiff having seen the advertisement, and having observed an unusual number of bank bills in the possession of a man whom he suspected to have stolen or found them, gave notice to the defendant, who, in consequence of the information so given, and by the plaintiff's aid and assistance, recovered more than one thousand dollars of the sum lost, and took the promissory note of the man in whose hands the money was found, for the part which was not restored, except fifty or sixty dollars' worth of furniture, which he also received from the original finder.

It was insisted in the defense, that, as the whole sum lost was not recovered, the plaintiff had not brought himself within the terms of the promise, and therefore, was not entitled to the reward, or any part of it; but, that, if he was entitled to any thing, it could only be upon the count for a *quantum meruit;* and, it appearing in the case that he had received five dollars from the defendant, that he had been sufficiently paid for his time and services; and therefore, that the verdict ought to be against him even upon this count.

But the judge ruled, and so instructed the jury, that the fair construction of the advertisement was, that the loser would pay two hundred dollars for the whole sum lost, and a ratable proportion for any part that should be recovered; and he further stated to the jury that, upon the count for a *quantum meruit,* they might consider the advertisement as evidence of the plaintiff's acknowledgment that the sum of two hundred dollars was a reasonable compensation for finding and restoring the whole, and might adopt it as a rule for ascertaining the reasonable compensation for the part which was actually restored.

Upon this direction, a verdict was accordingly returned for the plaintiff. The defendant moved to set aside the verdict for the misdirection of the judge. Upon this motion, the cause stood over to this term, and was now submitted without argument.

**binding than a public offer, orally made." Worden, J., in Hayden v. Songer, 56 Ind. 42, 46 (1877).**

PARKER, J.[70] * * * An offer of a reward might undoubtedly be so expressed as to exclude any apportionment; for the owner of the property may prescribe his terms for the restoration of it, he having a right to reclaim it, wherever found. But where a compensation is offered in general terms, like those in the present case, (viz., two hundred dollars for the finding and restoring of a lost parcel containing bank bills,) it is consistent with honesty and fair dealings, and with the interest of the loser himself, and not inconsistent with any principle of law, that a proportion of the reward should be recovered, according to the sum actually restored. The direction at the trial, was, therefore, right. * * *

PER CURIAM. Let judgment be entered on the verdict.[71]

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## WILLIAMS *v.* CARWARDINE.

**(Court of King's Bench, 1833. 4 Barnewall & Adolphus, 621.)**

Assumpsit to recover £20, which the defendant promised to pay to any person who should give such information as might lead to a discovery of the murder[er] of Walter Carwardine. Plea, general issue. At the trial before Parke, J., at the last spring assizes for the county of Hereford, the following appeared to be the facts of the case: One Walter Carwardine, the brother of the defendant, was seen on the evening of March 24th, 1831, at a public-house at Hereford, and was not heard of again till his body was found on April 12th in the river Wye, about two miles from the city. An inquest was held on the body on April 13th and the following days till the 19th; and it appearing that the plaintiff was at a house with the deceased on the night he was supposed to have been murdered, she was examined before the magistrates, but did not then give any information which led to the apprehension of the real offender. On April 25th the defendant caused a hand-bill to be published, stating that whoever would give such information as should lead to a discovery of the murder[er] of Walter Carwardine should, on conviction, receive a reward of £20; and any person concerned therein, or privy thereto (except the party who actually committed the offense), should be entitled to such reward, and every exertion used to procure a pardon; and it then added,

[70] Parts of the opinion are omitted.

[71] See Hawk v. Marion County, 48 Ia. 472 (1878). Compare Bloomfield v. Maloney, 176 Mich. 785 (1913) where the court divided a reward between three persons who did not act in concert to earn it. Usually, however, only one person, or several acting together by agreement, can earn a reward, and "It is well settled that in a contest between informers he is the informer who, with the intention of having his information acted upon, first gives information of a violation of law, which induces the prosecution, and contributes to the recovery of the fine, penalty, or forfeiture which is eventually recovered." Brown, J., in U. S. v. Simons, 7 Fed. 709, 711-712 (1881).

that information was to be given, and application for the above reward was to be made to Mr. William Carwardine, Holmer, near Hereford. Two persons were tried for the murder at the summer assizes 1831, but acquitted. Soon after this, the plaintiff was severely beaten and bruised by one Williams, and on August 23d, 1831, believing she had not long to live, and to ease her conscience, she made a voluntary statement, containing information which led to the subsequent conviction of Williams. Upon this evidence it was contended, that as the plaintiff was not induced by the reward promised by the defendant to give evidence, the law would not imply a contract by the defendant to pay her the £20. The learned judge was of opinion, that the plaintiff, having given the information which led to the conviction of the murderer, had performed the condition on which the £20 was to become payable, and was therefore entitled to recover it; and he directed the jury to find a verdict for the plaintiff, but desired them to find specially whether she was induced to give the information by the offer of the promised reward. The jury found that she was not induced by the offer of the reward, but by other motives.

Curwood now moved for a new trial.

DENMAN, C. J. The plaintiff, by having given information which let to the conviction of the murderer of Walter Carwardine, has brought herself within the terms of the advertisement, and therefore is entitled to recover.

LITTLEDALE, J. The advertisement amounts to a general promise, to give a sum of money to any person who shall give information which might lead to the discovery of the offender. The plaintiff gave that information.

PARKE, J. There was a contract with any person who performed the condition mentioned in the advertisement.

PATTISON, J. I am of the same opinion. We cannot go into the plaintiff's motives.

*Rule refused.*[72]

[72] In Gibbons v. Proctor, 64 L. T. (N. S.), 594, (1891) the plaintiff, a police officer, was allowed to recover a reward offered by hand-bill for information leading to the conviction of the perpetrator of a certain crime although he sent the information on its way to his superior officer before the reward was offered, since it reached such superior after the latter knew of the offer and, therefore, said Day, J., "The condition was fulfilled after the publication of the hand-bill and the announcement therein contained of the defendant's offer of the reward to the informant."

In Dawkins v. Sappington, 26 Ind. 199 (1866), Frazer, J. said of the return of a stolen horse by plaintiff in ignorance of defendant's offer of a reward, for which reward plaintiff was suing:

"If the offer was made in good faith, why should the defendant inquire whether the plaintiff knew that it had been made? Would the benefit to him be diminished by the discovery that the plaintiff, instead of acting from mercenary motives, had been impelled solely by a desire to prevent the larceny from being profitable to the person who had committed it? Is it not well that

## BROADNAX *v.* LEDBETTER.

(Supreme Court of Texas, 1907. 100 Tex. 375, 99 S. W. 1111, 9 L. R. A. (N. S.) 1057.)

Action by S. H. Broadnax against A. L. Ledbetter to recover a reward for the recapture and return to jail of an escaped prisoner. The defendant interposed demurrers on the ground that the petition stated no cause of action, because it was not alleged that the plaintiff had knowledge or notice of the reward when the escaped prisoner was captured and returned to jail by the plaintiff. These demurrers were by the court sustained, and, plaintiff declining to amend, judgment was entered dismissing plaintiff's case, with a judgment against him for all costs, etc. From the judgment for defendant, plaintiff appeals. Questions certified by the Court of Appeals to the Supreme Court. Judgment affirmed.

WILLIAMS, J.[78] This case is sent up by the Court of Civil Appeals for the third district upon the following certificate: * * *

"We propound the following question: Was notice or knowledge to plaintiff of the existence of the reward when the recapture was made essential to his right to recover?"

Upon the question stated there is a conflict among the authorities in other states. All that have been cited or found by us have received due consideration, and our conclusion is that those holding the affirmative are correct. The liability for a reward of this kind must be created, if at all, by contract. There is no rule of law which imposes it except that which enforces contracts voluntarily entered into. A mere offer or promise to pay does not give rise to a contract. That requires the assent or meeting of two minds, and therefore is not complete until the offer is accepted. Such an offer as that alleged may be accepted by any one who performs the service called for when the acceptor knows that it has been made and acts in performance of it, but not otherwise. He may do such things as are specified in the offer, but, in so doing, does not act in performance of it, and therefore does not accept it, when he is ignorant of its having been made. There is no such mutual agreement of minds as is essential to a contract. The offer is made to any one who will accept it by performing the specified acts, and it only becomes binding when another mind has embraced and accepted it. The mere doing of the specified things without reference to the offer is not the consideration for which it calls. This is the theory of the authorities which we regard as sound.

anyone who has an opportunity to prevent the success of a crime, may know that by doing so he not only performs a virtuous service, but also entitles himself to whatever reward has been offered therefor to the public?" See also Sullivan v. Phillips, 178 Ind. 164 (1912).

On knowledge, of offer of reward as prerequisite to right to reward, see 1 Ann. Cas. 285, note.

[78] The statement of facts is abbreviated from the opinion and the part of the opinion stating the facts is omitted.

Pollock on Contracts, 20; Anson on Contracts, 41; Wharton on Contracts, §§ 24, 507; Story on Contracts (5th Ed.) 493; Page on Contracts, § 32; 9 Cyc. Law & Proc. 254; 29 Am. & Eng. Ency. Law, 956. The decisions of the courts upon the question are cited by the authorities referred to.[74]

[74] In Fitch and Jones v. Snedaker, 38 N. Y. 248, 251-252 (1868), Woodruff, J. said:

"To the existence of a contract there must be mutual assent, or in another form offer and consent to the offer. The motive inducing consent may be immaterial, but the consent is vital. Without that there is no contract. How, then, can there be consent or assent to that of which the party has never heard? * * * An offer cannot become a contract unless acted upon or assented to. Such is the elementary rule in defining what is essential to a contract."

In Sheldon v. George, 132 N. Y., Appellate Division 470 (1909), plaintiff sued to recover $100 reward offered by defendant for the return of a pair of diamond earrings lost from defendant's store. Defendant alleged in effect that the two diamond earrings were stolen from him by one Katz, who thereafter sold the diamonds which were in said earrings to plaintiff. That after plaintiff had been informed that the diamonds so purchased were stolen and were the property of defendant, and he had been requested to surrender them to defendant and had refused to do so, he having been informed that defendant was about to institute legal proceedings to discover the whereabouts of the diamonds, delivered them to defendant, at the same time denying that the diamonds were the property of defendant, and denying that he could identify them. He left them in defendant's possession without waiving any rights he might have as a purchaser thereof. Robson, J., for the court said:

"To establish his contract with defendant by which the latter agreed to pay him the offered reward, he (the plaintiff) must necessarily prove a return of the diamonds to defendant voluntarily on his part, and in reliance upon the terms upon which the reward was offered. If the plaintiff returned the diamonds under compulsion, or even if he did so without knowledge of the offer, then no contract exists, and no liability of defendant to pay him the reward is created by the simple fact that defendant received the diamonds from plaintiff. Vitty v. Eley, 51 App. Div. 44, 64 N. Y. Supp. 397. As was said in the case last cited, the contract element would be destroyed if the service for which the reward was offered was not voluntary on the part of the one claiming it. * * * From the whole evidence, even accepting plaintiff's own version of the transactions, I think the conclusion is inevitable that plaintiff returned the diamonds, not with the intention of complying with defendant's offer of the reward, but solely to escape the trouble promised him if the threatened legal proceedings were begun, and with the further expressed intention of claiming the diamonds as his own by purchase, provided defendant failed to establish conclusively the identity of those returned with those he had lost. * * * The diamonds were returned as a result of compulsion, rather than voluntarily. The subsequent admission of defendant's title to them did not in any way change the character of the original act in returning them. The return was a fixed fact at the first interview. That return did not entitle plaintiff to the reward."

In Vitty v. Ely, cited in the passage last quoted, defendant offered a reward of $25 for the arrest and conviction of the party or parties who broke into and stole property from a school house. Plaintiff gave information which led to the arrest and conviction of a crony of his. The trial court found that he gave it

Some of the authorities taking the opposite view seem to think that the principles of contracts do not control the question, and in one of them, at least, it is said that "the sum offered is but a boon, gratuity, or bounty, generally offered in a spirit of liberality, and not as a mere price, or a just equivalent simply for the favor or service requested, to be agreed or assented to by the person performing it, but, when performed by him, as justly and legally entitling him to a fullfillment of the promise, without any regard whatever to the motive or inducement which prompted him to perform it." Eagle v. Smith, 4 Houst. (Del.) 293. But the law does not force persons to bestow boons, gratuities, or bounties merely because they have promised to do so. They must be legally bound before that can be done. It may be true that the motive of the performer in rendering service is not of controlling effect, as is said in some of the authorities above cited in pointing out the misapprehension of the case of Williams v. Carwardine, 6 English Ruling Cases, 133, into which some of the courts have fallen. But this does not reach the question whether or not a contractual obligation is essential.

Other authorities say that it is immaterial to the offerer that the person doing that which the offer calls for did not know of its existence; that the services are as valuable to him when rendered without as when rendered with knowledge. Dawkins v. Sappington, 26 Ind. 199; Auditor v. Ballard, 9 Bush. (Ky.) 572, 15 Am. Rep. 728. But the value to the offerer of the acts done by the other party is not the test. They may in supposable cases be of no value to him, or may be no more valuable to him than to the person doing them. He is responsible, if at all, because, by his promise, he has induced another to do the specified things. Unless

because he feared he might be arrested for complicity with his crony, or without expectation of obtaining the reward. Judgment for defendant was affirmed. Spring, J., for the court, said: "As I have suggested, it [the right to a reward] is a contract obligation. This being so, it must be the voluntary giving up of the information by the person. If cork-screwed out of him by threats inducing fear of prosecution, I take it no recovery could be had. * * * The authorities hold that the information must be imparted with a view to obtaining the reward."

Compare Markillie v. Markillie, 115 Mich. 658 (1898), where heirs at law attacked a conveyance by husband to wife as procured when the husband was mentally incompetent by undue influence and without consideration. On the consideration point, Grant, C. J., for the court, assumed that it was shown that the grantor told the grantee that he would convey the land to her if she would marry him, but said: "Whatever Mr. Markillie said to her, she has disposed of the question of a valid antenuptial contract by her own testimony, for she says that she did not rely upon any such promise in getting married: 'I married him for a companion, so that I might have some place to stay, and that he might have some place to stay. I had a home as well as I have now. One would assist in taking care of the other.' The promise to convey was not, therefore, the consideration for the marriage contract." A decree setting aside the deed was affirmed on the ground that the grantor was incompetent to convey.

so induced, the other is in no worse position than if no reward had been offered. The acting upon this inducement is what supplies, at once, the mutual assent and the contemplated consideration. Without the legal obligation thus arising from contract there is nothing which the law enforces.

Reasons have also been put forward of a supposed public policy, assuming that persons will be stimulated by the enforcement of offers of rewards in such cases to aid in the detection of crime and the arrest and punishment of criminals. But, aside from the fact that the principles of law to be laid down cannot on any sound system of reasoning be restricted to offers made for such purposes, it is difficult to see how the activities of people can be excited by offers of rewards of which they know nothing. If this reason had foundation in fact, it would hardly justify the courts in requiring private citizens to minister to the supposed public policy by paying rewards merely because they have made offers to pay upon which no one has acted. Courts can only enforce liabilities which have in some way been fixed by the law. While we have seen no such distinction suggested, it may well be supposed that a person might become legally entitled to a reward for arresting a criminal, although he knew nothing of its having been offered, where it is or was offered in accordance with law by the government. A legal right might in such a case be given by law without the aid of contract.[75] But the liability of the individual citizen must arise from a contract binding him to pay.[76]

The question is answerable in the affirmative.

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## WATTERS *v.* LINCOLN.

**(Supreme Court of South Dakota, 1912. 29 S. D. 98, 135 N. W. 712.)**

Action by G. M. Watters against A. D. Lincoln. From a judgment for defendant, plaintiff appeals. Affirmed.

McCOY, P. J.[77] It appears from the record that at all times material to the issues defendant resided at Seattle, in the state of Washington, and that plaintiff resided at Redfield, Spink county, this state. Defendant was the owner of two quarter sections of land in Spink county. On the 17th day of August, 1910, defendant wrote plaintiff a letter, offering to sell to him the said quarter sections of land upon certain specified terms

**[75] Some of the cases do distinguish between a reward offered by private parties and one offered under legislative authority on the ground that contract principles do not necessarily apply to the latter. See Smith v. State, 38 Nev. 477 (1915) where because the reward was offered by the state the court held that it was earned by persons who when they complied with the conditions, had no knowledge that the reward had been offered.**

**[76] See Taft v. Hyatt, (Kans.) 180 Pac. 213 (1919).**

**[77] The quotations in the opinion have been abbreviated.**

at any time on or before September 5th following. This letter was received by plaintiff in due course of mail some three or four days later. On the evening or night of August 26, 1910, plaintiff by a night telegraph letter or message wired to defendant his acceptance of the said offer of defendant contained in said letter of the 17th, which night message was delivered to defendant on the morning of the 27th day of August. Defendant on receipt of this message immediately wired back to plaintiff: "Twenty-four hours too late. Land sold." On the 26th day of August, about 11 a m., defendant received a telegram from Lyons & Schoniger Land Company of Redfield, defendant's agents, informing him that they had sold defendant's said land, and on the same day accepted said sale by Lyon & Schoniger Company by mailing to them a letter of acceptance and also mailed a letter to plaintiff informing him of the sale of said land, which letter to plaintiff was postmarked at Seattle at 6 p. m. August 26th, and was received by plaintiff on August 29th. It appears from the evidence that plaintiff knew at the time of receiving said offer and prior thereto that defendant was offering said land for sale, through others. It also appears from the evidence that plaintiff was informed personally and received knowledge on the 26th day of August prior to sending his night message of acceptance that said land had been sold by defendant, was so informed by one Elwell who farmed said land. Plaintiff brought suit to compel specific performance of the alleged contract to sell said land mentioned in said letter of defendant to plaintiff dated August 17, 1910. Defendant answered, alleging that he had sold said land prior to the acceptance by plaintiff of the offer to sell contained in said letter of August 17th, and that plaintiff had knowledge thereof. Findings and judgment were made and rendered in favor of defendant, and plaintiff appeals, alleging insufficiency of the evidence to justify the findings and judgment, and that the findings and judgment are against the law. We are of the opinion that the evidence fully sustains the findings and judgment, and that the same are not against the law.

Pomeroy in his work on Contracts says: "Before specific performance of a contract can be compelled by decree of a court, a contract must be actually concluded between the parties, for otherwise there are no rights upon which the equitable remedy can operate. * * * And, if it is left doubtful from all the evidence in the case whether a contract was concluded or not, equity will not grant specific relief. * * * The offer is, while it remains such, completely under the control of the person who makes it. As the offer is not in any sense binding, the person who makes it may at any time before a valid acceptance has changed its character withdraw it, and thus put an end to the negotiation. * * * No formal notice is necessary to constitute a withdrawal. It is sufficient that the person making the offer does some act inconsistent with it, as, for example, sells the property in question to another purchaser, and that the person to whom the offer was made has knowledge of such act. Indeed,

it appears that a sale of the property to a third person would of itself be a withdrawal, although made without the knowledge of the originally intended vendee."[78] Pomeroy on Contracts, subject, Specific Performance, §§ 58, 59, 60, 61.

"* * * But an offer cannot be withdrawn by a mere determination to withdraw it. The fact of withdrawal must, on obvious principles, be communicated to the other party. No formal notice is required, however. It is sufficient if the person to whom the offer was made has actual knowledge that the other person has done some act inconsistent with the continuance of the offer. The fact that the offer names a certain period within which acceptance may be made merely limits the time that the offer shall remain in force, and does not affect the right of withdrawal within such time, unless a consideration moves from the person to whom the offer is made so as to constitute a valid option, or the offer is made in the form of a promise under seal. Withdrawal may be effected by implication, as well as by express declaration that the offer is withdrawn. Thus an offer to sell is withdrawn where the owner of the land sells it to third parties before the person to whom the offer was made signifies his acceptance." 29 Am. & Eng. Ency. pp. 593-595. Dickenson v. Dodds, 2 Ch. D. 463;[79] Coleman v. Applegarth, 68 Md. 29, 11 Atl. 284, 6 Am. St. Rep. 417. In this last-cited case the court approved this language, quoted from Dickenson v. Dodds, an English case: "If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere *nudum pactum*, how is it possible that the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead, and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of the opinion that, just as when a man who has made an offer dies before it is accepted, it is impossible that it can then be accepted; so, when once the person to whom the offer was made knows that the property has been sold to some one else, it is too late for him to accept the offer, and on that ground I am clearly of the opinion that there was no binding contract for the sale of this property by Dodds v. Dickenson. In this case the plaintiff admits that, at the time he proffered to Applegarth acceptance of the previous offer to sell at the price named, he was aware of the fact that the property had been sold to Bradley. It was therefore

[78] But see Threlkeld v. Inglett, 289 Ill. 90 (1919).

[79] Dickinson v. Dodds was followed in England in Cartwright v. Hoogstoel, 105 L. T. 628 (1912), where the court said that the acceptance came too late because "the defendant had by conduct brought to the knowledge of the plaintiff effectually withdrawn the offer before acceptance" (p. 631).

too late for him to attempt to accept the offer and there was not, and could not be made by such proffered acceptance, any binding contract of sale of the property." In the case of Frank v. Stratford-Hancock, 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571, 110 Am. St. Rep. 963, the Supreme Court of Wyoming said: "* * * The sale and conveyance of the property to Mrs. McKenzie, which does not appear to have been otherwise than in good faith and for a valuable consideration and which was brought to the knowledge of the plaintiff before any attempted acceptance of the option, amounted to a sufficient revocation."[80]

Section 1215, Civ. Code, provides that: "A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards." By section 1216 the provisions of section 1212 are made applicable to the communication of notice of revocation of a proposal. The provisions of section 1212 as applied to notice of revocation would be that revocation would be deemed to be fully communicated between the parties as soon as the party making the revocation places his notice of revocation in the course of transmission to the person to whom the offer was made. Hence it would necessarily follow that any acceptance of the offer made after the person making the offer had deposited in the post office the letter containing notice of revocation would be ineffectual for the purpose of concluding the contract. We are aware that a different rule exists in many other jurisdictions, but this statute law of this state establishes the rule in this jurisdiction.[81]

The letter of defendant to plaintiff of August 26, 1910, informing plaintiff that said land had been sold, was a revocation of the offer made to plaintiff and notice thereof. The said letter of defendant was postmarked at Seattle August 26th at 6 o'clock p. m. Plaintiff by his testimony does not inform us of the hour or time on the 26th day of August when he delivered the telegram of acceptance to the telegraph company for transmission; but says: "I sent a night message on the 26th of August." The burden in this case was upon plaintiff, and we cannot say from this testimony that the telegram of acceptance was put in course of transmission prior to 6 o'clock p. m. of August 26th, but the natural inference is that it was not. Where it is left doubtful from all the evidence whether a contract was concluded or not, equity will not grant specific relief. Pomeroy on Contracts, § 59.

We are also of the opinion that plaintiff should not be permitted to recover in this action for the reason that prior to the time he sent his night message of acceptance he was aware of the fact that defendant had sold and disposed of the land in question, thereby making it impossible for defendant to make a sale thereof to plaintiff. Plaintiff knew prior to the time defendant made the offer to him that defendant had other agents

[80] But see Arentson v. Moreland, 122 Wis. 167 (1904).
[81] Local statutes should be consulted.

who were endeavoring to make a sale of said land. This clearly appears from the letter of plaintiff to defendant of August 12th. Plaintiff was informed during the day of August 26th that the land had been sold. He was so informed by the tenant who farmed the land. Information from such a source is more than common rumor. It was at least sufficient to put plaintiff upon inquiry. Either of the grounds (1) that the notice of revocation of defendant's offer was communicated to plaintiff, in the manner provided by law, before the acceptance thereof was communicated to defendant (2) that plaintiff was aware of the sale of said lands by defendant prior to his attempted acceptance, is sufficient to preclude plaintiff from the relief sought by this action.

Finding no error in the record, the judgment of the lower court is affirmed.

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## PERRY *v.* SUFFIELDS, LTD.

**(Court of Appeal. [1916] 2 Ch. 187.)**

LORD COZENS-HARDY, M. R.[88] This is an appeal from the decision of Sargent, J., who has granted a decree for specific performance in the usual common form. But it is said that there was no concluded contract, because though there were two letters which in form are absolutely complete, yet the court is entitled to go into subsequent matters between the parties and to say that they throw a light back on those letters and make them merely a part of negotiations which never ripened into a concluded contract. Now let us see what the letters are. "Stannards'" was a public house which was owned by Perry in this sense, that he was actually owner of two-thirds of the freehold, and he was in possession by his son of the entire property, carrying it on as a licensed public-house. The defendants are a limited company. On February 23rd, 1915, according to the minutes of the board, "It was resolved to make Mr. G. Perry an offer in writing of £7000 for freehold premises known as 'Stannards'' Rugby." That resolution was given effect to by the following letter written by the secretary of the company, Mr. Alfred Wright, on that same date: "At a meeting of directors held to-day, I was instructed to write and offer you seven thousand pounds for freehold premises, good-will and possession." That letter was answered by the plaintiff, on March 3, who wrote to Mr. Wright: "I am obliged for your offer of seven thousand pounds for above in your letter of February 23rd last. Please note I now accept same, viz. £7000." That letter was brought before the Board on March 8 and then the company decided in what way they would raise the purchase money, namely, by loan from their bank. Now is it possible

[88] The statement of facts and the opinions of Pickford, L. J., and Neville, J., and a portion of the opinion of Lord Cozens-Hardy, M. R., are omitted.

to doubt that those two letters amount to a concluded contract? In Hussey v. Horne-Payne, 4 App. Cas. 311, which was decided on demurrer it appeared on the allegations in the statement of claim that there were, prior to the date of the two letters, which were relied upon as satisfying the Statute of Frauds, certain terms which had been discussed and had not been settled between the parties. In those circumstances the House of Lords held that it was a fallacy to say that the letters concluded the whole agreement, because it appeared from the allegations in the statement or claim itself that there were terms, namely, that the purchase-money should be paid by installments, the amount of such installments, and the periods at which they should be payable, which had not been settled between the parties at that date. We are not troubled with that here. It is said, however, that the agreement is silent as to the date for completion. It is the first time that I have heard that a contract is not complete, so as to satisfy the Statute of Frauds, unless the date fixed for completion is prescribed. It is part of the common law applicable to cases of this kind that the fixing of the date of completion is a matter which arises after the title has been accepted, or rather after the inquiry as to title. Then, it is said there is no stipulation as to the payment of a deposit. Again I say I have never heard that there may not be a perfectly good contract satisfying the provisions of the Statute of Frauds although there is no provision for payment by installments. Then it is said that the plaintiff would have liked to have a deposit. I daresay he would, but that is quite a different matter. Mere arrangements which in the ordinary course of business are left to the legal advisers to settle, such as the date for completion, are subsequent matters which do not prevent the two letters constituting a concluded agreement.

Counsel for the appellant has referred to what Kay, J., said in Bristol, Cardiff, and Swansea Aerated Bread Co. v. Maggs, 44 Ch. D. 616, and also to what North, J., said in Ballamy v. Debbenham, 45 Ch. D., 481; and as the point does not seem ever to have come before the Court of Appeal, I think it right to say, for myself, that I agree with the criticism of North, J., in Bellamy v, Debenham, *supra*, upon the observations of Kay, J. in Bristol, Cardiff, and Swansea Aerated Bread Co. v. Maggs, *supra*, and I absolutely accept his decision in Bellamy v. Debbenham, the effect of which is, I think, accurately stated in the head-note: "Though, when a contract is contained in letters, the whole correspondence should be looked at, yet if once a definite offer has been made, and it has been accepted without qualification, and it appears that the letters of offer and acceptance contained all the terms agreed on between the parties,"—that means, of course agreed on at the date of the offer and acceptance—"the complete contract thus arrived at cannot be affected by subsequent negotiation. When once it is shewn that there is a complete contract, further negotiations between the parties cannot, without the consent of both, get rid of the contract already arrived at."

Now Sargant, J. refers to a passage in Fry on Specific Performance, par. 551: "The effect of subsequent letters may perhaps be thus stated. If the subsequent letters lead to the conclusion that at the date of the letters relied on as the memoranda of the contract there was no contract in fact, then the plaintiff must fail; if, on the other hand, the whole evidence shows that at that date there was a consensus between the parties upon the terms expressed in the letters relied upon, then the subsequent correspondence, unless amounting to a new contract or an agreement for rescission, can have no effect upon the existence of the contract." Then, after referring to Bristol, Cardiff and Swansea Aerated Bread Co. v. Maggs and saying that Kay, J.'s proposition seems worthy of further discussion, the learned author proceeds to deal with Bellamy v. Debenham in par. 553. He says: "In Bellamy v. Debenham, North, J., discussed the language used by Kay, J., in Bristol, &c., Bread Co. v. Maggs, and said 'In my opinion, subsequent negotiations first commenced on new points after a complete contract in itself had been signed, cannot be regarded as constituting part of the negotiations going on at the time when it was signed.'[83] This seems to be good law. It would seem clear that if the letters of proposal and acceptance in fact contain all the terms agreed on at the time, and were written with the intent of binding the writers, this complete contract could not be affected by subsequent negotiations not resulting in a new contract."

That is really the view taken by Sargant, J. It seems to me perfectly in accordance with good law, and there is nothing in the present case to induce me to think that there ought to be any variation of the rights of the parties as expressed in those two letters of formal offer and acceptance.

* * *

The parties rights were for all purposes sufficiently settled by the two letters of offer and acceptance. In my opinion the appeal fails and must be dismissed with costs.

[83] "The question therefore, is whether subsequent negotiations can be looked at merely for the purpose of preventing that which would otherwise be a complete contract from being so. In my opinion, when once it is shewn that there is a complete contract, it is impossible that further negotiations between the parties can, without the consent of both, get rid of what I may call the crystallized contract already arrived at, and as, in the present case, contained in the letters. Of course it may be an open question whether the terms of the contract really were all settled and the fact that further negotiations took place, as well as the language of those negotiations, may be very important as throwing light upon the state of things at the time when the alleged contract was signed by the party to be charged. The question is really one of fact; and if, in considering that question of fact, one should come to the conclusion that negotiations which subsequently took place related to new matter, started for the first time after the contract was complete, in my opinion they would have no weight in preventing full effect being given to the written contract previously existing." North, J., in Bellamy v. Debenham, L. R. 45 Ch. D. 481, 493-494 (1890).

## BOLTON, PARTNERS, *v.* LAMBERT.

**(Court of Appeal, 1887. 41 Ch. Div. 295.)**

The plaintiffs, Bolton Partners (Ltd.), were a limited company incorporated under the Companies Acts, and were owners of a factory and hereditaments at Lavenham, Suffolk, known as the Lavenham Sugar Works, for the residue of a term of ten years from the 25th of March, 1884.

On the 8th of December, 1886, the defendant, A. J. Lambert, wrote to P. A. Scratchley, who was then acting as managing director of the company in the absence of the chairman, a letter in which he said:

"Re Lavenham Sugar Works.

"I beg to make you an offer for the above-mentioned works, and at the same time allow me to call your attention to the following facts, which are matters too important to be overlooked on either side."

He then stated several particulars in which expense must be incurred by the purchaser, and proceeded as follows:

"As it is absolutely necessary to commence the new works almost immediately, I propose to take the factory over from the 25th of March, 1887, possession to be given on the 1st of January, 1887, to enable me to get the necessary alterations completed, and also to get the new machinery fixed. Taking into consideration all the facts which I have brought under your notice, I think a fair annual rental to offer you for the use of the factory (including depreciation of the buildings, plant, and machinery) would be £3500, the lease to be the remainder of your term, and subject to the conditions therein described. But as the wall requires repairs, and the machinery, which is now dismantled, will require to be re-started, an allowance of £500 should be made from the first quarter's rent, thus reducing the rent for the first year to £3000, which should be paid on the usual quarter days."

Scratchley wrote to the defendant on the 9th of December acknowledging the receipt of his letter, and saying that he would refer the matter to the directors.

Scratchley was a member of the works committee, which was appointed by the board of directors. On the 13th of December, 1886, a meeting of the works committee was held at which it was resolved that the defendant's offer should be accepted, and that a letter should be written to him accordingly, and that the company's solicitor should be instructed to prepare the necessary documents. It was admitted that the works committee had no power to accept the defendant's offer, or to bind the company by a sale of its property. On the same day, Scratchley wrote the defendant a letter in which he informed him that the directors accepted the offer contained in his letter of the 9th of December and that the company's solicitor had been instructed to prepare the necessary documents.

On the 17th of December the plaintiff's solicitor sent the defendant a draft agreement containing certain stipulations not mentioned in the defendant's offer, and in particular a stipulation as to a guarantee for rent. To these the defendant objected. After some correspondence the defendant, on the 13th January, 1887, wrote to the plaintiffs withdrawing his offer on the ground that he had been misled by the statements that had been made to him as to the value of the property.

On the 17th of January, 1887, the writ in this action was issued by direction of the board of directors. The plaintiffs claimed specific performance of the agreement contained in the letters before stated.

On the 28th day of January the board of directors held a meeting at which they confirmed the minutes of the meeting of the works committee on the 13th December, 1886; and Scratchley's letter of the same date was also read and confirmed.

The defendant denied that there had been any complete contract; and contended that after the defendant had repudiated his offer it was too late for the company to ratify Scratchley's letter of acceptance. He also alleged that he had been induced to make the offer by misrepresentation.

The action came on before Mr. Justice Kekewich on the 19th of December, 1888.

COTTON, L. J.[84] This is an appeal by the defendant against a judgment of Mr. Justice Kekewich decreeing specific performance of a contract to take a lease. The contract was entered into by certain letters but it is unnecessary to refer to the whole correspondence, as the transaction really begins and ends with the two letters of December the 8th and December the 13th, 1886 respectively. Taking those two letters alone, in my opinion they constitute a contract. The letter of the 8th of December, written by the defendant to Scratchley, a director of the plaintiff company, contained an offer by the defendant to take a lease from the plaintiff company on the terms therein mentioned, and the letter of the 13th of December, written by Scratchley to the defendant, is in terms an acceptance of that offer. It was urged that the acceptance was subject to the preparation by the company's solicitor "of the necessary documents." In my opinion, the principle which governs this point is correctly stated by the late Master of the Rolls in Crossley v. Maycock, L. R. 18 Eq. 181: "If there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions then specified or to be specified by the party making it, or by his solicitor, then, until those conditions are accepted, there is no final agreement such as the

[84] Parts of the opinions of Cotton, L. J., and of Lindley, L. J., are omitted, as is the opinion of Kekewich, J., in the court below.

court will enforce." It is said that the reference to the preparation of necessary documents shewed that the acceptance was not intended to be a simple acceptance, because if there was a full and complete acceptance no documents would have been necessary. But persons often very unnecessarily desire that what has been agreed on should be drawn up in a formal way by solicitors, and in my opinion that was all that was intended by this reference.[85] It was urged also that there was more than

[85] See Von Hatzfeldt-Wildenburg v. Alexander, [1912] 1 Ch. 284.

In Sanders v. Pottlitzer Bros. Fruit Co., 144 N. Y. 209 (1894), the parties by correspondence and telegrams agreed upon all the terms of the contract. The last two telegrams consisted of one from the plaintiffs saying, "Will accept conditions. If satisfactory will forward contract," and the reply by defendant, "All right, send contract." When the contract was sent by the plaintiffs, defendant sought to make certain burdensome modifications and, as plaintiffs would not consent, defendant refused to perform. O'Brien, J., for the court, said: "The writings and telegrams that passed between the parties contain all the elements of a complete contract. * * * It is true, as found by the learned referee, that the parties intended that the agreement should be formally expressed in a single paper which, when signed, should be the evidence of what had already been agreed upon. But neither party was entitled to insert in the paper any material condition not referred to in the correspondence, and if it was inserted without the consent of the other party it was unauthorized. Hence the defendant, by insisting upon further material conditions not expressed or implied in the correspondence, defeated the intention to reduce the agreement to the form of a single paper signed by both parties. The plaintiffs then had the right to fall back upon their written proposition as originally made and the subsequent letters and telegrams, and if they constituted a contract of themselves the absence of the formal agreement contemplated was not under the circumstances material.

"When the parties intend that a mere verbal agreement shall be finally reduced to writing as the evidence of the terms of the contract, it may be true that nothing is binding upon either party until the writing is executed. But here the contract was already in writing, and it was none the less obligatory upon both parties because they intended that it should be put into another form, especially when their intention is made impossible by the act of one or the other of the parties by insisting upon the insertion of conditions and provisions not contemplated or embraced in the correspondence. Vassar v. Camp, 11 N. Y. 441; Brown v. Norton, 50 Hun, 248; Pratt v. H. R. R. R. Co., 21 N. Y. 308. * * *

"In this case it is apparent that the minds of the parties met through the correspondence upon all the terms as well as the subject-matter of the contract, and that the subsequent failure to reduce this contract to the precise form intended, for the reason stated, did not affect the obligations of either party, which had already attached, and they may now resort to the primary evidence of their mutual stipulations."

In U. S. v. J. P. Carlin Const. Co., 224 Fed. 859 (1915) also, "the court intimated that a contract looking toward a formal instrument might not be binding in any case where the negotiations were wholly oral. The only reason for such a distinction is that the parties are more likely to want a formal document where the contract has been verbal; and so it might be said that in such a case there is a presumption that the formal instrument was intended as a condition." 15 Col. L. Rev. 701-702.

that in this case, and that on the letters themselves, it could not be said that there was a completed contract, but that matters with reference to the machinery remained to be settled before the final agreement. [The Lord Justice read the passage in the defendant's letter of the 8th of December with reference to the machinery, and continued:] In my opinion that was merely the reasoning put forth by the defendant to show why

In Drummond v. Crane, 159 Mass. 577 (1893), where the defendants' intestate agreed in writing to enter into a formal contract with terms set out, but died before doing so, in sustaining a recovery for breach of contract, Holmes, J., said of the fact that the contract sued upon contemplated another more formal contract that "That is merely an additional wheel in the machinery" (p. 579).

In Von Hatzfeldt-Wildenburg v. Alexander, *supra*, Parker, J. said: "It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored. The fact that the reference to the more formal document is in words which according to their natural construction import a condition is generally if not invariably conclusive against the reference being treated as the expression of a mere desire. North v. Percival [1898] 2 Ch. 128, appears to be an exception to this rule, but I doubt whether that case was correctly decided. See the earlier decision of Sir George Jessel in Winn v. Bull, 7 Ch. D. 29, 32." See also, Coope v. Rideout [1920] 2 Ch. 411.

In Mississippi and Dominion Steamship Co. v. Swift, 86 Me. 248, 258-259 (1894), Emery, J. said:

"If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument and attested by signature, then he will not be bound until the signatures are affixed. The expression of the idea may be attempted in other words: if the written draft is viewed by the parties merely as a convenient memorial, or record of their previous contract, its absence does not affect the binding force of the contract; if, however, it is viewed as consummation of the negotiation, there is no contract until the written draft is finally signed.

"In determining which view is entertained in any particular case, several circumstances may be helpful, as: whether the contract is of that class which are usually found to be in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount involved is large or small; whether it is a common or unusual contract; whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations. If a written draft is proposed, suggested or referred to, during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract."

"Whether correspondence with the purpose of entering into a contract is

he did not offer a larger rent, and does not prevent his offer from being a simple unqualified one.

Then it was said that other terms were introduced by subsequent letters, and the case of Hussey v. Horne-Payne, 4 App. Cas. 311 was relied on as shewing that in such circumstances there was no concluded contract. But the judgment of Lord Cairns in that case shows that it was not because the subsequent letters raised a doubt, that it was held that the two original letters did not form a complete agreement, but because the two original letters of themselves contained terms which raised the doubt.

That case therefore is not applicable, and in my opinion there was a binding contract constituted by these two letters alone.

But then it is said that on the 13th of January, 1887, the defendant entirely withdrew the offer he had made. Of course the withdrawal could not be effective, if it were made after the contract had become complete. As soon as an offer has been accepted, the contract is complete. But it is said that there could be a withdrawal by the defendant on the 13th of January on this ground, that the offer of the defendant had been accepted by Scratchley, a director of the plaintiff company, who was not authorized to bind the company by acceptance of the offer, and therefore that until the company ratified Scratchley's letter there was no acceptance on behalf of the company binding on the company, and therefore the defendant could withdraw his offer. Is that so? The rule as to ratification by a principal of acts done by an assumed agent is that the ratification is thrown back to the date of the act done, and that the agent is put in the

merely preliminary negotiation or the contract itself must be determined by the language used and the circumstances known to both parties under which the communications in writing were had. If it is plain from the language used that some term which either party desires to be in the contract is not included or definitely expressed in the correspondence relied upon, no contract is made. If it is plain from the language that either party wishes or contemplates that another person, not a party to the correspondence, shall be a party to the contract, a correspondence as to the terms of such a tripartite agreement between two cannot be a completed contract between the two. It is as essential that all the parties intended shall be bound as it is that all the terms intended should be definitely agreed upon." Taft, J., in Strobridge Lithographing Co. v. Randall, 73 Fed. 619, 622 (1896).

As to parties signing, see also Herndon v. Meadows, (W. Va.) 103 S. E. 404, 405 (1920), where Ritz, J., said:

"There is no doubt but that, where a contract in writing is executed by only one of the parties, and the other party waives the execution by accepting performance, or by doing something under the contract which shows that the parties did not contemplate execution as a prerequisite to a valid contract, it will be binding; but where a contract is reduced to writing, and the subject-matter is such that people do not ordinarily contract in regard to it without expressing their agreements in a writing, and the paper on its face indicates that it is the intention that all of the parties shall execute it, and nothing is done under the contract to indicate that the parties intend their agreements to be binding whether the writing is signed or not, it will be held that there is no completed contract, unless all of the parties thereto execute the same."

same position as if he had had authority to do the act at the time the act was done by him. Various cases have been referred to as laying down this principle, but there is no case exactly like the present one. * * *.

The rule as to ratification is of course subject to the same exceptions. An estate once vested cannot be divested, nor can an act lawful at the time of its performance be rendered unlawful, by the application of the doctrine of ratification. The case of Walter v. James, L. R. 6 Ex. 124, was relied on by the appellant, but in that case there was an agreement between the assumed agent of the defendant and the plaintiff to cancel what had been done before any ratification by the defendant; in the present case there was no agreement made between Scratchley and the defendant that what had been done by Scratchley should be considered as null and void. * * *

I think the proper view is that the acceptance by Scratchley did constitute a contract, subject to its being shewn that Scratchley had authority to bind the company. If that were not shown there would be no contract on the part of the company, but when and as soon as authority was given to Scratchley to bind the company the authority was thrown back to the time when the act was done by Scratchley, and prevented the defendant withdrawing his offer, because it was then no longer an offer, but a binding contract.

This point therefore must also be decided against the appellant. Another point was raised as to misrepresentation, but, having regard to the evidence, in my opinion that has not been made out. The appeal therefore fails.

LINDLEY, L. J. * * * It is impossible to read the two letters [of Dec. 8 and Dec. 13] otherwise than as amounting to a clear offer and an acceptance. * * *. The question is what is the consequence of the withdrawal of the offer after acceptance by the assumed agent but before the authority of the agent had been ratified. Is the withdrawal in time? It is said on the one hand that the ordinary principle of law applies, viz., that an offer may be withdrawn before acceptance. That proposition is of course true. But the question is—acceptance by whom? It is not a question whether a mere offer can be withdrawn, but the question is whether, when there has been in fact an acceptance which is in form an acceptance by a principal through his agent, though the person assuming to act as agent has not then been so authorized, there can or cannot be a withdrawal of the offer before the ratification of the acceptance? I can find no authority in the books to warrant the contention that an offer made, and in fact accepted by the principal, through an agent or otherwise, can be withdrawn. The true view on the contrary appears to be that the doctrine as to the retrospective action of ratification is applicable.

If we look at Mr. Brice's argument [for appellant] closely, it will be

found to turn on this—that the acceptance was a nullity and unless we are prepared to say that the acceptance of the agent was absolutely a nullity, Mr. Brice's contention cannot be accepted. That the acceptance by the assumed agent cannot be treated as going for nothing is apparent from the case of Walter v. James, L. R. 6 Ex. 124. I see no reason to take this case out of the application of the general principle as to ratification. The appeal fails therefore on all points.

LOPES, L. J. An important point is raised with regard to the withdrawal of the offer before ratification in this case.

If there had been no withdrawal of the offer this case would have been simple. The ratification by the plaintiffs would have related back to the time of the acceptance of the defendant's offer by Scratchley, and the plaintiffs would have adopted a contract made on their behalf.

It is said that there was no contract which could be ratified, because Scratchley at the time he accepted the defendant's offer had no authority to act for the plaintiffs. Directly Scratchley on behalf and in the name of the plaintiffs accepted the defendant's offer I think there was a contract made by Scratchley assuming to act for the plaintiffs, subject to proof by the plaintiffs that Scratchley had that authority.

The plaintiffs subsequently did adopt the contract, and thereby recognized the authority of their agent Scratchley. Directly they did so the doctrine of ratification applied and gave the same effect to the contract made by Scratchley as it would have had if Scratchley had been clothed with a precedent authority to make it.

If Scratchley had acted under a precedent authority the withdrawal of the offer by the defendant would have been inoperative, and it is equally inoperative where the plaintiffs have ratified and adopted the contract of the agent. To hold otherwise would be to deprive the doctrine of ratification of its retrospective effect. To use the words of Baron Martin in Brook v. Hook, L. R. 6 Ex. 96, the ratification would not be "dragged back as it were, and made equipollent to a prior command."

I have nothing to add with regard to the other points raised. I agree with what has been said on these points. The appeal must be dismissed.[86]

[86] North, J. as trial judge in In re Portuguese Consolidated Copper Mines, Ltd., 45 Ch. D. 16, 21 (1890), said of the Bolton Partners v. Lambert holding as to ratification: "It comes to this, that if an offer to purchase is made to a person who professes to be the agent for a principal, but who has no authority to accept it, the person making the offer will be in a worse position as regards withdrawing it than if it had been made to the principal; and the acceptance of the unauthorized agent in the meantime will bind the purchaser to his principal, but will not in any way bind the principal to the purchaser."

In Fleming v. Bank of New Zealand [1900] A. C. 577, 587, Lord Lindley said of Bolton Partners v. Lambert with reference to ratification: "The decision referred to presents difficulties; and their Lordships reserve their liberty to

## WHEATON BUILDING & LUMBER CO. *v.* CITY OF BOSTON.

**(Supreme Judicial Court of Massachusetts, 1910. 204 Mass. 218, 90 N. E. 598.)**

Action by the Wheaton Building & Lumber Company against the City of Boston. There was a verdict for defendant, and plaintiff brings exceptions. Overruled.

reconsider it if on some future occasion it should become necessary to do so."

In Kline Bros. & Co. v. Royal Ins. Co., Limited, 192 Fed. 378, 386-387 (1911) Learned Hand, J., said:

"The facts, therefore, raise two questions: First, whether a third party who has made a contract with an unauthorized agent on behalf of his principal is bound before the principal has ratified. * * * Upon the first question, there is no doubt some division of authority. In England the law now is that the third party may not withdraw, provided the principal ratifies the contract in season. Bolton Partners v. Lambert, 41 Ch. D. 295; Re Tiedemann [1899] 2 Q. B. D. 66. * * * On the other hand, in Wisconsin (Dodge v. Hopkins, 14 Wis. 630; Atlee v. Bartholomew et al., 69 Wis. 43, 33 N. W. 110, 5 Am. St. Rep. 103), and apparently in Illinois (Cowan v. Curran, 216 Ill. 598, 75 N. E. 322), the whole unauthorized contract seems to amount only to an offer by the third person, which must be accepted *de novo* by the principal, a rule certainly at variance with the well-established law that an uncommunicated ratification by the principal will bind him. The English case proceeds on the civil law maxim, "*Omnis ratihabitio retrotrahitur*," though it by no means follows, because a ratification relates back when once a valid contract is made, that the third party is bound meanwhile, and may not withdraw while the principal remains unbound. Now, relation back is in the sense here used a fiction, and certainly should not be extended to cover unjust cases, of which this is one, as I shall show. In so far as by the maxim it is only meant to say that a ratification carries with it by implication the intention of the principal that the contract shall in fact date from the time when it was made between the agent and the third party, it is unobjectionable in principle, and accords with the facts; but, if taken in the sense that the law will regard both parties as bound from the date of the contract, it merely misstates the facts, because, by hypothesis, the principal is not bound before ratification. All that the law can do is to hold the third party bound from the outset, and that by the mere force of authority. It certainly serves no useful purpose to cloak that authority in a phrase which misstates the truth in Latin, unless it accords with the principles of the law of contracts, or at least produces just results at the expense of those principles.

"Upon principle the doctrine does not appear to be correct, and it has been criticised by text-writers. Wambaugh, 9 Harv. L. R. 60; 31 Cyc. 1291. * * * The result is unfair to the third party, since it permits the principal to speculate on the value of the contract, while he himself remains unbound. If it proves advantageous, he may ratify. If not, he may repudiate. There is no just ground for giving him such an advantage over the third party merely because of an unknown defect in the agent's powers. In view of the dearth of authority in this country and especially of any decisions binding upon me, I do not think that I should follow the rule in Bolton v. Lambert, *supra*, but rather what I cannot but believe to be the result necessary under the principles of the laws of contract."

In Breithaupt v. Thurmond, 3 Rich. L. (S. C.) 216, 219, (1832) O'Neall, J., said: "I am not disposed to question that the agreement made with the de-

RUGG, J.[87] The plaintiff in common with several others, in response to an advertisement issued by the schoolhouse commissioners of Boston, submitted a bid for the erection of a certain schoolhouse, transmitting with it a check to the order of defendant for $2,000. The city claims the right to hold this money upon these facts: The bid contained the provision that the plaintiff "proposes and agrees that if, within 20 days after the day named below for leaving the proposal, notice that this proposal will be accepted for the city shall be mailed to him at the address given below or shall be delivered to him, he will at 11 o'clock a. m. of some day of the six week days next after such mailing or delivery * * * deliver * * * a contract and bond for doing the work properly executed in the form annexed, * * * and also agrees that the certified check payable to the city left herewith is the property of the city, and the amount thereof is the amount of damages which the city will sustain by failure to carry out the proposal, but if this proposal is not accepted or if notice is mailed and delivered and the undersigned executes and delivers said contract and bond the check or its amount is to be paid to him on receipt therefor."

The bid of the lowest bidder was accepted, but he declined to execute a contract, and the city forfeited his check. Thereupon, the proposal of the plaintiff, being the next lowest, was accepted by letter mailed within the time limited in the bid, and it refused to execute a contract. The proposal of the next lowest bidder was then accepted, but he refused to execute the contract, and his check was taken by the city. Between these three bids and the next lowest was a gap of about $24,000, and his proposal being accepted, he executed a contract. The plaintiff did not attempt to withdraw its proposal until after it had been accepted by the school-house commission.

1. It is urged that the acceptance of one bid by the city constituted a rejection of all the other bids, and that hence the attempted acceptance of the plaintiff's bid was of no effect. Undoubtedly an advertisement and proposal might be so framed as to sustain such contention. But that is not the effect of the acts of the defendant and the statute under which they were performed. The terms of the proposal as to the time during which it was to remain open indicate that the city intended to reserve to itself time to make at least three attempts to hold bidders before its rights should have expired. St. 1890, p. 370, c. 418, required the execu-

fendant by B. McKennie, as the agent of C. Breithaupt, trustee, would not have been binding on either party until ratified and confirmed by Breithaupt. If, therefore, Breithaupt had refused to comply with the contract, or if, before he had assented to it, defendant had refused to abide by it, he could not have been compelled to do so. But after the plaintiff assents to the contract and offers to perform everything which his supposed agent has undertaken he shall do, it is too late for the defendant to disclaim the contract on the ground that it was originally not binding on the plaintiff."

[87] Part of the opinion is omitted.

tion of a formal written contract in addition to the acceptance of the proposal. The acceptance of the bid by the schoolhouse commissioners did not of itself constitute a formal contract. The city could not be bound under the statute until the formal contract was executed. Edge Moor Bridge Works v. Bristol, 170 Mass. 528, 49 N. E. 918.[88] The only way in which the city could secure a binding agreement for the construction of its building was through such a written contract. But it is plain that the statute contemplated some obligation on the part of the bidders, even though there was none on the part of the city. St. 1890, c. 418, § 5, provides that "every proposal * * * shall be accompanied by a suitable bond, certified check or certificate of deposit for the faithful performance of such proposal. * * *" This section must be given a reasonable

[88] Yet in Massachusetts, "The recorded vote of a corporation, or of a committee acting upon a subject over which the committee has power, is a sufficient memorandum within the meaning of the statute of frauds." Barker, J., in McManus v. Boston, 171 Mass. 152, 155 (1898).

In Edge Moor Bridge Works v. County of Bristol, 170 Mass. 528 (1898) the county commissioners advertised for proposals on a new bridge as per specifications and form of contract supplied by the commissioners, the advertisement stating that "An agreement for five thousand dollars ($5000) liquidated damages will be required for the faithful performance of the contract, with sureties to be residents of or qualified to do business in the State of Massachusetts and satisfactory to said county commissioners." The plaintiff put in a proposal, and at a meeting of the county commissioners a vote was passed and entered upon the records of the commissioners as follows: "Voted, That the cumulative bid of Edge Moor Bridge Works is accepted and that the contract thereon be awarded to said party." A copy of the vote was mailed to the plaintiff by the clerk of the commissioners. The plaintiff at once sent a letter to the commissioners accepting the award and offered to execute the contract and tendered the agreement as to liquidated damages with a corporation qualified to do business in Massachusetts as surety; but the commissioners refused to execute the contract. It was held that the vote awarding the contract to the plaintiff was but a step in the negotiation, showing merely an intention at the time to execute a contract in the future and not even constituting a preliminary agreement that a formal contract should be executed in the future. That holding was deemed confirmed by the state statute requiring all contracts made by county commissioners for the construction of public works to be in writing, which statute, the court thought, made it "open to doubt whether it would now be in the power of county commissioners to bind a county by a preliminary agreement to enter into a future contract for the construction of a public work," though the court did not determine that question. With the Edge Moor Bridge Works case should be contrasted U. S. v. Purcell Envelope Co., 249 U. S. 313 (1919). There the company, whose bid to supply envelopes for the Post Office Department was accepted by departmental order, actually signed the contract submitted by the Postmaster General with a surety company of unquestioned responsibility as surety, but the Postmaster General failed to sign it. The court found for the plaintiff, resting its decision on the holding in Garfielde v. U. S., 93 U. S. 242 (1876), that a proposal in accordance with an advertisement of the Post Office Department and the acceptance by it of the proposal "created a contract of the same force and effect as if a formal contract had been written out and signed by the parties."

effect. It would be a nullity if it should be held that the bidder was at liberty to withdraw without any liability at any time before the formal contract, which alone could bind the city, should be executed. The reasonable construction is to hold that the bidder is bound to stand by his proposal, at least after its acceptance, and to the extent of his bond or deposit, but no further. If the case was free from statutory regulation, and it did not appear that a more formal contract was contemplated, the mere acceptance of the proposal would constitute a contract, and neither party could refuse to carry it out without becoming liable to all the damage sustained. Beach & Clarridge Co. v. American Steam Gauge & Valve Mfg. Co., 202 Mass. 177, 88 N. E. 924. The legislature, perhaps in recognition of the hardship, which might follow requiring the bidder to be bound though the city was not, restricted the liability of the former to the extent of the deposit. From this interpretation of the statute it follows that an acceptance of the proposal of one bidder did not constitute a binding contract even on the part of the bidder to execute a formal contract, but only to forfeit his deposit if he failed to do so. The proposal stated that the bid should remain open a definite number of days, not until some one of the bids should be accepted. The acceptance of a bid was only one step toward the execution of the contract. The bidder first accepted might be unable to secure the required bond for the performance of the contract. The mayor might for some just reason refuse to approve the contract, or some other cause might intervene to prompt the execution of a final contract. The tenor of the proposal, which was upon a blank furnished by the defendant, read in the light of the statute, indicates an intent that the city reserves all its rights under all the bids until a contract shall have been formally executed and delivered, and to hold all the bidders to the terms of their proposals until it has either rejected all of them as provided in St. 1890, c. 418, § 4, or become bound by the execution of a contract with one, or the time limited for acceptance has expired. Hence the acceptance of a bid without the execution of a contract cannot be regarded as an unequivocal and definite determination on the part of the city to consider no other proposal. So long as the time limited for the deposit to remain had not expired and no formal contract had been executed, the city was at liberty to accept any proposal, and require the bidder to respond either by signing the contract or sustaining the loss of the deposit. Gibson v. Owens, 115 Mo. 258, 21 S. W. 1107.

2. It is next argued by the plaintiff that, the city's acceptance of the bid being made subject to the approval of the mayor, there was not an unconditional acceptance of the terms of the offer. An offer must be accepted in the terms in which it is made, in order to become binding, and a conditional acceptance or one that varies from the offer in any substantial respect is in effect a rejection and amounts to a new proposition. The phrase in the acceptance by the schoolhouse commissioners,

which is relied on as rendering it conditional, was simply a reference to the statute under which the matter was proceeding. It was by implication a part of the invitation for proposal and also of the bid which the plaintiff had submitted. It added no new term to the proposal or to the contract. It did not vary in any respect the offer, and was therefore an unconditional and valid acceptance of it. * * *

4. It is next suggested by the plaintiff that there is no mutuality of obligation imposed by the acceptance of the proposal before the execution of the contract, the city not being bound thereby, and that hence there can be no obligation resting on the bidder. But as has been before pointed out, St. 1890, c. 418, in its several sections, was imported by implication into the transaction. Its terms, in conjunction with the proposal, in substance exonerated the city from any liability until the contract should be executed, but imposed a liability upon the bidders to respond to the extent of the deposit if they failed to stand by their proposal. It cannot be doubted that such a regulation of the conduct of business of municipalities is within the power of the legislature.

5. The final contention of the plaintiff is that the deposit was a penalty, and hence cannot be enforced. The terms of the agreement indicate an intent to treat the deposit as liquidated damages, and this appears to be the purpose of the statute. The amount of the check must be regarded as liquidated damages. It was in fact much smaller than the loss sustained by the city, for by the failure of the plaintiff to take the contract it was awarded to another bidder for a sum about $24,000 larger. The plaintiff refused to sign the contract except for an additional price of $21,000. Therefore no reason appears why the intent of the parties as manifested by their written communication and the purpose of the statute should not be carried out. Guerin v. Stacy, 175 Mass. 595, 56 N. E. 892; Garcin v. Pennsylvania Furnace Co., 186 Mass. 405, 71 N. E. 793; Morrison v. Richardson, 194 Mass. 370, 80 N. E. 468.

*Exceptions overruled.*[89]

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## THE GREAT NORTHERN RAILWAY COMPANY *v.* WITHAM.

**(Court of Common Pleas, 1873. L. R., 9 Common Pleas 16.)**

In October, 1871, the plaintiffs advertised for tenders for the supply of goods (among other things iron) to be delivered at their station at Doncaster, according to a certain specification. The defendant sent in a tender, as follows:

[89] On right to withdraw bid for public contract and recover deposit, see L. R. A. 1915A, 225, note. On remedy of lowest bidder on a public contract, see 26 L. R. A. 707, note; 30 L. R. A. (N. S.) 126, note.

"I, the undersigned, hereby undertake to supply the Great Northern Railway Company, for twelve months from November 1st, 1871, to October 31st, 1872, with such quantities of each or any of the several articles named in the attached specification as the company's store-keeper may order from time to time, at the price set opposite each article respectively, and agree to abide by the conditions stated on the other side.

"(Signed) SAMUEL WITHAM."

The company's officer wrote in reply, as follows:

"MR. S. WITHAM:

"SIR: I am instructed to inform you that my directors have accepted your tender, dated, etc., to supply this company at Doncaster Station any quantity they may order during the period ending October 31st, 1872, of the descriptions of iron mentioned on the enclosed list, at the prices specified therein. The terms of the contract must be strictly adhered to. Requesting an acknowledgment of the receipt of this letter.

"(Signed) S. FITCH,
*"Assistant Secretary."*

To this the defendant replied:

"I beg to own receipt of your favor of 20th instant, accepting my tender for bars, for which I am obliged. Your specifications shall receive my best attention. S. WITHAM."

Several orders for iron were given by the company, which were from time to time duly executed by the defendant; but ultimately the defendant refused to supply any more, whereupon this action was brought.

A verdict having been found for the plaintiffs, Digby Seymour, Q. C., moved to enter a nonsuit, on the ground that the contract was void for want of mutuality.

KEATING, J.† * * * Some orders were given by the company, which were duly executed. But the order now in question was not executed; the defendant seeking to excuse himself from the performance of his agreement, because it was unilateral, the company not being bound to give the order. The ground upon which it was put by Mr. Seymour was, that there was no consideration for the defendant's promise to supply the goods; in other words, that, inasmuch as there was no obligation on the company to give an order, there was no consideration moving from the company, and therefore no obligation on the defendant to supply the goods. * * * If before the order was given the defendant had given notice to the company that he would not perform the agreement, it might be that he would have been justified in so doing. But here the company had given the order, and had consequently done something which amounted to a consideration for the defendant's promise. I see no ground for doubting that the verdict for the plaintiffs ought to stand.

† Parts of the opinions are omitted.

BRETT, J. * * * This action is brought for the defendant's refusal to deliver goods ordered by the company; and the objection to the plaintiffs' right to recover is, that the contract is unilateral. I do not, however, understand what objection that is to a contract. Many contracts are obnoxious to the same complaint. If I say to another, "If you will go to York, I will give you £100," that is in a certain sense a unilateral contract. He has not promised to go to York. But if he goes, it cannot be doubted that he will be entitled to receive the £100. His going to York at my request is a sufficient consideration for my promise. So, if one says to another, "If you will give me an order for iron, or other goods, I will supply it at a given price;" if the order is given, there is a complete contract which the seller is bound to perform. There is in such a case ample consideration for the promise. So, here, the company having given the defendant an order at his request, his acceptance of the order would bind them. * * * This is matter of every day's practice; and I think it would be wrong to countenance the notion that a man who tenders for the supply of goods in this way is not bound to deliver them when an order is given. I agree that this judgment does not decide the question whether the defendant might have absolved himself from the further performance of the contract by giving notice.

*Rule refused.*[90]

[90] "One knows that these tenders are very often in a form under which the purchasing body is not bound to give the tenderer any order at all; in other words, the contractor offers to supply goods at a price, and if the purchasing body chooses to give him an order for goods during the stipulated time, then he is under an obligation to supply the goods in accordance with the order; but apart from that nobody is bound." Atkin, J., in Percival, Lim. v. London County Council Asylums, etc. Com., 87 L. J. K. B. 677, 678-679 (1918). See Queen v. Demers, [1900] A. C. 103.

But In re The Gloucester Municipal Election Petition, [1901] 1 K. B. 683, Darling, J. construed a similar tender and the letter of acceptance of it as being a contract. The tender was made to the city and Darling, J. said:

"The advertisement issued by the council on December 5th, 1899 amounted to this, that the council agreed to receive tenders for the goods of specified kinds which they might want during the period of twelve months, and it concludes with the words, 'the lowest or any other tender will not necessarily be accepted.' Then on December 13th the respondent writes the letter already referred to, which amounts to a statement that he would supply the goods required during the period of twelve months, as ordered, at the prices specified. This is answered by the letter of December 22, by which the committee intimate that they will accept the respondent's tender for the articles which they may want during the period of twelve months at the prices specified in the tender. I think there is a good obligation to order from the respondent such of the goods included in his tender as the council might require during the period of twelve months, for I do not think that the council would have been justified in treating the respondent's tender as a mere price list, and ordering the goods which they required from any one whom they might choose. The conclusion at which I have arrived, therefore, is that there was a contract, because there was an obligation on both sides."

## M. KELLER *v.* R. YBARRU.

**(Supreme Court of California, 1853. 3 Cal. 147.)**

This action was brought upon an agreement between the plaintiff and defendant, which set forth, that about the 15th of June, 1852, the plaintiffs and defendant entered into a contract, whereby the defendant agreed with the plaintiff to sell, and pick from the vines, and deliver to plaintiff, at the vineyard of the defendant, so many of the grapes then growing in said vineyard, as plaintiff should wish to take the present year, the plaintiff to have the first grapes that were ripe, for which plaintiff agreed to pay defendants ten cents per pound, cash, on delivery; and plaintiff avers, that on the 19th August, 1852, he notified the defendant that he wished to take of said grapes 1900 pounds, and tendered the defendant $190 in payment therefor, and requested the defendant to pick and deliver the said quantity to the plaintiff; but that defendant refused to deliver the same or any part thereof.

The defendant denied all the allegations of the bill, and the cause was tried by a jury, who were instructed by the court that the contract set up in the plaintiff's bill was void, for want of a binding consideration on the part of the plaintiff, which plaintiff excepted to, and judgment being rendered for the defendant, the plaintiff took this appeal.

HEYDENFELDT, J. When the agreement, which is the subject of this action was first entered into, it amounted to a mere offer on the part of the defendant, which the plaintiff had the right to accept or reject, and the defendant to retract, at any time before actual acceptance. When, however, the plaintiff named the amount of grapes which he would take under the offer of the defendant, the contract was complete, and both parties were bound by it. The court below, therefore erred in deciding for the defendant, and judgment is reversed, with costs.

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## THE CHICAGO & GREAT EASTERN RAILWAY COMPANY *v.* DANE.

**(Court of Appeals of New York, 1870. 43 N. Y. 240.)**

This is an appeal from a judgment of the General Term of the Supreme

**Compare these cases with Jordan v. Patterson, 67 Conn. 473 (1896) where between Feb. 10, 1892 and March 16, 1892, plaintiffs sent to defendants 14 separate orders for goods, each order numbered and signed, and where on March 16, 1892 defendants wrote plaintiffs, "We are in receipt of the following contracts for which we thank you," describing the 14 orders by their numbers and amounts, and it was held that the letter of March 16 accepted all the orders as one contract, and with Peoria Mfg. Co. v. Bain Mfg. Co., 76 Mo. App. 76, where an order for twine and another for rope were given on the same day and accepted in one letter, and where instructions not to send the twine were held not to relieve the seller from his obligation to send the rope.**

Court in the first judicial district, affirming a judgment for the defendant upon the report of a referee.

This action was brought to recover damages on an alleged contract of the defendant to carry and transport a quantity of railroad iron from New York to Chicago for the plaintiffs. The only evidence of the contract were the letters quoted in the opinion of the court.

GROVER, J. Whether the letter of the defendants to plaintiff, and the answer of plaintiff thereto (leaving the question of revenue stamps out of view), proved a legal contract for the transportation of iron by the defendants for the plaintiff from New York to Chicago upon the terms therein specified, depends upon the question whether the plaintiff became thereby bound to furnish any iron to the defendants for such transportation, as there was no pretense of any consideration for the promise of the defendants to transport the iron, except the mutual promise of the plaintiff to furnish it for that purpose, and to pay the specified price for the service. Unless, therefore, there was a valid undertaking by the plaintiff so to furnish the iron, the promise of the defendants was a mere nude pact, for the breach of which no action can be maintained. The material part of the defendants' letter affecting this question is as follows: "We hereby agree to receive in this port (New York), either from yard or vessel, and transport to Chicago, by canal and rail or the lakes, for and on account of the Chicago & Great Eastern Railway Company, not exceeding 6000 tons gross (2240 pounds) in and during the months of April, May, June, July, and August, 1864, upon the terms and for the price hereinafter specified." This letter was forwarded by the defendants to the plaintiff April 15th, 1864. On April 16th the plaintiff answered this letter, the material part of which was as follows: "In behalf of this company I assent to your agreement, and will be bound by its terms." We have seen that the inquiry is, whether this bound the plaintiff to furnish any iron for transportation. It is manifest that the word "agree" in the letter of the defendants was used as synonymous with the word "offer," and that the letter was a mere proposition to the plaintiff for a contract to transport for it any quantity of iron upon the terms specified, not exceeding 6000 tons, and that it was so understood by the plaintiff. The plaintiff was at liberty to accept this proposition for any specified quantity not beyond that limited; and had it done so, a contract mutually obligatory would have resulted therefrom, for the breach of which by either party the other could have maintained an action for the recovery of the damages thereby sustained. This mutual obligation of the parties to perform the contract would have constituted a consideration for the promise of each. But the plaintiff did not so accept. Upon the receipt of the defendants' offer to transport not to exceed 6000 tons upon the terms specified, it merely accepted such offer, and agreed to be bound by its terms. This amounted to nothing more than the acceptance of an option by the plaintiff for the transportation of

such quantity of iron by the defendants as it chose; and had there been a consideration given to the defendants for such option, the defendants would have been bound to transport for the plaintiff such iron as it required within the time and quantity specified, the plaintiff having its election not to require the transportation of any. But there was no consideration received by the defendants for giving any such option to the plaintiff. There being no consideration for the promise of the defendants, except this acceptance by the plaintiff, and that not binding it to furnish any iron for transportation unless it chose, it follows that there was no consideration for any promise of the defendants, and that the breach of such promise furnishes no foundation for an action. The counsel for the defendants insists that the contract may be upheld for the reason that at the time the letters were written the defendants were engaged in transporting iron for the plaintiff. But this had no connection with the letters any more than if the defendants were at the time employed in any other service for the plaintiff. Nor does the fact that the defendants, after the letters were written, transported iron for the plaintiff at all aid in upholding the contract. This did not oblige the plaintiff to furnish any additional quantity, and consequently constituted no consideration for a promise to transport any such. The counsel for the appellant further insists that the letter of defendant was a continuing offer, and that the request of the plaintiff, in August, to receive and transport a specified quantity of iron was an acceptance of such offer, and that the promises then became mutually obligatory, if not so before. This position cannot be maintained. Upon receipt of the defendants' letter, the plaintiff was bound to accept in a reasonable time and give notice thereof, or the defendant was no longer bound by the offer. The judgment appealed from must be affirmed with costs.

*Judgment affirmed.*[91]

[91] See Houston etc. R. Co. v. Mitchell, 38 Tex. 86, (1873); Hoffman v. Maffiola, 104 Wis. 630 (1899).

In South Hetton Coal Co. v. Haswell etc. Coal Co., [1898] 1 Ch. 465, a bidder for property to be sold to the highest bidder sent in a bid "of such a sum as will exceed by £200 the amount offered by" the only other bidder. Assuming that the seller would have been bound to accept a proper bid, the court held that the bid in question was not one because "whether it was a tender at all depended entirely, not upon the construction of the letter, but upon whether other people tendered. That is not what * * * he bound himself to accept." Lindley, M. R., who wrote the opinion also said: "I have not the slightest doubt that if the liquidator had thought fit to accept the plaintiffs' offer it would have been open to him to do so, and the plaintiffs would have been bound by that acceptance."

## SAMUEL P. WHITE, Respondent, *v.* JOHN W. CORLIES and JONATHAN N. TIFT, Appellants.

(Court of Appeals of New York, 1871. 46 N. Y. 467.)

Appeal from judgment of the General Term of the first judicial district, affirming a judgment entered upon a verdict for plaintiff.

The action was for an alleged breach of contract.

The plaintiff was a builder, with his place of business in Fortieth Street, New York City.

The defendants were merchants at 32 Dey Street.

In September, 1865, the defendants furnished the plaintiff with specifications, for fitting up a suite of offices at 57 Broadway, and requested him to make an estimate of the cost of doing the work.

On September 28th the plaintiff left his estimate with the defendants, and they were to consider upon it, and inform the plaintiff of their conclusions.

On the same day the defendants made a change in their specifications, and sent a copy of the same, so changed, to the plaintiff for his assent under his estimate, which he assented to by signing the same and returning it to the defendants.

On the day following the defendants' book-keeper wrote the plaintiff the following note:

"New York, September 29.

"Upon an agreement to finish the fitting up of offices 57 Broadway in two weeks from date, you can begin at once.

"The writer will call again, probably between 5 and 6 this p. m.

"W. H. R.,

"For J. W. Corlies & Co., 32 Dey Street."

No reply to this note was ever made by the plaintiff; and on the next day the same was countermanded by a second note from the defendants.

Immediately on receipt of the note of September 29th, and before the countermand was forwarded, the plaintiff commenced a performance by the purchase of lumber and beginning work thereon.

And after receiving the countermand, the plaintiff brought this action for damages for a breach of contract.

The court charged the jury as follows: "From the contents of this note which the plaintiff received, was it his duty to go down to Dey Street (meaning to give notice of assent), before commencing the work?

"In my opinion it was not. He had a right to act upon this note and commence the job, and that was a binding contract between the parties."

To this defendants excepted.

FOLGER, J. We do not think that the jury found, or that the testimony shows, that there was any agreement between the parties, before the written communication of the defendants of September 30th was

received by the plaintiff. This note did not make an agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound, in contract, to the other. The only overt action which is claimed by the plaintiff as indicating on his part an acceptance of the offer, was the purchase of the stuff necessary for the work, and commencing work, as we understand the testimony, upon that stuff.

We understand the rule to be, that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound, if that manifestation is not put in a proper way to be in the usual course of events, in some reasonable time communicated to him. Thus a letter received by mail containing a proposal may be answered by letter by mail, containing the acceptance. And in general, as soon as the answering letter is mailed, the contract is concluded. Though one party does not know of the acceptance, the manifestation thereof is put in the proper way of reaching him.

In the case in hand, the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act, which, in itself, is no indication of an acceptance, become such, because accompanied by an unevinced mental determination. Where the act uninterpreted by concurrent evidence of the mental purpose accompanying it, is as well referable to one state of facts as another, it is no indication to the other party of an acceptance, and does not operate to hold him to his offer.

Conceding that the testimony shows, that the plaintiff did resolve to accept this offer, he did no act which indicated an acceptance of it to the defendants. He, a carpenter and builder, purchased stuff for the work. But it was stuff as fit for any other like work. He began work upon the stuff, but as he would have done for any other like work. There was nothing in his thought formed but not uttered, or in his acts that indicated or set in motion an indication to the defendants of his acceptance of their offer, or which could necessarily result therein.

But the charge of the learned judge was fairly to be understood by the jury as laying down the rule to them, that the plaintiff need not indicate to the defendants his acceptance of their offer; and that the purchase of stuff and working on it after receiving the note, made a binding contract between the parties. In this we think the learned judge fell into error.

*Judgment reversed, and new trial ordered.*[92]

[92] The difficulty was not that plaintiff did not sign an agreement but that

## CARNIG *v.* CARR.

(Supreme Judicial Court of Massachusetts, 1897. 167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512, 57 Am. St. Rep. 488.)

Action by Callenkiar S. Carnig against Martin W. Carr for breach of an oral contract for "permanent employment." There was a verdict for plaintiff, and defendant brings exceptions. Overruled.

MORTON, J.[98] There was evidence tending to show that the defendant agreed that if the plaintiff would give up his business, which was that of an enameler, and enter his service in the same occupation, he would furnish him with permanent employment at stipulated wages; that the plaintiff gave up his business, and entered defendant's employment, and continued therein several months, receiving wages at the rate agreed, when defendant suspended his employment, and finally ceased altogether to employ him, though he has work of the kind which the plaintiff was to do. The defendant contends that the contract is too indefinite to be capable of enforcement; that it is within the statute of frauds; that the

conduct of acceptance was not exhibited to the defendants. See note to Spencer v. Spencer, *ante*, p. 46.

"It will be observed that the appellee did not sign the contract and hence it is contended that the contract is not mutual. It appears, however, that the contract was delivered by Morris Sellers, appellant, to appellee, on the day it was executed, and appellee accepted the contract and agreed to its terms and conditions. The acceptance of the contract by appellee assenting to its terms, holding it and acting upon it as a valid instrument, may be regarded as equivalent to its formal execution on his part, as held by this court in Johnson v. Dodge, 17 Ill. 433 and Vogel v. Pekoc, 157 Ill. 339." Craig, J., in Sellers v. Greer, 172 Ill. 549, 552 (1898). See Louisville, etc. Co. v. Coyle, 123 Ky. 854 (1906).

"If one person makes a proposition to another and without any formal acceptance the latter proceeds to avail himself of the proposition, that will be a virtual acceptance, and he will be as fully bound as if he had in terms, accepted the offer. Or if a contract is entered into and the terms agreed upon, and it is understood that it shall be in writing, and the parties perform the agreement, or one of them, without the objection of the other, enters upon the performance of the agreement, the contract, unless of the character required by the statute to be in writing, will be as binding as if reduced to writing as agreed. The writing gives no additional force or validity, except in cases arising under the statute of frauds. It is not the agreement, but the evidence of its terms and conditions." Walker, J., in Miller v. McManis, 57 Ill. 126, 130-131 (1870).

In McKell v. Chesapeake & O. Ry. Co., 175 Fed. 321 (1910) where an acceptance by letter of an offer was conditional as to certain points and was not replied to, but the parties proceeded for years on the theory that a contract was formed, Severens, J., said of the insistence of counsel that there never was a contract: "But it is a sufficient answer to this that the parties proceeded with their contract as if these supposed conditions were a part of it, and this was as effectually an acceptance as if they had been formally a part of it." (p. 328).

[98] Part of the opinion is omitted.

plaintiffs agreement to give up his business was unlawful; and that, therefore, the contract is void for want of consideration; and that the action cannot be maintained on the declaration.

To ascertain what the parties intended by "permanent employment," it is necessary to consider the circumstances surrounding the making of the contract, its subject, the situation and relation of the parties, and the sense in which, taking these things into account, the words would be commonly understood; for it fairly may be assumed that the parties used and understood them in that sense. Navigation Co. v. Moore, 2 Whart. 491. Looking at the matter in that way, we think that the words would be commonly understood as meaning that so long as the defendant was engaged in enameling, and had work which the plaintiff could do, and desired to do, and so long as the plaintiff was able to do his work satisfactorily, the defendant would employ him, and that in that sense the employment would be permanent; that is, the plaintiff would be under no necessity of looking for work elsewhere, but could rely on the arrangement thus made. So construed, the contract would be capable of enforcement, and there would be no want of mutuality because the plaintiff might not have bound himself to continue in the defendant's employment. The construction contended for by the defendant, namely, that it was for him to say whether he needed the plaintiff's services or not, would put the plaintiff entirely at the defendant's mercy, and, in view of the fact that the plaintiff was to give up his business to enter the defendant's employment, would be such an agreement as he could not necessarily have been expected to make. See Russell v. Allerton, 108 N. Y. 288, 15 N. E. 391. On the other hand, it would be equally unreasonable to hold that the defendant could have intended to bind himself to employ the plaintiff so long as they both lived, regardless of his continuing in the enameling business, or of the plaintiff's rendering satisfactory service. The plaintiff does not, indeed, contend for such a construction. If it is difficult, as the defendant insists that it is, to lay down a rule for estimating the damages arising from the breach of such a contract as we have construed this to be, the difficulty is no greater than exists in many other cases, and does not present an insuperable objection to recovery.

The construction which we have given to the contract disposes of the defense of the statute of frauds. It has been repeatedly held that, if an agreement whose performance would otherwise extend beyond a year may be completely performed within a year on the happening of some contingency, it is not within the statute of frauds. Peters v. Inhabitants of Westborough, 19 Pick. 364; Lyon v. King, 11 Metc. (Mass.) 411; Doyle v. Dixon, 97 Mass. 208; Worthy v. Jones, 11 Gray 168; Somerby v. Buntin, 118 Mass. 279; Bartlett v. Mystic River Corp., 151 Mass. 435, 24 N. E. 780; McGregor v. McGregor, 21 Q. B. Div. 424. In this case we say nothing of other contingencies. The contract would have been com-

pletely performed if the defendant had ceased to carry on business within a year.

The contract did not impose an unlimited restraint upon the plaintiff, but, at the most, only restrained him from engaging in business so long as he continued in the employment of the defendant. There was nothing unlawful or against public policy in such a contract. Machine Co. v. Morse, 103 Mass. 73. * * *

*Exceptions overruled.*[94]

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THE OAKBANK OIL COMPANY, Ltd., Pursuers, (Appellants) *v.* LOVE & STEWART, Ltd., Defenders (Respondents).

(House of Lords. [1918] S. C. (H. L.) 54.)

The pursuers appealed to the House of Lords.

LORD CHANCELLOR [FINLAY]. * * * The question is a very short one, and it turns substantially upon the letter of the 29th July, 1914. At the top of the letter is printed in red ink this: "All offers over a period are subject to stoppages through strikes, lockouts, &c., and the right to cancel is reserved in the event of any of the countries from which our supplies are drawn becoming engaged in war." Then the letter proceeds: "Dear Sirs:—We hereby offer to undertake to supply all your requirements in pit-props in accordance with your schedule class No. 12, from No. 41 to 61 inclusive, for 12 months from 1st July, 1914 to 30 June, 1915, at the annexed prices, and hope to be favoured with your acceptance." That was accepted by a letter of the same date signed by the managing director of the pursuers: "I beg to inform you that your offer for the various article specified, as per enclosed schedule, has been accepted." Your Lordships have been referred to a facsimile of the letter from which it appears that the headnote is in red ink and is printed in a reasonably conspicuous position upon the form of the letter. The question is whether that red ink note is to be regarded as forming part of the contract or not. It seems to me clear that it must be so regarded. It is a letter, no doubt, but the parties were in the habit of

**94 On vagueness and uncertainty of promises, see Shaw v. Woodbury Glass Works, 52 N. J. L. 7 (1889) where a promise of "a place" in the works "made to a workman, when there were different places and the rate of wages was not fixed, was held to be merely a negotiation in contemplation of a bargain. The opinion quoted Lord Wensleydale in Ridgway v. Wharton, 6 H. L. Cas., 238, 268 (1857), that "An agreement to be finally settled, must comprise all the terms which the parties intended to introduce into the agreement. An agreement to enter into an agreement, to be afterwards settled between the parties, is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled. Until those terms are settled, he is perfectly at liberty to retire from the bargain."**

writing letters upon business, and, for convenience, they appear to have had this headnote relating to the case of strikes and the case of war. The case of strikes is, unfortunately, so common that everyone would expect to find a provision made for what was to happen in case an occurrence of that kind took place. The case of war is also provided for by this note. It is said that the pursuers did not, nor did any of the directors or officials read this clause—that their own attention was not directed to it, and that the attention of none of the higher officers of the company was called to it. That, to my mind, is utterly immaterial. The question is whether the red ink note was put in such type and in such a position that it must be regarded reasonably as forming part of the terms which were offered by those who wrote the letter. It seems to me quite clear that this red ink note did form part of these terms. Many cases have been put. The case may be suggested of a postscript which had not been added at the end of the letter but was written in at the top of the page on which the letter begins with "Dear Sirs," so that there you would have, "P. S.:—It will of course be remembered that this is subject to the strike clause in the form with which you are familiar," or something of that kind. But here, for convenience, they had this printed clause in red ink, and it seems to me that it is quite impossible to divorce the letter, which is said to begin with the words, "Dear Sirs," and end with the words, "Yours truly," from the clause which is printed in such a way as to call attention to it, and which purports to qualify the terms of the letter. It appears to me that the cases with regard to tickets on railways, which are merely vouchers for payment of a fare, have no application, and it is impossible to read the contract here apart from the red ink note. If that red ink note forms part of the contract, then the decision of the majority of the Inner House was right. They reversed the decision of the Lord Ordinary, and in my opinion they were right. This appeal, therefore, fails.

*Interlocutor appealed from affirmed, and appeal dismissed with costs.*[95]

[95] "It is insisted by appellants that the words, 'All sales subject to strikes and accidents,' printed at the top of their letter-heads, must be considered in determining what the contract was, and that said words constituted an express condition that became a part of the contract between them and appellees. We do not so understand the case. Under date of March 1st, 1889, appellees invited appellants to make them an offer of sale of a specified quantity of sheet iron, to be delivered in certain designated months. On March 4th appellants made them an offer, as requested. On March 9, in their letter of that date, appellees declined to accept the offer received, and at the same time they submitted for consideration an offer of their own,—an offer of purchase. This offer contained all the elements and terms of a precise and complete contract, and lacked only the assent thereto of the persons to whom it was addressed to make it such a contract. The offer was to buy a certain quantity of sheet-iron, of certain sizes, to be delivered in Chicago in specified quantities at designated times, and to pay therefor certain prices at certain stated times, and appellees concluded their proposal by saying, 'If you accept our offer you may enter us

## THE GOVERNORS AND COMPANY OF THE BANK OF IRELAND *v.* PATRICK M'MANAMY and others.

(High Court of Justice in Ireland, King's Bench Division. [1916] 2 Ir. Rep. 161.)

Motion to set aside judgment entered for twenty-three (23) of the defendants and for a new trial.

for March shipment 250 bundles,' etc. The offer was absolute and positive, and without any conditions, qualifications or exceptions whatever. On March 11, appellants wrote to appellees: 'Your favor of March 9 at hand. We accept your offer.' And they thereupon proceeded to restate in their letter the terms of the proposal made to them. These two letters made the contract between the parties. The two preceding letters seem to us to be wholly immaterial. The mere fact that appellants wrote their acceptance on a blank form for letters, at the top of which were printed the words, 'All sales subject to strikes and accidents,' no more made those words a part of the contract than they made the other words there printed, 'Summers Bros. & Co. Manufacturers of Box-annealed Common and Refined Sheet-Iron,' a part of the contract. The offer was absolute. The written acceptance which they themselves wrote was just as absolute. The printed words were not in the body of the letter or referred to therein. The fact that they were printed at the head of their letter-heads would not have the effect of preventing appellants from entering into an unconditional contract of sale.

"In American Express Co. v. Pickney, 29 Ill. 392, this court said: 'In a case where the agreement is partly written and in part printed, the preference is always given to the written part.' In that case the printed matter was in the body of the instrument, incorporated and mingled with the written matter. It would seem there is more reason and occasion for applying the principle of law there invoked in a case where, as here, the words in print are separate and apart from the writing that appears upon the paper, and in a place where one would not be likely to look for limitations upon that which is written. People ex rel. v. Dulaney, 96 Ill. 503, is to the same effect as the case above cited.

"When an instrument is in part written and in part printed, and these parts are apparently inconsistent, or there is a reasonable doubt upon the sense and meaning of the whole, the words in writing will control, because they are the immediate language and terms selected by the parties themselves for the expression of their meaning. (Alsagu v. St. Katherine's Dock Co., 14 M. & W 796, and Robertson & Thomasson v. French, 4 East, 360, both cases cited with approval in Express Co. case, *supra.*) In the case at bar it is inconsistent that the contract should be both an absolute contract and a conditional contract. The terms of payment in this contract were sixty days' time or two per cent discount for cash in ten days. Suppose the words, 'All sales not paid for on delivery to draw interest,' had been printed on the letter-head; can there be any doubt that the written terms would have controlled the printed words? Here there was a written provision that the iron was to be delivered free on board the cars at Chicago. Suppose it had been printed on the letter-head that the manufacturers would not be responsible for iron after a delivery to a common carrier; would not the written provision have governed the contract?

"Upon the whole, we are inclined to the opinion that the mere fact that the words in question were printed in the caption of the paper on which appellants wrote their unqualified acceptance of the contract proposed by appellees, did not have the effect of reading them into the agreement thereby consummated;

CHERRY, L. C. J.[96] * * * The action was brought on foot of a guarantee by the defendant to the Bank of Ireland of the debts and liabilities to the Bank of the Boyle Co-operative Society, Ltd. The guarantee is in the ordinary form. It is dated the 7th April, 1911, and signed by all the defendants. Although the document is dated on that day, it was not, as a matter of fact, signed by many of the defendants until long afterwards. Some of the signatures were obtained as late as the year 1913. The whole transaction was indeed, a very strange one. It appears that there was an earlier guarantee to the bank for £500; that a man named Ahern, who was manager of the Co-operative Society, asked the local bank manager to increase the amount to £1000 which he agreed to do, provided additional names were put to a new contract. The guarantee for £1000 now sued upon was then prepared by the bank's solicitor, and given to Ahern, who took the document away with him, and kept it

and appellants understood that some sort of an agreement was brought to a completion by their act, for in their letter they wrote: 'We also enter your order for 250 bundles, etc., March shipment.'" Baker, J., in Summers v. Hibbard & Co., 153 Ill. 102, 108-110 (1894).

In Poel v. Brunswick-Balke-Collender Co., 216 N. Y. 310, 322-323 (1915) Seabury, J., for the court, said:

"Under well-established rules the instrument is to be construed as a whole, and effect is to be given to every word or expression contained in it where there is no irreconcilable conflict. Barhydt v. Ellis, 45 N. Y. 107; Kratzenstein v. Western Assurance Co., 116 N. Y. 54, 57, 22 N. E. 221, 5 L. R. A. 799. * * * This rule is applied with greater liberality where it appears that the printed matter is in obscure type or placed where it would not be likely to be seen or where the printed matter was evidently not intended to be incorporated in the contract. In such cases the printed matter has been accorded little influence in changing the clear and explicit language of a contract. Sturtevant Co. v. Fireproof Film Co., 216 N. Y. 199, 110 N. E. 440; Sturm v. Boker, 150 U. S. 312, 327, 14 Sup. Ct. 94, 37 L. Ed. 1093; Summers v. Hibbard, 153 Ill. 102, 38 N. E. 899, 46 Am. St. Rep. 872; R. J. Menz Lumber Co. v. McNeeley, 58 Wash 223, 108 Pac. 621, 28 L. R. A. (N. S.) 1007. When the printed matter is not evidently intended to be incorporated in the contract and the understanding of the parties is doubtful, it is to be determined, as similar issues are determined, as a question of fact in the light of the surrounding circumstances. Sturtevant Co. v. Fireproof Film Co., *supra;* Clark v. Woodruff, 83 N. Y. 518, 522.

"In the present case the printed clauses are to the left of the signature of the defendant. They are printed in clear type, under a caption printed in type larger than the other type, which caption plainly reads: 'Conditions on which the above order is given.' The printed clauses are at least as plain and as prominently displayed upon the face of the order [for the goods] as the written matter contained therein. They are not in conflict with that which is written. Under these circumstances they must be deemed to be a part of the order, and cannot be eliminated therefrom by the court upon an inference as to the intention of the parties which is not reflected in the order or in any evidence that was received upon the trial."

See L. R. A. 1916D, 1072, note; Ann. Cas. 1913E, 961, note.

[96] The statement of facts and parts of the opinion are omitted.

at the office of the society, where nearly all the defendants signed, their signatures being witnessed by Ahern.

At the trial Ahern swore that he explained the nature of the document to all the defendants whose signatures he witnessed, and that they all knew the purport of what they were signing. These defendants, on the other hand, positively denied this, and swore that they signed the document without being aware of its nature, and believing it to be of an entirely different character. Most of them swore that they were under the impression when signing the guarantee, that it was a receipt for manure supplied to them. Others said that they thought that it was a receipt of a dividend, while others said that they thought that it was for milk supplied.

MADDEN, J., at the trial, submitted to the jury a series of questions, as to the knowledge and belief of each of the defendants, according to the evidence given by each of them as to his state of mind when signing the guarantee. The jury found in answer to these questions that in the case of all the defendants, save one, the document was signed by them in the honest belief that it was one of an entirely different character from what it really was, and that it was signed by them without negligence on their part. The jury also found that none of the defendants, except Healy, knew that the document was a guarantee of any debt which the society owed to other persons. But upon one question (No. 7)—"Were the signatures of the defendants obtained by the fraudulent representations of Ahern that the document in question was one which did not involve them in any liability to the plaintiffs in respect of any money due or to become due by the creamery to the plaintiffs?" they disagreed. Upon the findings in answer to the other questions I have mentioned, however, the judge gave judgment for all the defendants (except Healy) as against the plaintiffs; and the question now is, was he right in so doing?

The principle of law which the learned judge evidently had in his mind when framing the questions for the jury, was that laid down by Byles, J., in delivering the judgment of the court in the well known case of Foster v. McKinnon, L. R. 4 C P. 704, namely this:—That where a party signs a document under a fundamental mistake as to its nature and character, and that mistake is not due to negligence on his part, he is not bound by his signature, upon the ground that there is, in reality, no contract at all binding him on his part. It is true that in Foster v. McKinnon, and I think also in nearly all the cases which have followed it, the cause of the error has been fraud on the part of some person, but this is due to the fact that such error as to the nature of the document can scarcely ever exist without fraud on somebody's part. The principle of the cases is not, however, that fraud vitiates consent, but rather that there is an entire absence of consent. That the mind of the party who signs under a fundamental error does not go with the act of signing, and that there is consequently no contract at all in fact. The defendant, if he succeeds, does

so upon the issue *non est factum,* not upon the issue of fraud, though fraud, as I have said, is usually present, and is generally found by the jury to have existed. * * *

For these reasons I am of the opinion that the learned judge at the trial was right in giving judgments for the defendants upon the answers to the first six questions, notwithstanding the disagreement of the jury upon the question as to the fraudulent representations by Ahern; and that unless we set aside these findings in favour of the defendants the judgment in their favour should be allowed to stand. * * * On all the grounds therefore, I am of the opinion that the verdict and judgment should stand, and that the application for a new trial should be refused.[97]

[97] In Ford v. Stier, [1896] P. 1, a marriage was annulled where the petitioner, at the time of the marriage a girl of 17, went through the ceremony thinking it was a betrothal and never lived with the respondent.

In New York the negligence of a party in failing to read a paper which he signs will not preclude him from attacking it for fraud. Wilcox v. American Telegraph & Telephone Co., 176 N. Y. 115 (1903). But in Wisconsin, if the party was inexcusably ignorant of the contents of the paper which he signed, as where he did not read what was in plain sight because he was "too busy," although a stranger was asking him to sign, the court will not afford him relief even if there is some evidence of false representations. Standard Mfg. Co. v. Slot, 121 Wis. 14 (1904).

But where there is no fraud, the fact that the party, though able to read and write, and though not prevented from reading, chooses not to read (Chicago Rock Island & Pacific Ry. Co. v. Hamler, 215 Ill. 525 (1905) or the fact that he does not know how to read the language in which the contract is written, but chooses not to seek the assistance of some one capable of reading it to him or translating it for him (Albrecht v. Milwaukee Superior Ry. Co., 87 Wis. 105 (1894)) will not prevent the contract from being valid.

So too "A contract entered into without full understanding of its terms can be ratified thereafter so as to make it binding upon the parties the same as if it was fully understood before its execution. Phelps v. Pratt, 225 Ill. 85; Hare on Contracts, 299." Carter, C. J., in Anderson v. Anderson, 251 Ill. 415, 420 (1911).

In a few jurisdictions in the absence of statute, and in a few others because of statutes, mistake of law is treated in the same way as mistake of fact, but in most jurisdictions mistakes of law, though with growing exceptions to the rule, are not a ground for relief.

"If all contracts made in ignorance of the law were to be held invalid, there would be no certainty in business, and no security in titles. All rights of property would be endangered; and the most important encouragements for industry and enterprise would be taken away. It is indispensable, therefore, that the obligation of contracts should be maintained, unless there is some stronger reason for annulling them than a mere mistake of the law. Champlin v. Laytin, 18 Wend. (N. Y.) 407." Davis, J., in Jordan v. Stevens, 51 Me. 78, 80 (1863). The court there concedes that the distinction between mistakes of law and mistakes of fact is one of policy rather than of principle but says that "and yet it may not be the less necessary to maintain and observe it." (Id.) But in that case for other reasons relief was given.

On effect of signing contract in ignorance of its contents, see 138 Am. St. Rep. 810, note; 6 L. R. A. (N. S.) 463; note; L. R. A. 1917F, 637, note.

## BOULTON *v.* JONES.

(Court of Exchequer, 1857. 2 Hurlstone & Norman, 564.)

Action for goods sold. Plea.—Never indebted.

At the trial before the Assessor of the Court of Passage at Liverpool, it appeared that the plaintiff had been foreman and manager to one Brocklehurst, a pipe hose manufacturer, with whom the defendants had been in the habit of dealing, and with whom they had a running account. On the morning of January 13th, 1857, the plaintiff bought Brocklehurst's stock, fixtures, and business, and paid for them. In the afternoon of the same day, the defendant's servant brought a written order, addressed to Brocklehurst, for three 50-feet leather hose 2½ in. The goods were supplied by the plaintiff. The plaintiff's bookkeeper struck out the name of Brocklehurst and inserted the name of the plaintiff in the order. An invoice was afterward sent in by the plaintiff to the defendants, who said they knew nothing of him. Upon these facts, the jury, under direction of the Assessor, found a verdict for the plaintiff, and leave was reserved to the defendants to move to enter a verdict for them.

POLLOCK, C. B.[98] * * * It is a rule of law, that if a person intends to contract with A., B. cannot give himself any right under it. Here the order in writing was given to Brocklehurst. Possibly Brocklehurst might have accepted the act of the plaintiff in supplying the goods, and maintained an action for their price. But since the plaintiff has chosen to sue, the only course the defendants could take was to plead that there was no contract with him.

BRAMWELL, B. The admitted facts are, that the defendants sent to a shop an order for goods, supposing they were dealing with Brocklehurst. The plaintiff, who supplied the goods, did not undeceive them. If the plaintiff were now at liberty to sue the defendants, they would be deprived of their right of set-off as against Brocklehurst. When a contract is made, in which the personalty of the contracting party is or may be of importance, as a contract with a man to write a book, or the like, or where there might be a set-off, no other person can interpose and adopt the contract. As to the difficulty that the defendants need not pay anybody, I do not see why they should, unless they have made a contract either express or implied. I decide the case on the ground that the defendants did not know that the plaintiff was the person who supplied the goods, and that allowing the plaintiff to treat the contract as made with him would be a prejudice to the defendants.

CHANNEL, B. * * * When the invoice was delivered in the name

[98] The opinion of Martin, B and parts of the opinion of Pollock, C. B., and Channell, B. are omitted.

of the plaintiff, it may be that the defendants were not in a situation to return the goods.

*Rule absolute.*[99]

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## PHILLIP *v.* GALLANT.

(Court of Appeals of New York, 1875. 62 N. Y. 256.)

This action was brought upon an alleged contract between David Phillip, plaintiff's assignor, and defendant, for the completion of a house by Phillip, for the defendant. The making of the contract was denied. Judgment for plaintiff was affirmed by the General Term. Defendant appealed.

CHURCH, CH. J.[100] The appellant insists that she is not bound by the contract of twenty-second of February, in respect to completing the building, for the reason that she supposed it contained a provision requiring the plaintiff's assignor to remedy defects which she alleged had occurred in the work done under previous contracts, and that she never agreed to the terms of this contract.

The referee, in his original report, found that the defendant, who does not understand English perfectly, was informed by one Trudo, who was present at the time, that by this new agreement David Phillip was bound to repair the defects she claimed existed in regard to the work already performed, which she believed, but that such statement by Trudo

[99] "It is the case of a country merchant, sending an order for goods to a person supposed to be in business; but in consequence of a change, the order is executed by another person. Upon this alone, the defendant would not have been bound, because he had made no proposal to the plaintiff, and he had a right to decide for himself with whom he would deal. But on being notified of this change, he assents to it and ratifies it; such ratification relates to the original order, and gives it the same effect, as if originally addressed to him. The letter accompanying the invoice, addressed to the defendant by the plaintiff, distinctly informed the defendant of the execution of the order by the plaintiff, and of his forwarding of the goods by the railroad to Greenfield. The receipt of the goods at Greenfield pursuant to this notice, and payment of the freight, are decisive proof of the assent of the defendant to the change in the execution of the order, and a ratification of the act of the plaintiff." Shaw, C. J., in Orcutt v. Nelson, 1 Gray (Mass.) 538, 542 (1854). See Barnes v. Shoemaker, 112 Ind. 512 (1887); Indiana Mfg. Co. v. Hayes, 155 Pa. St. 160 (1893).

"It is well understood that one may accept delivery of and make use of a newspaper, just as he may of other things, under such circumstances as to make a contract implied in fact." Dibell, J., in Legal News Pub. Co. v. George C. Knispel Cigar Co., 142 Minn. 413, 415 (1919).

Whether a paid for offer or "option" may be assigned to a third person depends upon whether it is personal in its nature or not, a question of construction. See Rease v. Kittle, 56 W. Va. 269, for a decision against the right to assign.

[100] The statement of facts and a part of the opinion are omitted.

was made without the knowledge or consent of said Phillip or of the person who drew the agreement, and was not heard by either of them; that the agreement was read over twice carefully and distinctly to the defendant; that the same was executed in good faith and without fraud on the part of Phillip, and as he believed, contained the entire agreement between the parties. In a supplementary report the referee found that Trudo was nominally a clerk in the office of the person who drew the agreement, but that he occupied a separate office and did business for himself, and was not present at the request of the said person; that the defendant was informed that Phillip was only bound to do what he had agreed to do by that agreement; that while it was being read over Trudo explained it to the defendant in French, and told her that all the work would have to be done in a workmanlike manner, including what had been done, and that the defendant believed from Trudo's interpretation that the prior defective work would have to be made good. The referee did not consider the character or quality of work previously done, but held that this contract superseded the prior contracts, and that no claims could be made under them.

It is not claimed that there was a mutual mistake of the parties, so as to lay the foundation for a reformation, but that the defendant is not bound because she believed it obligated the other party to repair defects in previous work. The plaintiff was guilty of no deception in respect to the provisions of the contract; entire good faith on his part, and on the part of Mr. Barnard, who drew the contract, is found. It does not appear from the facts found but that she knew and understood what the provisions of the contract were, and the legal presumption is that she did. It does not appear but that she understood it herself as it was read, and if not, but that Trudo correctly stated the actual provisions of the contract. All that can be claimed from the facts found is, that Trudo construed the contract as imposing an obligation upon Phillip, to repair defects in previous work, and upon his opinion she believed it. The plaintiff was in no sense responsible for his misconstruction; indeed, it must be presumed to have been innocently made by Trudo. She adopted his opinion without calling the attention of the plaintiff to the subject. The point made by the appellant that she never made this contract cannot be sustained. The contract is in writing; it was read to her carefully; she was told that it contained the whole agreement on the subject. It would be a dangerous precedent to hold that under such circumstances a party was not bound. None of the authorities cited justify such a rule. By signing the agreement upon the construction of her adviser, without calling the attention of the other party or the scrivener to such construction, and thus inducing such party to execute the contract upon the supposition that it contained the true agreement, and that the defendant understood and assented to it, and especially as he proceeded to and did perform the contract upon such supposition, the defendant not notifying him of the claim that she con-

strued it differently from what its language imported, she is precluded and foreclosed from insisting that it is not her contract. In the recent case of Smith v. Hughes, L. R. 6 Q. B. 597, cited by the learned counsel for the defendant, Blackburn, J., lays down the correct rule, which is, I think, applicable to this case. He says: "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

The plaintiff's assignor had every reason to believe that the defendant understood the contract as he did. She acted in a way to induce that belief, and upon that belief thus induced, he executed and performed the contract, and she is bound by it. There are many cases where a party is thus bound, although not knowing or intending to agree to the terms. A familiar instance is in the case of bills of lading and the like, containing terms which the shipper does not read but by accepting which he induces the carrier to believe that they are assented to. The general rule that a party is not bound by the terms of a contract which he does not assent to is well established; but under circumstances like those developed in this case the party is bound, because he is deemed to have assented to the terms, and also because he has so acted as to induce the other party to enter into the contract and is therefore precluded from asserting that he did not assent. * * *

The judgment must be modified by deducting the amount of the mechanics' liens * * * and, as modified, judgment

*Affirmed.*[101]

[101] In Bonelli v. Burton, 61 Ore. 429, 123 Pac. 37 (1912), the plaintiff and one Barber who spoke different languages and were obliged to rely upon an interpreter entered into a contract for the sale by plaintiff to Barber of certain land of which plaintiff did not know the value but Barber, a real estate agent, did. Barber secured an interpreter, agreeing to pay him money, but there was no evidence that plaintiff knew that the interpreter was to receive compensation from Barber. The interpreter made false representations to plaintiff as to the number of acres of land contracted for and plaintiff believing him signed a contract to sell to Barber for $1140 his interest in the land, when in fact it was worth not less than $3000. Barber assigned his interest in the contract to defendant Burton who performed and got the deed but was not a *bona fide* purchaser. It was held that Barber had made the interpreter his agent in the negotiations to an extent that made him liable for the interpreter's misrepresentations and that plaintiff was entitled to have the contract and the deed cancelled on repaying the $1140 and interest and to have a reconveyance from defendant Burton, which was accordingly decreed. Moore, J., for the court said:

"When two parties, who speak different languages and cannot understand each other, voluntarily agree upon a third person to translate for them, they make the interpreter their agent, so that each has a right to rely on the communica-

## RAFFLES *v.* WICHELHAUS.

**(Court of Exchequer, 1864. 2 Hurlstone & Coltman 906.)**

**Declaration.** For that it was agreed between the plaintiff and the defendants, to wit, at Liverpool, that the plaintiff should sell to the defendants, and the defendants buy of the plaintiff, certain goods, to wit, 125 bales of Surat cotton, guaranteed middling fair merchant's Dhollorah, to arrive ex Peerless from Bombay; and that the cotton should be taken from the quay, and that the defendants would pay the plaintiff for the same at a certain rate, to wit, at the rate of 17¼d. per pound, within a certain time then agreed upon after the arrival of the said goods in England. Averments: that the said goods did arrive by the said ship from Bombay in England, to wit, at Liverpool, and the plaintiff was then and there ready and willing and offered to deliver the said goods to the defendants, etc. Breach: that the defendants refused to accept the said goods or pay the plaintiff for them.

Plea. That the said ship mentioned in the said agreement was meant and intended by the defendants to be the ship called the Peerless, which sailed from Bombay, to wit, in October; and that the plaintiff was not ready and willing, and did not offer, to deliver to the defendants any bales of cotton which arrived by the last-mentioned ship, but instead thereof was only ready and willing, and offered to deliver to the defendants 125 bales of Surat cotton which arrived by another and different ship, which was also called the Peerless, and which sailed from Bombay, to wit, in December.

Demurrer, and joinder therein.

*Milward* in support of the demurrer. The contract was for the sale of a number of bales of cotton of a particular description, which the plaintiff was ready to deliver. It is immaterial by what ship the cotton was to arrive, so that it was a ship called the Peerless. The words "to arrive ex Peerless," only mean that if the vessel is lost on the voyage, the contract is to be at an end. [Pollock, C. B. It would be a question for the jury whether both parties meant the same ship called the Peerless.] That would be so if the contract was for the sale of a ship called the

tion made to him by the other party through his representative. Sullivan v. Kuykendall, 82 Ky. 483, 489, 56 Am. Rep. 901; Miller v. Lathrop, 50 Minn. 91, 93, 52 N. W. 274. An interpreter selected by adverse parties, who speak different languages and cannot understand each other, being the agent of both, his representations, made in their presence and hearing, in communicating to one what purport to be the expressions of the other, related in the regular course and prior to the termination of the business, are chargeable to each; and the other is entitled to rely on such representations."

Yet "Courts are always open to receive and enforce equitable considerations; and even in cases of unilateral mistakes, it has been held that the contract would not be enforced when it would be harsh to do so." Morris, J., in Buck v. Equitable Life Assn. Society, 96 Wash. 683, 688 (1917).

Peerless; but it is for the sale of cotton on board a ship of that name. [Pollock, C. B. The defendant only bought that cotton which was to arrive by a particular ship. It may as well be said, that if there is a contract for the purchase of certain goods in warehouse A., that is satisfied by the delivery of goods of the same description in warehouse B.] In that case there would be goods in both warehouses; here it does not appear that the plaintiff had any goods on board the other Peerless. [Martin, B. It is imposing on the defendant a contract different from that which he entered into. Pollock, C. B. It is like a contract for the purchase of wine coming from a particular estate in France or Spain, where there are two estates of that name.] The defendant has no right to contradict by parol evidence a written contract good upon the face of it. He does not impute misrepresentation or fraud, but only says that he fancied the ship was a different one. Intention is of no avail, unless stated at the time of the contract. [Pollock, C. B. One vessel sailed in October and the other in December.] The time of sailing is no part of the contract.

*Mellish* (*Cohen* with him) in support of the plea. There is nothing on the face of the contract to show that any particular ship called the Peerless was meant; but the moment it appears that two ships called the Peerless were about to sail from Bombay there is a latent ambiguity, and parol evidence may be given for the purpose of showing that the defendant meant one Peerless and the plaintiff another. That being so, there was no consensus *ad idem,* and therefore no binding contract. He was then stopped by the court.

PER CURIAM. There must be judgment for the defendants.

*Judgment for the defendants.*[102]

[102] In Mead v. Phenix Ins. Co., 158 Mass. 124 (1892-3) where the dispute was whether grain in a burned elevator or in another one was covered by a description of the grain as in "the elevator building" of a company which owned one of the elevators and leased the other, Holmes, J., said: "Perhaps it will be pressing the principle of such cases as Kyle v. Kavanagh, 103 Mass. 356 and Raffles v. Wichelhaus, 2 H. & C. 906, too far to say that the description of the elevator containing the corn was one proper name in the mouth of the plaintiff and another in that of the defendant, and that therefore the policy was void and the supposed contract never made." (158 Mass. at p. 125.)

In Scriven Brothers & Co. v. Hindley & Co., [1913] 3 K. B. 564, at an auction sale, tow was offered for sale but the buyer reasonably understood that hemp was offered and bid accordingly. After the goods were knocked down to the buyer he discovered the mistake and refused to take or pay for them. In this action for the price, A. T. Lawrence, J., said that the foregoing facts found by the jury "shew that the parties were never *ad idem* as to the subject matter of the proposed sale; there was therefore in fact no contract of bargain and sale" (p. 568). See Sheldon & Barton v. Capron, 3 R. I. 171 (1855); Kyle v. Kavanagh, 103 Mass. 356 (1869); Machine Co. v. Chalkley, 143 N. C. 181 (1906):

"Undoubtedly, in order to create a contract, the minds of the parties must meet and agree upon the expressed terms of the contract. Thus, in Rupley v. Daggett, 74 Ill. 351, one party offered to sell a horse for $165; the other party

## McCAULL-WEBSTER ELEVATOR CO. *v.* STEELE et al.

**(Supreme Court of South Dakota, 1921. 180 N. W. 782.)**

Action by the McCaull-Webster Elevator Company against Lee A. Steele and J. W. Steele, copartners doing business under the firm name of Steele Bros. From judgment for defendants and order denying new trial, plaintiff appeals. Affirmed.

WHITING, J.[103] Plaintiff and defendants entered into a written contract whereby defendants contracted to sell and plaintiff to buy, at a certain agreed price, "5,000 bu. of good sound, dry and merchantable S. corn to grade 3Y, * * * said grain being now in my possession." "3Y" meant No. 3 yellow corn. This corn was not delivered, and, the market price of "3Y" corn being much above the agreed price at the time delivery should have been made under the contract, plaintiff sought a judgment in damages for the difference between such agreed and market prices. From a judgment for defendants and from an order denying a new trial, plaintiff has appealed.

Defendants alleged that the corn that was in contemplation of the

understood him to say $65. It was held that there was no contract. [See Hartford & New Haven R. Co. v. Jackson, 24 Conn. 514]. To the same head may be referred cases where a person, by mistake, enters into a different kind of agreement from that which he intended to make or supposed he was making; as where he signed a bond supposing it to be a mere petition, or which he supposed he was signing merely as a witness. See Thoroughgood's Case, 2 Coke 9; Foster v. McKinnon, L. R. 4 C. P. 704. To the same general principle may be referred those cases where, after the parties have apparently agreed to the terms of a contract, it is made to appear that there was a latent ambiguity in an essential word, by which one of the parties meant one thing, and the other a different thing, the essential word being applicable to both. See Raffles v. Wichelhaus, 2 Hurl. & C. 906; Kyle v. Kavanaugh, 103 Mass. 356. In all these cases it was held that there was no binding contract, because the minds of the parties had never met on its terms. But suppose, in Raffles v. Wichelhaus, there had been but one ship named Peerless, and hence no latent ambiguity in the terms of the contract; the defendant could not have been released from his contract merely because he had in mind, and supposed he was contracting with reference to, another ship of a different name." Mitchell, J., in Stong v. Lane, 66 Minn. 94, 97 (1896).

In Cargill Commission Co. v. Mowery, 99 Kans. 389 (1916), where plaintiff sued for failure of defendant to deliver 30,000 to 35,000 bushels of wheat defendant claimed mistake in use of code words whereby 30,000 to 35,000 bushels stated when 3,000 to 3,500 bushels meant. Plaintiff, however, in reliance on code messages, sold 35,000 bushels of wheat before learning of the claimed mistake, and, accordingly, the contract for the larger amount was held binding. The court said, however, that "Had the mistake been discovered and made known to the plaintiff before acting on the contract the error could have been corrected" (West, J., 99 Kans., at p. 396).

See Roland R. Foulke, Mistake in the Formation and Performance of a Contract, 11 Col. L. Rev. 197, 299.

[103] Parts of the opinion are omitted.

parties as the subject-matter of this contract was corn raised by defendants and standing in their fields at the time the written contract was entered into; that, when this contract was entered into, both parties believed that this corn would, at the time it was to be delivered test No. 3; that as a matter of fact it would not grade No. 3; that it was because of this mutual mistake that the parties entered into this contract; that plaintiff refused to accept this corn under such contract; and that, upon such refusal, defendants returned to plaintiff a check which had been given to them in part payment for such corn. The trial court, over objections, admitted evidence that fully established all of the above allegations of the answer. * * *

In this case it is perfectly clear that both parties were so confident that the corn, then in the minds of the parties, would fulfill the conditions as to grade, that they made no provision whatsoever as to what should be done if this corn would not test No. 3. They contracted in the full belief that defendants had in their possession 5,000 bushels of yellow corn that would, at the time for delivery, grade No. 3. No corn that would, by mere lapse of time, become No. 3 corn, was in possession of defendants. Both parties assumed, as the very basis of the contract, that corn that would fulfill this contract did exist in the possession of defendants. Being mistaken as to this essential fact, there was no binding contract. 13 C. J. 376; 6 R. C. L. 620; Virginia Iron, Coal & Coke Co. v. Graham, 124 Va. 692, 98 S. E. 659; Muhlenberg v. Henning, 116 Pa. 138, 9 Atl. 144; St. L. S. W. Ry. Co. v. Johnston, 58 Tex. Civ. App. 639, 125 S. W. 61.

Let us suppose that No. 3 corn had not been worth the contract price and defendants had gone out and purchased No. 3 corn and tendered same to plaintiff, plaintiff knowing such fact would have had the right to, and would undoubtedly, have refused to accept such corn for the very simple reason that it never agreed to buy any corn other than the corn in possession of defendants when the contract was entered into.

The judgment and order appealed from are

*Affirmed.*[104]

[104] "There was no subject-matter. The parties supposed there was a judgment, and negotiated and agreed on that basis, but there was none. Where they assumed there was substance there was no substance. They made no contract because the thing they supposed to exist, and the existence of which was indispensable to the institution of the contract had no existence." Graves, J., in Gibson v. Pelkie, 37 Mich. 380, 381 (1877).

So in Galloway v. Galloway, 30 T. L. R. 531 (1914), the plaintiff and defendant, erroneously believing that they were married, entered into a deed of separation, and it was held that the deed was void because of mutual mistake of a material fact.

## FALCK *v.* WILLIAMS.

**(The Privy Council, on Appeal from the Supreme Court of New South Wales. [1900] A. C. 176.)**

LORD MACNAGHTEN. Mr. Falck, who was plaintiff in the action and is now the appellant, was a shipowner residing in Norway; Williams, the respondent was a shipbroker in Sydney, New South Wales.

Through one Buch, who was a shipbroker and chartering agent at Stavanger, in Norway, Falck did a good deal of business with Williams.

Buch and Williams corresponded by means of a telegraphic code, or rather a combination of two codes arranged between them. It was owing to a misunderstanding of a code message relating to one of Falck's vessels called the "Semiramis" that the difficulty arose which led to the present litigation.

Falck sued Williams for breach of a contract of affreightment to load the "Semiramis" with a cargo of copra in Fiji for delivery in the United Kingdom or some port in Europe. Williams understood the proposal made to him to be a proposal for carriage of a cargo of shale to be loaded at Sydney and delivered at Barcelona, and he accepted the proposal under this impression. It was conceded that both parties acted in good faith, and that the mistake was unintentional, whoever might be to blame for the misunderstanding.

The case came on for trial before Owen, J., and a jury. A verdict was taken by consent for the defendant. The amount of damages, if damages were recoverable, was fixed by agreement. All other questions were reserved for the full court. The full court dismissed the action with costs.

The first question is, Was there a contract? If there was no contract in fact, Was the proposal made on Falck's behalf so clear and unambiguous that Williams cannot be heard to say that he misunderstood it? If this question be answered in the negative, all other questions become immaterial.

The negotiation in reference to the "Semiramis" began apparently on February 7, 1895, by a telegram from Williams to Buch. Williams offered to load the "Semiramis" with shale at Sydney Wharf for Barcelona "at freight per ton dead weight 27s." Buch replied by telegram, dated February 9, asking £2250 as a lump sum for freight. On February 12 Williams offered 27s. 6d. "per ton dead weight." On the 13th Buch offered to accept that sum on the ships dead weight "capacity." By telegram on the 14th Williams explained that the rate offered was "per ton dead weight discharged." On the 15th Buch replied that the freight was to be payable "on guaranteed dead weight capacity," or to be a lump sum of £2100, adding a word interpreted to mean "Do your best to obtain our figures, vessel will not accept less." Then, on the 16th, Williams asked what was the guaranteed dead weight capacity of the ship. The answer on the 17th was "1550" tons. On the 18th Williams tele-

graphed, "Shippers will not pay more than they have already offered at per ton dead weight discharged." He also offered in the same telegram to engage a vessel to load shale at Sydney for Liverpool, at freight per ton dead weight 23s.

Having had no reply to his telegram of the 18th, Williams, on the 21st, telegraphed to Buch, "Why do you not reply to our last telegraph? It is very important that we have immediate reply" And he went on to offer to engage a vessel to load copra at two ports in the Fiji Islands, deliverable in the United Kingdom, or some port on the Continent, at 47s. 6d. per ton cargo delivered.

Then we come to the disputed message. On February 22 Buch telegraphed as follows: "Shale Copyright Semiramis Begloom Estcorte Sultana Brilliant Argentina Bronchil." That message with the code words interpreted runs thus: "Shale. Your rate is too low, impossible to work business at your figures. Semiramis. Have closed in accordance with your order.—Confirm. Two ports Fiji Islands. Sultana. Brilliant. Argentina. Keep a good look-out for business for this vessel and wire us when anything good offers."

On the following day Williams telegraphed, "Semiramis, we confirm charter." And, in accordance with his reading of the telegram of February 22, he at once proceeded in the name and on behalf of Falck to charter the "Semiramis" to carry a cargo of shale from Sydney to Barcelona. So the controversy arose. And after mutual explanations or mutual recrimination the action was brought.

Now, it is impossible to contend that there was a contract in fact. Obviously the parties were not at one. Obviously the acceptance by Williams as he meant it to be understood had no connection with or reference to the proposal which Buch intended to make and thought he was making.

But then, said the learned counsel for the appellant, the message of February 22 was too plain to be misread. An intelligent child would have understood it. Business cannot go on if men of business are allowed to shelter themselves under such a plea. Their Lordships are unable to take that view of the disputed message. When the message was sent there were three matters under consideration. There was the Barcelona charter for the "Semiramis," there was the offer for a Liverpool charter, and there was the Fiji proposal. Of these the most important and the most pressing was the Barcelona charter. True, the negotiation was at a deadlock for the moment, but the parties were so nearly at one that it was only reasonable to expect that they would come to terms, and it is to be observed that during the negotiation, which seems to have been unusually protracted, the "Semiramis" was never once mentioned in connection with any other voyage. Whether the appellant's view or the respondent's view be correct, the telegram of February 22 seems to deal with all three points. The appellant says that the first two words

of the code message deal compendiously with both the Barcelona charter and the Liverpool proposal, and that the next three words deal with the "Semiramis," the last word of the three indicating clearly that she was to be sent to Fiji. The respondent says that the first two words refer to the Liverpool proposal, the second two to the Barcelona charter, and that the fifth word, "estcorte," is to be read with what follows. Indeed, the whole controversy when the matter is threshed out seems to be narrowed down to this question—"Is the word 'estcorte' to be read with what has gone before or with what follows?" In their Lordships' opinion there is no conclusive reason pointing one way or the other. The fault lay with the appellant's agent. If he had spent a few more shillings on his message, if he had even arranged the words he used more carefully, if he had only put the word "estcorte" before the word "begloom" instead of after it, there would have been no difficulty. It is not for their Lordships to determine what is the true construction of Buch's telegram. It was the duty of the appellant as plaintiff to make out that the construction which he put upon it was the true one. In that he must fail if the message was ambiguous, as their Lordships hold it to be. If the respondent had been maintaining his construction as plaintiff he would equally have failed.

Their Lordships will therefore humbly advise Her Majesty that this appeal must be dismissed.[105]

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## JOHN EDMUNDS & Another *v.* MERCHANTS' DESPATCH TRANSPORTATION CO.

## JOSIAH C. BENNETT & Another *v.* SAME.

## C. H. ABORN & Another *v.* SAME.

**(Supreme Judicial Court of Massachusetts, 1883. 135 Mass. 283.)**

Three actions of tort, with counts in contract, against a common carrier, to recover the value of certain goods entrusted to the defendant by

[105] "The rule of ethics is that 'when the terms of a promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended at the time the promisee received it,' and this is the established rule at law, as well as in morals. In the language of the books, it is to be interpreted in the sense in which the promisor had reason to suppose it was understood by the promisee." Allen, J., in White v. Hoyt, 73 N. Y. 505, 511 (1878).

"If A makes an offer to B which B reasonably understands to have a particular meaning, and so accepts, A is bound in accordance with B's understanding. * * * If there is a misunderstanding and neither party was negligent, there is no contract. The same is true if both are equally negligent [citing Falck v. Williams]." Arthur L. Corbin, Offer and Acceptance and Some of the Resulting Legal Relations, 26 Yale L. J. 169, 205, 206.

the plaintiffs, at Boston, for carriage to Dayton, Ohio. Verdict for plaintiffs. Defendants alleged exceptions.

MORTON, C. J. These three cases were tried together. In some features they resemble the case of Samuel v. Cheney, *ante* [135 Mass.] 278. In other material features they differ from it. They also in some respects differ from each other. In two of the cases, a swindler, representing himself to be Edward Pape of Dayton, Ohio, who is a reputable and responsible merchant, appeared personally in Boston and bought of the plaintiffs the goods which are the subject of the suits respectively. In those cases, we think it clear, upon principle and authority, that there was a sale, and the property in the goods passed to the purchaser. The minds of the parties met and agreed upon all the terms of sale, the thing sold, the price and time of payment, the person selling and the person buying. The fact that the seller was induced to sell by fraud of the buyer made the sale voidable, but not void. He could not have supposed that he was selling to any other person; his intention was to sell to the person present, and identified by sight and hearing; it does not defeat the sale because the buyer assumed a false name, or practiced any other deceit to induce the vendor to sell.[106]

In Cundy v. Lindsay, 3 App. Cas. 459, 464, where the question was whether a man, who in good faith had bought chattels of a swindler who had obtained possession of them by fraud, could hold them against the former owner, Lord Chancellor Cairns states the rule to be that, "if it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title."

In the cases before us, there was a *de facto* contract, purporting, and by which the plaintiffs intended, to pass the property and possession of the goods to the person buying them; and we are of opinion that the property did pass to the swindler who bought the goods. The sale was voidable by the plaintiffs; but the defendant, the carrier by whom they were forwarded, had no duty to inquire into its validity. The person who bought them, and who called himself Edward Pape, owned the goods, and upon their arrival in Dayton had the right to demand them of the carrier. In delivering them to him, the carrier was guilty of no fault or negligence. It delivered them to the person who bought and owned them, who went by the name of Edward Pape, and thus answered the direction upon the packages and who was the person to whom the plaintiffs sent them. Dunbar v. Boston & Providence Railroad, 110 Mass. 26. The learned judge who tried the cases in the Superior Court based his charge upon a different view of the law; and, as three cases were tried together, there must be a new trial in each.

[106] See Phillips v. Brooks, Ltd., [1919] 2 K. B. 243.

It seems to have been assumed that the same questions are raised in each case. It is proper that we should add that the third case differs materially from the others. In that case, the contract did not purport, nor the plaintiffs intend, to sell to the person who was present and ordered the goods. The swindler introduced himself as a brother of Edward Pape of Dayton, Ohio, buying for him. By referring to the mercantile agency, he tacitly represented that he was buying for the Edward Pape who was there recorded as a man of means. The plaintiffs understood that they were selling, and intended to sell, to the real Edward Pape. There was no contract made with him, because the swindler who acted as his agent had no authority, but there was no contract of sale made with any one else. The relation of vendor and vendee never existed between the plaintiffs and the swindler. The property in the goods, therefore, did not pass to the swindler;[107] and the defendant cannot defend, as in the other cases, upon the ground that it has delivered the goods to the real owner. Hardman v. Booth, 32 L. J. (N. S.) Ex. 105; Kingsford v. Merry, 26 L. J. (N. S.) Ex. 83; Barker v. Dinsmore, 72 Pa. St. 427.

Whether the defendant has any other justification or excuse for delivering the goods to the swindler is a question not raised by this bill of exceptions, and not considered at the trial; and therefore we cannot express an opinion upon it.

*Exceptions sustained.*

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## W. F. TURNER and Another *v.* O. M. WEBSTER.

**(Supreme Court of Kansas, 1880. 24 Kan. 38, 36 Am. Rep. 251.)**

Action brought by Webster against Turner and another, partners, to recover for services rendered the defendants. Trial at the January term, 1879, of the District Court, and verdict and judgment for plaintiff. The defendants bring the case to this court.

BREWER, J.[108] In an action commenced by plaintiffs in error, an attachment was issued, placed in the hands of the sheriff, and by him

[107] So where the fraudulent person orders the goods by mail in the name of a responsible buyer, while the courts could take the view that there is a sale to the one signing the letter with the other's name, they take, instead, the view that the intention to sell to the person whose name is used is the fundamental intent and there is no sale. See Cundy v. Lindsay, 3 A. C. 459 (1878), cited in the principal case; Brighton Packing Co. v. Butchers, etc. Association, 211 Mass. 398 (1912); Phelps v. McQuade, 220 N. Y. 232 (1917).

See Clarence D. Ashley, Mutual Assent in Contract, 3 Col. L. Rev. 71. On right to avoid contract because of mistake as to identity of other party thereto, see L. R. A. 1916D, 801, note.

[108] Part of the opinion is omitted.

levied upon certain mill property. Pending the attachment proceedings, the sheriff, under direction of the plaintiffs in error, employed defendant in error to watch the property; and this action was brought by defendant in error, plaintiff below, to recover for such services. That the sheriff was authorized by plaintiffs in error to employ defendant in error, and that the latter performed the services, are conceded facts. The dispute is as to the compensation. Webster claims that the contract price was three dollars per day, and that it was worth that amount, while Turner & Otis say that they authorized the sheriff to contract for only one dollar and a half a day, and the sheriff says that that was all he promised to pay. The misunderstanding seems to have arisen in this way: After the attachment, Turner & Otis requested the sheriff to find some one to guard the mill. Meeting Webster, he asked him what he would undertake the job for. He replied, one dollar and one half a day, and nights the same. The sheriff understood him to say and mean, one dollar and a half for each day of twenty-four hours, while plaintiff meant that amount for a twelve-hour day, and the same for the night-time, or three dollars for every twenty-four hours. The sheriff reported the offer to Turner & Otis as he understood it, and they, after some hesitation, told him to accept the offer and employ Webster. Without further words as to the price, the sheriff gave the key of the mill to Webster, and told him to go ahead.

Now the contention of plaintiffs in error is that the case turns on the law of agency; that they never personally employed Webster; that the sheriff was only a special agent with limited powers, only authorized to bind them by a contract to the amount of one dollars and fifty cents per day of twenty-four hours; that Webster is chargeable with notice of the extent of the sheriff's authority, and can enforce the contract as against the plaintiffs in error to the extent only of such authority. For any contract beyond that amount, the special agent binds himself alone, and not the principal. On the other hand, the defendant in error contends that, where services are contracted for and rendered, and no price stipulated, the law awards reasonable compensation therefor, and that, where there is a misunderstanding as to the price, the one party understanding it at one sum and the other at a different, there is no stipulation as to the price, and that it makes no difference whether the contract be made through an agent or with the principal directly. In the case at bar, he contends that it is immaterial that the conversation and misunderstanding were with the sheriff,—the agent—and that the rule is just the same as though the talk and misundertsanding had been with Turner & Otis personally.

We think the case rests upon the propositions advanced by the defendant in error. It will not be questioned that, where the minds of two contracting parties do not come together upon the matter of price or compensation, but do upon all other matters of the contract, and the contract is thereupon performed, the law awards a reasonable price or

compensation. Thus, where shingles were sold, and delivered, at $3.25, but there was a dispute as to whether the $3.25 was for a bunch or for a thousand, it was ruled that, unless both parties had understandingly contracted to one of these views, there was no special contract as to price. Green v. Batemen, 2 Woodb. & M. 359. It is said by Parsons, in his work on Contracts (vol. 1, p. 389), that "there is no contract unless the parties thereto assent; and they must assent to the same thing, in the same sense." Here, Webster never assented to a contract to work for $1.50 a day. Turner & Otis employed him to do that work, and knew that he did it; but their understanding was that they were to pay but $1.50 per day. In other words, the minds of the parties met upon everything but the compensation. As to that, there was no *aggregatio mentium.* What then, should result? Should he receive nothing, because there was no mutual assent to the compensation. That were manifest injustice. Should his understanding bind both parties. That were a wrong to them. Should theirs control? That were an equal wrong to him. The law, discarding both, says a reasonable compensation must be paid. So that if the negotiation had been between the parties directly, and this misunderstanding had arisen, the rule of reasonable compensation would unquestionably have obtained. Now how does the law of agency interfere? The proposition of law advanced by counsel for plaintiff in error, that a special agent binds his principal to the extent only of the authority given, and himself by any promise in excess, is clear. But the agent made no promise in excess of his authority. He promised that which he was authorized to promise. Because the other party misunderstood the extent of the promise, is surely no reason for holding the agent bound for more than he did in fact promise. The agent has rights as well as the principal. The work is not done for his benefit. He has discharged his agency in good faith, and to the best of his ability. Why should he be mulcted in any sum on account of the misunderstanding of the party with whom he contracted? * * * Justice is done to all parties by ignoring any promise or understanding as to compensation, and giving to the laborer reasonable compensation for the work done, and requiring the party receiving the benefit of such work to pay a just and reasonable price therefor.[109]

The case was submitted to the jury upon this basis, and * * *

[109] "Justice is done by emphasizing that everything actually performed took place in a full meeting of minds with only the matter of pay undetermined and by concluding, in effect, that an implied-in-fact contract existed. The parties meant to have an express contract; they got one implied-in-fact and, perhaps, though that is arguable, it is fairly to be called a meeting-of-the-minds implied-in-fact contract." George P. Costigan, Jr., Implied in Fact Contracts and Mutual Assent, 33 Harv. L. Rev. 376, 391.

we think the main question was fairly presented, and that no error appears justifying a reversal of the judgment and it will be affirmed.[110]

[110] In Vickery v. Ritchie, 202 Mass. 247 (1909), Knowlton, C. J., stated the facts as follows:

"This is an action to recover a balance of $10,467.16, alleged to be due the plaintiff as a contractor, for the construction of a Turkish bath house on land of the defendant. The parties signed duplicate contracts in writing, covering the work. At the time when the plaintiff signed both copies of the contract the defendant's signature was attached, and the contract price therein named was $33,721. When the defendant signed them the contract price stated in each was $23,200. * * * The contracts were on typewritten sheets, and it is supposed that the architect accomplished the fraud by changing the sheets on which the price was written before the signing by the plaintiff, and before the delivery to the defendant. The parties did not discover the discrepancy between the two writings until after the building was substantially completed. Each of them acted honestly and in good faith, trusting the statements of the architect. * * *

"The auditor found that the market value of the labor and materials furnished by the plaintiff, not including the customary charge for the supervision of the work, was $33,499.30, and that their total cost to the plaintiff was $32,950.96. He found that the land and building have cost the defendant much more than their market value. The findings indicate that it was bad judgment on the part of the defendant to build such a structure upon the lot, and that the increase in the market value of the real estate, by reason of that which the plaintiff put upon it, is only $22,000."

The opinion stated that "In this case there was no express contract. The plaintiff's right is to recover upon an implied contract of an owner to pay for labor and materials used upon his property at his request" and ended as follows:

"The right of recovery depends upon the plaintiff's having furnished property or labor, under circumstances which entitle him to be paid for it, not upon the ultimate benefit to the property of the owner at whose request it was furnished.

"It follows that the plaintiff is entitled to recover the fair value of his labor and materials."

By "implied contract" the court should have meant a contract implied-in-fact, whether it did so or not, for the measure of damages adjudged was the market value of the labor and materials furnished by the plaintiff, viz., $33,499.30, rather than the increase in the market value of the land, viz., $22,000, resulting from the erection of the bath house. There was a clear showing of the actual enrichment and a clear showing of the still greater value of the labor and materials. The selection of the contract implied-in-fact measure of damages necessarily was an assertion that there was an implied-in-fact contract, even though the court may have thought, as some suppose that it did, that it was enforcing a quasi-contractual obligation. See George P. Costigan, Jr., Implied-in-Fact Contracts and Mutual Assent, 33 Harv. L. Rev. 376, 386-390.

## FRED W. AYER *v.* WESTERN UNION TELEGRAPH COMPANY.

**(Supreme Judicial Court of Maine, 1887. 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353.)**

EMERY, J.[111] On report. The defendant telegraph company was engaged in the business of transmitting messages by telegraph between Bangor and Philadelphia, and other points. The plaintiff, a lumber dealer in Bangor, delivered to the defendant company in Bangor, to be transmitted to his correspondent in Philadelphia, the following message:—

"Will sell 800M. laths, delivered at your wharf, two ten net cash. July shipment. Answer quick."

The regular tariff rate was prepaid by the plaintiff for such transmission. The message delivered by the defendant company to the Philadelphia correspondence was as follows:—

"Will sell 800M. laths delivered at your wharf two net cash. July shipment. Answer quick."

It will be seen that the important word "ten" in the statement of price was omitted.

The Philadelphia party immediately returned by telegraph the following answer:—

"Accept your telegraphic offer on laths. Cannot increase price spruce."

Letters afterward passed between the parties which disclosed the error in the transmission of the plaintiff's message. About two weeks after the discovery of the error, the plaintiff shipped the laths, as per the message received by his correspondent, to wit, at $2.00 per M. He testified that his correspondent insisted he was entitled to the laths at that price, and they were shipped accordingly.

The defendant telegraph company offered no evidence whatever, and did not undertake to account for or explain the mistake in the transmission of the message. The presumption therefore is, that the mistake resulted from the fault of the telegraph company. We cannot consider the possibility that it may have resulted from causes beyond the control of the company. In the absence of evidence on that point we must assume that for such an error the company was in fault. Bartlett v. Tel. Co., 62 Maine 221.

The fault and consequent liability of the defendant company being thus established, the only remaining question is the extent of that liability in this case. The plaintiff claims, it extends to the difference between the market price of the laths and the price at which they were shipped. The defendant claims its liability is limited to the amount paid for the transmission of the message. * * * It contends that the plaintiff was not bound by the erroneous message delivered by the company to the Philadelphia party, and hence need not have shipped the laths at the lesser price.

111 Part of the opinion is omitted.

This raises the question, whether the message written by the sender and entrusted to the telegraph company for transmission, or the message written out and delivered by the company to the receiver at the other end of the line, as and for the message intended to be sent, is the better evidence of the rights of the receiver against the sender. The question is important and not easy of solution. It would be hard, that the negligence of the telegraph company, or any error in transmission resulting from uncontrollable causes, should impose upon the innocent sender of a message a liability he never authorized nor contemplated. It would be equally hard that the innocent receiver, acting in good faith upon the message as received by him, should through such error, lose all claim upon the sender. If one, owning merchandise, write a message offering to sell at a certain price, it would seem unjust that the telegraph company could bind him to sell at a less price by making that error in the transmission. On the other hand, the receiver of the offer may, in good faith, upon the strength of the telegram as received by him, have sold all the merchandise to arrive, perhaps at the same rate. It would seem unjust that he should have no claim for the merchandise. If an agent receive instructions by telegraph from his principal, and in good faith act upon them as expressed in the message delivered him by the company, it would seem he ought to be held justified, though there were an error in the transmission.

It is evident that in case of an error in the transmission of a telegram, either the sender or receiver must often suffer loss. As between the two, upon whom should the loss finally fall? We think the safer and more equitable rule, and the rule the public can most easily adapt itself to, is, that, as between sender and receiver, the party who selects the telegraph as the means of communication shall bear the loss caused by the errors of the telegraph. The first proposer can select one of many modes of communication, both for the proposal and the answer. The receiver has no such choice, except as to his answer. If he cannot safely act upon the message he receives through the agency selected by the proposer, business must be seriously hampered and delayed. The use of the telegraph has become so general, and so many transactions are based on the words of the telegram received, any other rule would now be impracticable.

Of course the rule above stated presupposes the innocence of the receiver, and that there is nothing to cause him to suspect an error. If there be anything in the message, or in the attendant circumstances, or in the prior dealings of the parties, or in anything else, indicating a probable error in the transmission, good faith on the part of the receiver may require him to investigate before acting. Neither does the rule include forged messages, for in such case the supposed sender did not make any use of the telegraph.

The authorities are few and somewhat conflicting, but there are sev-

eral in harmony with our conclusion upon this point. In Durkee v. Vt. C. R. R. Co., 29 Vt. 137, it was held, that where the sender himself elected to communicate by telegraph, the message received by the other party is the original evidence of any contract. In Saveland v. Green, 40 Wis. 431, the message received from the telegraph company was admitted as the original and best evidence of a contract, binding on the sender. In Morgan v. People, 59 Ill. 58, it was said that the telegram received was the original, and it was held that the sheriff, receiving such a telegram from the judgment creditor, was bound to follow it, as it read. There are dicta to the same effect, in Wilson v. M. & N. Ry. Co., 31 Minn. 481, and Howley v. Whipple, 48 N. H. 488.

Tel. Co. v. Schotter, 71 Ga. 760, is almost a parallel case. The sender wrote his message, "Can deliver hundred turpentine at sixty-four." As received from the telegraph company it read, "can deliver hundred turpentine at sixty," the word "four" being omitted. The receiver immediately telegraphed an acceptance. The sender shipped the turpentine, and drew for the price at sixty-four. The receiver refused to pay more than sixty. The sender accepted the sixty, and sued the telegraph company for the difference between sixty and the market. It was urged, as here, that the sender was not bound to accept the sixty, as that was not his offer. The court held, however, that there was a complete contract at sixty—that the sender must fulfil, it and could recover his consequent loss of the telegraph company.

It follows, that the plaintiff in this case is entitled to recover the difference between the two dollars and the market, as to laths. The evidence shows that the difference was ten cents per M.

*Judgment for plaintiff for eight dollars, with interest from the date of the writ.*[118]

[118] The authorities are divided on the point. In accord, see W. U. Tel. Co. v. Flint River Lumber Co., 114 Ga. 576 (1901). *Contra*, see Henkel v. Pape, L. R. 6 Ex. 7 (1870); Shingleur v. W. U. Tel. Co., 72 Miss. 1030 (1895). See also, 42 L. R. A. (N. S.) 419, note.

In Henkel v. Pape, L. R. 6 Ex. 7, 8-9 (1870) Kelley, C. B. said: "But the post-office authorities are only agents to transmit messages in the terms in which the senders deliver them. * * * The defendant cannot be made responsible because the telegraph clerk made a mistake in the transmission of the message."

"The explanation of the English cases [saying no contract] lies in the fact that in England the telegraph lines are connected with the postoffice and that according to Anglo-American law the government is not responsible for the negligence of its employees. It seemed unfair to hold the sender liable on account of the carelessness of the telegraph company without giving him any redress against the company." 27 Yale L. J. at p. 933.

On the duty to mitigate damages to the telegraph company see Bentley v. W. U. Tel. Co., 98 Wash. 431 (1917).

In Borden v. Richmond and Danville R. Co., 113 N. C. 570 (1893), the plaintiffs complained for damages for the non-fulfilment of a contract of affreight-

## BUTLER *v.* FOLEY.

**(Supreme Court of Michigan, 1920. 211 Mich. 668, 179 N. W. 34.)**

Action by A. E. Butler, doing business as A. E. Butler & Co., against J. William Foley. Judgment for plaintiff, a motion for judgment notwithstanding the verdict denied, and defendant brings error. Affirmed.

ment between Goldsborough and Liverpool, alleging that the defendant agreed to transport five hundred bales of cotton for plaintiffs between those points at a rate of sixty-nine and a half cents per one hundred pounds and afterwards declined to do so, but charged eighty-nine and a half cents, which latter amount plaintiffs paid under protest, and brought suit to recover the difference between eighty-nine and a half cents and sixty-nine and a half cents. Defendant admitted that its agent at Goldsborough quoted a rate of sixty-nine and a half cents on October 20, 1891, and that plaintiffs accepted it, but alleged that this rate was quoted by a mistake of a telegraph operator in transmitting an authorization from J. H. Drake, defendant's general freight agent at Richmond, Va., to C. M. Levister, the local agent of defendant at Goldsborough, N. C., with whom plaintiffs dealt, for a rate of eighty-nine and a half cents. As delivered to Levister the message fixed sixty-nine and a half cents as the rate, and he offered that rate to the plaintiffs who accepted. Burwell, J., for the majority of the court, said:

"Assuming for the sake of argument that the local agent at Goldsborough was the mere mouthpiece or spokesman of the defendant in this matter, and that plaintiff knew this fact, then we have here a variance between the intention of the proposer (the defendant) and the expression of that intention. There was an error in the expression of the defendant's intention, but that error was unknown to the plaintiff. He had no good reason to suspect that the writing submitted to him did not correctly express the intention of the defendant. He did not 'snap up' an offer which he knew or suspected was erroneously expressed. He merely accepted a plainly-expressed proposition. In the view of the matter we are now taking, the question, then, is, if in the expression of the intention of one of the parties to an alleged contract there is error, and that error is unknown to and unsuspected by the other party, is that which was so expressed by the one party and agreed to by the other a valid and binding contract, which the party not in error may enforce? * * * An essential bilateral error as to the nature of a contract avoids it if based upon such error, but a unilateral error will not have that effect. Bish. Cont. §§ 701, 702. 'It would open the door to fraud if such a defense was to be allowed. It is said that it is hard to hold a man to a bargain entered into under a mistake, but we must consider the hardship on the other side.' Tamplin v. James, 15 Ch. Div. 215. We must consider also that 'one of the remarkable tendencies of the English common law upon all subjects of a general nature is to aim at practical good, rather than theoretical perfection; and to seek less to administer justice in all possible cases than to furnish rules which shall secure it in the common course of human business.' 1 Story, Eq. Jur. § 111. We think, therefore, that all evidence in regard to plaintiff's purchase of the cotton was irrelevant. He had a valid contract for its shipment at 69½ cents. His rights thereunder could not be affected by a notice that the defendant's agent had been misinformed as we have seen."

CLARK, J., in dissenting, said:

"There was no contract at 69½ cents. The mind of the defendant never entered into such. * * * The principal is only bound by the acts of its

BROOKE, J.[113] This is an action for damages arising out of an alleged breach of contract to deliver certain stock. The contract is based upon three telegrams, as follows:

Exhibit B: "Western Union Telegram, Chicago, Ill. September 19, 1916. Received 3 P. M. J. William Foley, Wyandotte, Mich. We bid

agents within the scope of their agency. The scope of Drake's agency at Richmond was to contract for rates. He made no offer at 89½ cents. He made no mistake. He has done nothing that fixes any contractual liability upon the defendant. Yet he is the only one who could have done so. The scope of the agency of the telegraph operator at Chase City, who, it seems, made the mistake, was not to make contracts, but to transmit messages. The defendant is only bound by his acts within the scope of its agency. Whatever damage the plaintiffs sustained by the mistake in relaying the message, the principal, the defendant company, is liable for; but not for a breach of a contract, since that agent could not make a contract if he had offered to do so, and certainly could not by making a mistake. In relaying the message he inadvertently took or erroneously transmitted six dots ( . . . . . ), the telegraphic marks for 6, instead of a dash and four dots (— . . . .), the sign for 8. This mistake of a dash for two dots was, so to speak, a *lapsus pennae* on his part. It was no mistake on the part of the contracting agent. The learning about unilateral mistakes has, therefore, no bearing, for there was no mistake on either side to the contract. The two sides simply never agreed. The defendant offered 89½ cents, the plaintiff thought he was accepting 69½ cents. Take a homely example: A landowner has an overseer, who is authorized to employ hands. The overseer sends a message by one of his employees to some one that he will give him employment for a year at $10 per month. By reason of carelessness, drunkenness, or stupidity the messenger says the overseer will give $30 per month. Could it be contended that the landowner must pay for a year three times the usual price for an ordinary farm hand? Not at all. He is bound by the act of his overseer, who is authorized to hire hands, in the absence of collusion and the like. But as to the messenger, the principal is bound by his mistake only to the extent of the damages actually suffered by the other party by relying upon the message before it is corrected."

But where the receiver of the telegram knew, or ought to have known, that there was a mistake in the telegram, his acceptance does not complete a contract. German Fruit Co. v. W. U. Tel. Co., 137 Cal. 598 (1902). Some courts overlook that rule, however. See J. L. Price Brokerage Co. v. Chicago, B. & Q. R. Co., (Mo. App.) 199 S. W. 732 (1917).

The rule against snapping up an offer applies, of course, also in other than telegram cases. See on accepting bid with knowledge of mistake as to subject matter, 43 L. R. A. (N. S.) 654, note.

In Tyra v. Cheney, 129 Minn. 428 (1915) plaintiff by mistake left an item of $963 out of his written bid for repair work on a school building, though it had been in an oral estimate given to defendant, and the trial court charged that if plaintiff by a fair preponderance of the testimony showed that the defendant knew of the mistake when he accepted the plaintiff might recover the reasonable value of the work, otherwise he could recover only the unpaid balance of the contract price. The jury found for the plaintiff the reasonable value of the work and in affirming the judgment on the verdict, Holt, J., for the court, said (p. 430):

"If cognizant of the mistake in plaintiff's bid, and that the latter was un-

[113] Parts of the opinion are omitted.

hundred fifty-two firm immediate acceptance fifty by-products. Wire confirmation. A E. Butler & Co. Charge Acc't. JAB 1 P. M."

Exhibit C: "Western Union Telegram, Chicago, Ill. 1916, Sept. 20, P. M. 12:33 a249H 12 Coll Sibley, Mich., 1020A. A. E. Butler and Co., La Salle St., Chicago, Ill. Your bid one five two by-products accepted on forty-four shares. J. W. Foley."

Exhibit D: "Western Union Telegram, Chicago, Ill. September 20, 1916. J. William Foley, Sibley, Mich. We confirm purchase forty-four by-products hundred fifty-two. Please ship stock to-day. Draft attached. A. E. Butler & Co. Charge account 12:55 JAB"

Defendant failed to deliver the stock mentioned in the last two telegrams, and plaintiff, having made sale of the stock, was obliged to purchase the same in the open market at a cost of $792 in excess of the price mentioned in the contract. A jury trial resulted in a verdict in plaintiff's favor for $885.39. A motion was hereafter made by defendant for judgment notwithstanding the verdict, which was denied. * * *

Defendant's entire contention as shown by the correspondence was based upon his claim that Exhibit C (his telegram of September 20, 1916) should have contained the word "subject," making the message read as follows:

"Your bid one hundred fifty-two by-products accepted on forty-four shares, subject." * * *

It is undisputed that Exhibit C was received by plaintiff without the word "subject." * * *

It is the contention of the defendant that the plaintiff, having chosen the telegraph company as a means of communication, and having asked an answer by telegraph, constituted that company its agent; and that therefore any error in transmission of defendant's reply (Exhibit C) should be

**aware of its occurrence, defendant had no right to claim that, when he told the plaintiff to go ahead with the work, their minds met upon the price mistakenly stated in the bid. Nor should plaintiff be allowed to profit by his own mistake so as to hold defendant to the oral bid. There was a failure to enter a binding contract. One cannot snap up an offer or bid knowing that it was made in mistake."**

**"Take the case of 'snapping up' too low an offer or bid knowing that the offeror has made a mistake and then, after getting performance, insisting on paying the erroneously offered low price. Even if it be thought that there cannot properly be said to be even an imperfect meeting-of-the-minds implied-in-fact contract in such a case, why is it not a situation calling for the finding and enforcement of a no-meeting-of-the-minds implied-in-fact contract? The thing done is done at request, is the very thing attempted to be contracted about, payment for it is contemplated—all these are tests of implied-in-fact contracts—and, if defendant is to be denied his unfair advantage under the express contract, clearly the implied-in-fact contract measure of damages is the sound one to apply. The plaintiff should not be compelled to show defendant's enrichment and should recover even if defendant was not enriched."** George P. Costigan, Jr., Implied-in-Fact Contracts and Mutual Assent, 33 Harv. L. Rev. 376, 391.

chargeable to plaintiff. We are of the opinion that the authorities are clear that—

"The offerer takes the risk as to the effectiveness of communication if the acceptance is made in the manner either expressly or impliedly indicated by him." 13 Corpus Juris. 301, § 117, and cases cited.

See, also, Jones on Telegraph and Telephone Companies, page 944; Trevor v. Wood, 36 N. Y. 307, 93 Am. Dec. 511; Magie v. Herman, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660; Wilson v. Railway, 31 Minn. 483, 18 N. W. 291; Durkee v. Vt. Central Ry., 29 Vt. 127.

The difficulty with defendant's contention is that Exhibit C does not constitute an acceptance of plaintiff's offer, Exhibit B. It was, in fact, a counter proposition, and, as such, under the authorities, it operated as a rejection of the original offer. Mechem on Sales, § 299; Elliott on Contracts, § 41; 9 Cyc. 290; Johnson v. Federal Union Surety Co., 187 Mich. 469, 153 N. W. 788. By refusing to accept plaintiff's proposition for the sale of 50 shares and making the counter offer to sell 44 shares, defendant became the offerer, and under the authorities above cited constituted the telegraph company his agent; and therefore, if any error occurred in the transmission of the message, his remedy would be against the telegraph company, and not against the plaintiff.

It is claimed by defendant that Plaintiff's Exhibit D is not an unqualified acceptance of defendant's offer (Exhibit C) by reason of the addition of the words: "Please ship stock to-day. Draft attached." With this contention we are unable to agree. The offer contained in Exhibit C was accepted without qualification in Exhibit D, and the added words are simply precatory and do not affect the binding character of the contract. 13 C. J. § 86, subsec. 2; Marshall v. Jamison, 42 U. C. Q. B. 115; Elliott on Contracts, vol. 1, § 39; Purrington v. Grimm, 83 Vt. 466, 76 Atl. 158.

* * *

We find no reversible error in the record, and the judgment is

*Affirmed.*

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## PAUL FELTHOUSE *v.* BINDLEY.

**(Court of Common Pleas, 1862. 11 C. B. (N. S.) 868.)**

This was an action against an auctioneer for the conversion of a horse. Pleas, not guilty, and not possessed. A verdict was found for the plaintiff, damages £33, leave being reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that the objection was well founded.

WILLES, J.[114] I am of opinion that the rule to enter a nonsuit should be made absolute. The horse in question had belonged to the plaintiff's

[114] The statement of facts is omitted.

nephew, John Felthouse. In December, 1860, a conversation took place between the plaintiff and his nephew relative to the purchase of the horse by the former. The uncle seems to have thought that he had on that occasion bought the horse for £30, the nephew that he sold it for 30 guineas, but there was clearly no complete bargain at that time. On January 1st, 1861, the nephew writes: "I saw my father on Saturday. He told me that you considered you had bought the horse for £30. If so, you are laboring under a mistake, for 30 guineas was the price I put upon him, and you never heard me say less. When you said you would have him, I considered you were aware of the price." To this the uncle replies on the following day: "Your price, I admit, was 30 guineas. I offered £30; never offered more, and you said the horse was mine. However, as there may be a mistake about him, I will split the difference. If I hear no more about him, I consider the horse mine at £30 15s." It is clear that there was no complete bargain on January 2d, and it is also clear that the uncle had no right to impose upon the nephew a sale of his horse for £30 15s. unless he chose to comply with the condition of writing to repudiate the offer. The nephew might, no doubt, have bound his uncle to the bargain by writing to him, the uncle might also have retacted his offer at any time before the acceptance. It stood an open offer, and so things remained until February 25th, when the nephew was about to sell his farming stock by auction. The horse in question being catalogued with the rest of the stock, the auctioneer (the defendant) was told that it was already sold. It is clear, therefore, that the nephew in his own mind intended his uncle to have the horse at the price which he (the uncle) had named—£30 15s.—but he had not communicated such his intention to his uncle, or done anything to bind himself. Nothing, therefore, had been done to vest the property in the horse in the plaintiff down to February 25th, when the horse was sold by the defendant. It appears to me that, independently of the subsequent letters, there had been no bargain to pass the property in the horse to the plaintiff, and therefore that he had no right to complain of the sale.

Then what is the effect of the subsequent correspondence? The letter of the auctioneer amounts to nothing. The more important letter is that of the nephew, of February 27th, which is relied on as showing that he intended to accept and did accept the terms offered by his uncle's letter of January 2d. That letter, however, may be treated either as an acceptance then for the first time made by him, or as a memorandum of a bargain complete before February 25th, sufficient within the Statute of Frauds. It seems to me that the former is the more likely construction, and if so, it is clear that the plaintiff cannot recover. But, assuming that there had been a complete parol bargain before February 25th, and that the letter of the 27th was a mere expression of the terms of that prior bargain, and not a bargain then for the first time concluded, it would be directly contrary to the decision of the Court of Exchequer in Stockdale v. Dunlop, 6 M. &

W. 224, to hold that that acceptance had relation back to the previous offer so as to bind third persons in respect of a dealing with the property by them in the interim. In that case Messrs. H. & Co., being the owners of two ships, called the Antelope and the Maria, trading to the coast of Africa, and which were then expected to arrive in Liverpool with cargoes of palm-oil, agreed verbally to sell the plaintiffs two hundred tons of oil—one hundred tons to arrive by the Antelope and one hundred tons by the Maria. The Antelope did afterward arrive with one hundred tons of oil on board, which were delivered by H. & Co. to the plaintiffs. The Maria, having fifty tons of oil on board, was lost by perils of the sea. The plaintiffs having insured the oil on board the Maria, together with their expected profits thereon, it was held that they had no insurable interest, as the contract they had entered into with H. & Co., being verbal only, was incapable of being enforced.

BYLES, J. I am of the same opinion, and have nothing to add to what has fallen from my brother Willes.

KEATING, J. I am of the same opinion. Had the question arisen as between the uncle and the nephew, there would probably have been some difficulty. But as between the uncle and the auctioneer, the only question we have to consider is, whether the horse was the property of the plaintiff at the time of the sale on February 25th. It seems to me that nothing had been done at that time to pass the property out of the nephew and vest it in the plaintiff. A proposal had been made, but there had before that day been no acceptance binding the nephew.

*Rule absolute.*

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## HOBBS v. MASSASOIT WHIP COMPANY.

**(Supreme Judicial Court of Massachusetts, 1893. 158 Mass. 194, 33 N. E. 495.)**

Contract, upon an account annexed for one hundred and eight dollars and fifty cents, for 2350 eelskins sold by the plaintiff to the defendant. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

HOLMES, J.[115] This is an action for the price of eelskins sent by the plaintiff to the defendant, and kept by the defendant some months, until they were destroyed. It must be taken that the plaintiff received no notice that the defendants declined to accept the skins. The case comes before us on exceptions to an instruction to the jury, that, whether there was any prior contract or not, if skins are sent to the defendant, and it sees fit, whether it has agreed to take them or not, to lie back, and say nothing, having reason to suppose that the man who has sent them

[115] The statement of facts is abbreviated.

believes that it is taking them, since it says nothing about it, then, if it fails to notify, the jury would be warranted in finding for the plaintiff.

Standing alone, and unexplained, this proposition might seem to imply that one stranger may impose a duty upon another, and make him a purchaser, in spite of himself, by sending goods to him, unless he will take the trouble, and be at the expense, of notifying the sender that he will not buy. The case was argued for the defendant on that interpretation. But, in view of the evidence, we do not understand that to have been the meaning of the judge, and we do not think that the jury can have understood that to have been his meaning. The plaintiff was not a stranger to the defendant, even if there was no contract between them. He had sent eelskins in the same way four or five times before, and they had been accepted and paid for. On the defendant's testimony, it is fair to assume that, if it had admitted the eelskins to be over twenty-two inches in length, and fit for its business, as the plaintiff testified, and the jury found that they were, it would have accepted them; that this was understood by the plaintiff; and, indeed, that there was a standing offer to him for such skins. In such a condition of things, the plaintiff was warranted in sending the defendant skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance. See Bushel v. Wheeler, 15 Q. B. 442; Benjamin on Sales, §§ 161-164; Taylor v. Dexter Engine Co., 146 Mass. 613, 615. The proposition stands on the general principle that conduct which imports acceptance or assent is acceptance or assent in the view of the law, whatever may have been the actual state of mind of the party—a principle sometimes lost sight of in the cases. O'Donnell v. Clinton, 145 Mass. 461, 463; McCarthy v. Boston & Lowell Railroad, 148 Mass. 550, 552.

*Exceptions overruled.*

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JOHN F. WHEELER and Another *v.* A. W. KLAHOLT and Another.

**(Supreme Judicial Court of Massachusetts, 1901. 178 Mass. 141, 59 N. E. 756.)**

HOLMES, C. J.* This is an action for the price of one hundred and seventy-four pairs of shoes, and the question raised by the defendants' exceptions is whether there was any evidence, at the trial, of a purchase by the defendants. * * *

* **The statement of facts and a portion of the opinion are omitted.**

The evidence of the sale was this. The shoes had been sent to the defendants on the understanding that a bargain had been made. It turned out that the parties disagreed, and if any contract had been made it was repudiated by them both. Then, on September 11, 1899, the plaintiffs wrote to the defendants that they had written to their agent, Young, to inform the defendants that the latter might keep the goods "at the price you offer if you send us net spot cash at once. If you cannot send us cash draft by return mail, please return the goods to us immediately via Wabash & Fitchburg Railroad, otherwise they will go through New York City and it would take three or four weeks to get them." On September 15, the defendants enclosed a draft for the price less four per cent, which they said was the proposition made by Young. On September 18 the plaintiffs replied, returning the draft, saying that there was no reduction of four per cent, and adding, "If not satisfactory please return the goods at once by freight via Wabash & Fitchburg Railroad." This letter was received by the defendants on or before September 20, but the plaintiffs heard nothing more until October 25, when they were notified by the railroad company that the goods were in Boston.

It should be added that when the goods were sent to the defendants they were in good condition, new, fresh, and well packed, and that when the plaintiffs opened the returned cases their contents were more or less defaced and some pairs of shoes were gone. It fairly might be inferred that the cases had been opened and the contents tumbled about by the defendants, although whether before or after the plaintiffs' final offer perhaps would be little more than a guess.

Both parties invoke Hobbs v. Massasoit Whip Co., 158 Mass. 194, the defendants for the suggestion on p. 197 that a stranger by sending goods to another cannot impose a duty of notification upon him at the risk of finding himself a purchaser against his own will. We are of opinion that this proposition gives the defendants no help. The parties were not strangers to each other. The goods had not been foisted upon the defendants, but were in their custody presumably by their previous assent, at all events by their assent implied by their later conduct. The relations between the parties were so far similar to those in the case cited, that if the plaintiffs' offer had been simply to let the defendants have the shoes at the price named, with an alternative request to send them back at once, as in their letters, the decision would have applied, and a silent retention of the shoes for an unreasonable time would have been an acceptance of the plaintiffs' term, or, at least would have warranted a finding that it was. See also Bohn Manuf. Co. v. Sawyer, 169 Mass. 477.

The defendants seek to escape the effect of the foregoing principle, if held applicable, on the ground of the terms offered by the plaintiffs. They say that those terms made it impossible to accept the plaintiffs' offer, or to give the plaintiffs any reasonable ground for understanding that their offer was accepted, otherwise than by promptly forwarding

the cash. They say that whatever other liabilities they may have incurred they could not have purported to accept an offer to sell for cash on the spot by simply keeping the goods. But this argument appears to us to take one-half of the plaintiffs' proposition with excessive nicety, and to ignore the alternative. Probably the offer could have been accepted and the bargain have been made complete before sending on the cash. At all events we must not forget the alternative, which was the immediate return of the goods.

The evidence warranted a finding that the defendants did not return the goods immediately or within a reasonable time, although subject to a duty in regard to them. The case does not stand as a simple offer to sell for cash received in silence, but as an alternative offer and demand to and upon one who was subject to a duty to return the goods, allowing him either to buy for cash or to return the shoes at once, followed by a failure on his part to do anything. Under such circumstances a jury would be warranted in finding that a neglect of the duty to return imported an acceptance of the alternative offer to sell, although coupled with a failure to show that promptness on which the plaintiffs had a right to insist if they saw fit, but which they also were at liberty to waive.

*Exceptions overruled.*[116]

[116] "Now though it is true that if a stranger were to write and say to a person, 'If I do not hear I will send goods,' the omission to reply would be no evidence of a contract, yet it is different where two persons are actually engaged in dealing or under contract with each other. Then, if a proposal is made to which assent might be reasonably expected amongst men of business, and no answer is sent to it, acquiescence may be presumed." Pollock, C. B., in Lucy v. Mouflet, 5 H. & N. 228, 233 (1860).

In Emerson v. Stevens Grocer Co., 95 Ark. 421 (1910) 105 Ark. 575 (1912) it was held a question for the jury whether silent retention of a check for an unreasonable time constituted acceptance of a counter offer which had been made in the form of a conditional acceptance of an offer, or was merely a retention awaiting negotiations.

In Cole-McIntyre Norfleet Co. v. Holloway, 141 Tenn. 679, (1919) retention of a solicited order for goods for two months with no notice of non-acceptance until delivery of the goods, which had risen in price, was requested was held to constitute an acceptance by acts, the principal by the authorized solicitation of the order being placed in a position where he must accept or reject promptly. Lansden, C. J., said: "Delay in communicating action as to the acceptance may amount to an acceptance itself" (p. 1683) and, on rehearing, said:

"Acceptance of an offer may be inferred from silence. This is only where the circumstances surrounding the parties afford a basis from which an inference may be drawn from silence. There must be the right and the duty to speak, before the failure to do so can prevent a person from afterwards setting up the truth. We think it is the duty of a wholesale merchant, who sends out his drummers to solicit orders for perishable articles, and articles consumable in the use, to notify his customers within a reasonable time that the orders are not accepted; and if he fails to do so, and the proof shows that he had ample opportunity, silence for an unreasonable length of time will amount to an acceptance, if the offerer is relying upon him for the goods."

## CARNAHAN MFG. CO. *v.* BEEBE-BOWLES CO.

(Supreme Court of Oregon, 1916. 80 Or. 124, 156 Pac. 584.)

Action by the Carnahan Manufacturing Company against the Beebe-Bowles Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The defendant was a contractor for the erection of a building in Walla Walla, Wash., to whom the plaintiff agreed to furnish for use in the structure certain doors and interior trim under a written contract which plaintiff claimed had been modified.

The trial resulted in a verdict and judgment for the plaintiff, and the defendant appeals.

BURNETT, J.[117] It was competent for the parties to modify their original contract which would amount to making a new agreement; but this later stipulation, like all others, must be one in which the minds of the parties meet on identically the same proposition. The record shows that the plaintiff proposed certain changes in the contract, but it does not show that the defendant accepted the offer. It was therefore error for the court to say to the jury:

"That a modification of a contract submitted and taken under consideration must be answered. If it is not answered, it is agreed to."

**On effect of delay of principal in disapproving or rejecting orders for goods taken by agent subject to approval, see 7 A. L. R. 1686, note. On whether acknowledging receipt of order is acceptance completing the contract, see 10 A. L. R. 683, note.**

**"The case of Wheeler v. Klaholt, 178 Mass. 141, 59 N. E. 756 (1901), for instance, has offered serious difficulty from the express contract point of view. There the express offer was to sell for 'net spot cash at once' shoes which belonged to the offeror but by mutual mistake of the parties were in the possession of the offeree, the offer specifying that the offeree should return the goods 'immediately' or 'at once' if the offer was not accepted. Though net spot cash was not forthcoming, the court held that the jury could find from the silence of the offeree, and his failure to return the shoes for about a month, the previous relations of the parties calling for speech, an acceptance of an offer to sell, with payment, presumably, to be due at once without demand. That would seem to be binding the parties by a contract different from that contemplated by the express offer, but it may perhaps be an instance of a no-meeting-of-the-minds implied-in-fact contract, the conduct of the offeror being such that it must receive the interpretation 'Unless you send the cash or else in a reasonable time return the goods, you will be deemed to buy them and we shall hold you for the price,' and the offeree's silence and failure to return the goods in a reasonable time having the significance which the jury may see fit to attach to it. It is not intended here to defend the decision, but merely to suggest that as an implied-in-fact contract decision it is understandable, though as merely an express contract decision it is incapable of comprehension, let alone of support." George P. Costigan, Jr., Implied-in-Fact Contracts and Mutual Assent, 33 Harv. L. Rev. 376, 396, n.**

**117 The statement of facts is abbreviated and part of the opinion is omitted.**

No one receiving an overture to change an agreement to which he is a party is obliged to answer the same. His silence cannot be construed as an acceptance if nothing else is shown. * * *

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings.[118]

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## OSTMAN *v.* LEE.

**(Supreme Court of Errors of Connecticut, 1917. 91 Conn. 731, 101 Atl. 23.)**

Action by Frederick Ostman against Harry P. Lee. From an order setting aside a verdict for defendant, defendant appeals. No error.

PER CURIAM.[119] * * * The plaintiff offered evidence to prove that the defendant, after examination, on May 5, 1915, agreed to purchase an old automobile belonging to him for $150, payable in two weeks; that the defendant took the automobile into his possession on the same afternoon, and still retains it, and has paid no part of the purchase price. The defendant offered evidence to prove that he agreed with the plaintiff to store the auto-

[118] "It may be said that it [the offeree's President's silence] could not have constituted an acceptance in the absence of an agreement that such silence should have that effect." Settle, J., in Cincinnati Equipment Co. v. Big Muddy etc. Co., 158 Ky. 247, 256 (1914).

See Royal Ins. Co. v. Beatty, 119 Pa. St. 6 (1888).

In Prescott v. Jones, 69 N. H. 305 (1898) the defendant insurance agents wrote the plaintiff that they would renew his fire insurance policy on a building for a further term of one year unless notified to the contrary. Relying on that letter the plaintiff did not reply. The defendants, however, did not renew the policy and the building was destroyed by fire within the year. Blodgett, J., for the court, said:

"If, therefore, the defendants might and did make their offer in such a way as to dispense with the communication of its acceptance to them in a formal and direct manner, they did not and could not so frame it as to render the plaintiff liable as having accepted it, merely because he did not communicate his intention not to accept it. And if the plaintiff was not bound by the offer until he accepted it, the defendants could not be, because 'it takes two to make a bargain,' and, as contracts rest on mutual promises, both parties are bound or neither is bound. * * * All the plaintiff did was merely to determine in his own mind that he would accept the offer, for there was nothing whatever to indicate it by way of speech or other appropriate act. Plainly, this did not create any rights in his favor as against the defendants. From the very nature of a contract this must be so, and it therefore seems superfluous to add that the universal doctrine is that an uncommunicated mental determination cannot create a binding contract.'

"Nor is there any estoppel against the defendants on the ground that the plaintiff relied upon their letter, and believed they would insure his buildings as therein stated. The letter was a representation only of a present intention or purpose on their part."

[119] Parts of the opinion are omitted.

mobile until fall, free of charge, and if, upon examination, it was then found to be in good condition, and he could use it, he would purchase it, and pay for it $150, and that in November, 1915, he found the automobile was not what he could use. If the decision of the case depended exclusively upon the weight of these respective claims in the light of the probabilities, and of the character and quality of the testimony, we should hold that these were considerations for the jury, and that the trial court was without authority to substitute its judgment for that of the jury. But the defendant's own testimony was that he had kept possession of the automobile from May 5, 1915, to the trial, January 2, 1917, and had neither returned it to the plaintiff, nor told him to take it away, and that, although he had frequently passed the plaintiff's place of business, he had not called upon him or told him the automobile was unsatisfactory, but had advertised it for sale together with other property of his own.

Assuming that the jury found the agreement of sale as the defendant claimed, his subsequent conduct in not informing the plaintiff, in the fall of 1915, that the automobile was not in good condition, and that he could not use it, and in assuming ownership over it by keeping possession of it down to the trial, and by advertising it for sale as his own, constituted in law an acceptance of the automobile by the defendant. He cannot now be permitted to withdraw from a sale long since consummated. The ground of the decision of the trial court would be difficult to justify; the decision itself was right. * * *

There is no error.[120]

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## EDWARD WHEAT AND OTHERS, *v.* LEMUEL CROSS.

**(Court of Appeals of Maryland, 1869. 31 Md. 99, 1 Am. Rep. 28.)**

BARTOL, C. J.[121] This suit was brought by the appellee to recover the price of a horse sold to the appellants.

The plaintiff resided in Frostburg, and the defendants were engaged in the business of buying and selling horses in Baltimore. The contract of sale was made by correspondence between the parties through the mails.

The facts of the case, so far as it is material to state them, were as follows: On the 23d of August, 1867, the defendants received the horse into their possession, to be sold on commission, at that time apparently sound and in good condition. On the 12th of September, 1867, they addressed a letter to the plaintiff, stating that the horse had been sick, but is doing well at this time, and offering $140 for him clear of all expenses, and saying, "you can draw on us at sight for $140." This letter was received on the 15th or 16th of September; on the 16th the

120 See Evans Piano Co. v. Tully, 116 Miss. 267 (1917).

121 Part of the opinion is omitted.

plaintiff signified his acceptance of the offer by drawing on the defendants for $140. The draft was sent on that day, and on the 17th the defendants refusing to pay the draft, it was protested.

On the 16th of September, the defendants addressed a letter to the plaintiff withdrawing their offer of the 12th, stating that "when they wrote they did not think the horse was so bad, but since it has turned out to be 'farcy,' they would not buy at any price," and directing him "not draw on them for the money, that they will not pay the draft until they see how the horse gets." This letter was not received by the plaintiff till after he had accepted the offer contained in the letter of the 12th, by sending the draft.

In the argument of the case two positions have been taken by the defense—

1. That there was not such mutual assent between the parties as to constitute a binding contract. * * *

1st. On the first question, we consider the law well settled that where parties are at a distance from each other, and treat by correspondence through the post, an offer made by one is a continuing offer until it is received, and its acceptance then completes the *aggregatio mentium* necessary to make a binding bargain. The bargain is complete as soon as the letter is sent containing notice of acceptance. This rule applies where the offer and acceptance are unconditional.

The offer may be withdrawn, and the withdrawal thereof is effectual so soon as the notice thereof reaches the other party; but if before that time the offer is accepted, the party making the offer is bound, and the withdrawal thereafter is too late.

In this case it appears the defendants' letter of withdrawal was sent on the same day on which the notice of the plaintiff's acceptance of their previous offer was transmitted, and it has been argued that the *onus* is on the plaintiff to show that the sending of the acceptance preceded the sending of the letter of withdrawal. This position is not correct; it is quite immaterial to inquire whether the defendants' letter of the 16th, or the draft of the same date, was first sent.

Until the notice of the withdrawal of the offer actually reached the plaintiff, the offer was continuing, and the acceptance thereof completed the contract.

This point was expressly decided in Tayloe v. Merchants' Fire Ins. Co., 9 Howard 390. That was a case arising upon an insurance contract, but the reasoning of the court on this question, and the principles decided, are applicable alike to all contracts made by correspondence between parties at a distance from each other. There the terms upon which the company was willing to insure were made known by letter,

and it was held "that the contract was complete when the insured placed a letter in the post-office accepting the terms." * * *

*Judgment [for the plaintiff] affirmed.*[122]

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## OLIVE PICKERING *v.* JAMES C. PICKERING.

(Superior Court of Judicature of New Hampshire, 1833. 6 N. H. 120.)

This was an action of assumpsit, in which the plaintiff alleged, that, on the 27th November, 1802, one E. Pickering being seized of certain

[122] "If the offer contemplates the formation of a unilateral contract, it may be that the offeror proposes to exchange his own promise for an act of the offeree, or, conceivably, that the offeror proposes to exchange an act on his part in exchange for a promise which he requests from the offeree. In fact, an offer contemplating a unilateral contract is almost invariably of the former sort; that is, the offeror is the party who becomes bound as promisor when the contract is formed by acceptance. Even when the offeror in terms offers an act of his own in exchange for a promise to be made by the offeree, the words of the offer are necessarily promissory, for the offeror must, in the nature of the case, announce that he will do a certain act in the future, in return for a promise to be made to him. Indeed an offer which requests from the offeree a promise will, when accepted, always ripen into a bilateral rather than a unilateral contract, except in one narrow class of cases: namely, where the very giving of the promise by the offeree also has the effect of completing the act promised by the offeror. The only instance of this sort that can be supposed arises where the offeror offers (that is, promises) to transfer title to personal property on receiving a specific promise from the offeree. As title to most kinds of personal property will pass by the mere assent of parties, it follows that when the offeree makes the promise requested, the requisite assent is had and he at once becomes the owner of the property offered. The offer though in terms a promise when made, thus becomes fully executed by the promise of the offeree. A unilateral contract is thus formed in which the offeror has performed the act (transferring the ownership of goods) which is the consideration for the acceptor's promise." 1 Williston on Contracts, § 25, p. 31.

"Thus the offeror may send goods with a letter stating the price and requesting no manifestation of acceptance from the offeree except that he shall take the goods and use them. If he does, there can be no doubt that though his use of the goods involves no attempt at communication with the offeror, a debt arises. It may be objected that though there is a sale and debt in such a case, there is no promise by the buyer and therefore properly speaking no contract; but it seems hard to believe that the law would not impose on the acceptor in such a case any obligation which the offeror requested and which the acceptor must be supposed to have intended to assume; and unless the acceptor can be held liable on a contract if what is requested by the offeror is a liability not enforceable as a debt, the offeror would be without remedy. Let it be supposed that bills of lading are sent with the statement that the offeree may take them if he is willing to accept bills of exchange to be drawn against them. It can hardly be supposed that a court would not hold the acceptor bound to honor the bills of exchange if he took the bills of lading." 1 Williston on Contracts, § 71, p. 126.

real estate, made his will, and devised certain lands to the defendant and E. P., provided the defendant should pay the plaintiff, annually, from the decease of the testator, the sum of twenty dollars, during her life; that the testator, died, on the 12th January, 1803; and afterwards the will was probated, and the defendant accepted the devise and promised the plaintiff to pay her said sum, according to the will. The jury returned a verdict for the amount of the legacy, from the death of the testator, to January 12th, 1831, and interest. The defendant moved for a new trial

BY THE COURT.[193] * * * In general, no action can be maintained for a legacy against an executor, without showing a demand. 3 Pick. 218; 14 Mass. Rep. 431. The reason of this is, that it is not the duty of the executor to seek the legatee, but it is enough if he pay when the legatee comes and demands payment.

The question is, whether, in this respect, a devisee in a case like this, stands on any other ground than that on which an executor stands? We are of the opinion that he does stand on different ground. When he accepts the land he becomes a debtor, by reason of the land, for the legacy, and, like any other debtor, is bound to pay without a demand. He stands on the same ground as if he had expressly promised to pay.[194] * * *

*Judgment on the verdict.*

[193] The statement of facts is abbreviated and parts of the opinion are omitted.

[194] "The rule is thus stated in Porter v. Jackson, 95 Ind. 210: 'Where lands are devised to one who, by the will, is directed to pay a legacy, the legacy is charged upon the land devised; and, when payment of the legacy is made a condition of the devise, its acceptance creates also a personal liability to the legatee, which may be enforced without resorting to the land, the lien still remaining as a security.' * * * The rule rests upon the reasonable principle that he who takes a benefit under a will must take it subject to its provisions. Any other construction would necessarily defeat the intention of the testator. So that, where a devisee is required to pay legacies to others, an acceptance of the devise imports a promise to pay the legacies; and the legatees have the right to maintain an action thereon for its nonperformance, as though the promise had been made to themselves." Minshall, J., in Case v. Hall, 52 Oh. St. 24, 31-32 (1894).

"It is settled law that a devisee who accepts a devise charged with the payment of a legacy thereby becomes personally liable to pay the legacy, although the land is worth less than the amount of legacy. This liability is put upon the ground of an implied promise arising from the fact of acceptance; for the doctrine is that he who accepts a benefit under a will must conform to all its provisions, and renounce every right inconsistent with them. Brown v. Knapp, 79 N. Y. 136; Glen v. Fisher, 6 Johns. Ch. 33; Wiggin v. Wiggin, 43 N. H. 561; Porter v. Jackson, 95 Ind. 210. But when the devisee conveys the land subject to the charge the vendee stands, in respect of personal liability, much like one who purchases mortgaged premises subject to the mortgage, who does not become personally liable for the mortgage debt without a contract of assumption, evidenced in some way. But no particular form of words is necessary to create such liability. Any words that clearly import the assump-

## JOHN WALL *v.* THE NIAGARA MINING & SMELTING CO. OF IDAHO.

(Supreme Court of Utah, 1899. 20 Utah 474, 59 Pac. 399.)

Action by John Wall against the Niagara Mining & Smelting Company of Idaho. From a judgment for plaintiff, defendant appeals. Affirmed.

BARTCH, C. J.[125] The plaintiff brought this action to recover $3,000, with interest, alleged to be due upon a contract. It appears from the record that the plaintiff, Ole H. Petersen, Peter A. H. Franklin, Hans H. Petersen, G. E. Palen, and Sarah J. Vance were the promoters and incorporators of the defendant company. The articles of incorporation,

tion of such obligation are sufficient to impose it, and the intention will be sought from the whole instrument, if the promise is to be gathered from a writing. The statement in a deed that the land is conveyed subject to mortgage does not, of itself, make the grantee personally liable for the payment of the mortgage debt. But if the statement is that the grantee assumes, or agrees to pay, the mortgage, then he becomes personally liable. So, by many authorities, certainly, when the purchaser agrees to pay a particular sum as purchase money, and on the execution of the contract of purchase the amount of the mortgage is deducted from the consideration, and the land conveyed subject to the mortgage, the purchaser is bound to pay the mortgage debt, whether he so agreed in express words or not, for this obligation results from the very nature of the transaction. Held v. Vreeland, 30 N. J. Eq. 591; 1 Jones, Mortg. § 749; note to Klapworth v. Dressler, 78 Amer. Dec. 83." Powell, J., in Hodges v. Phelps, 65 Vt. 303, 309-310 (1893).

In Olmstead v. Brush, 27 Conn. 530, 536 (1858) Ellsworth, J., said that in Lord v. Lord, 22 Conn. 602, the court had held that a devise with direction to pay a legacy created a personal charge on the devisee, "a private personal duty, founded on his election to accept and enjoy under the will" and pointed out that "we find in the books a class of conveyances, leases, etc., by deeds poll, in which some clause is inserted by the grantor, imposing a duty of some kind on the grantee which, if accepted, is held to create an implied obligation that the grantee is to comply with the condition. Not that the grantee covenants to do it, for the words are the words of the grantor, but if the grantee accepts the deed he assents to the condition in it, and becomes liable on an implied assumpsit to keep and perform it."

There is no personal liability beyond the proceeds of the property where it is provided that payment is to be made out of the proceeds. Hunkypillar v. Harrison, 59 Ark. 453 (1894); Funk v. Eggleston, 92 Ill. 515 (1879).

The doctrine about legacies applies also to debts. Gridley v. Gridley, 24 N. Y. 130 (1861) (defendant treated as sued on an "implied promise"); Baylor's Lessee v. Dejarnette, 13 Gratt. (Va.) 152 (1856).

If the devisee is only a life tenant an intention to make him personally liable is negatived, since the estate might terminate before he got any benefit. Decker v. Decker, 3 Ohio 157 (1827). See Case v. Hall Admr., 52 Oh. St. 24, 32-33 (1894).

On the statute of limitations applicable to action to enforce an implied promise arising from acceptance of devise chargeable with payment of legacy, see 8 L. R. A. (N. S.) 393, note.

[125] Parts of the opinion are omitted.

which were signed by the promoters, were dated October 29, 1888, but were neither sworn to nor filed, as required by law, before December 3, 1888. The plaintiff, Ole H. Petersen, and Sarah J. Vance, on the same day (December 3, 1888), conveyed by deed to the corporation certain mining claims, which were described in the articles of incorporation, and accepted by the corporation as payment in full of its capital stock, which, according to the articles, consisted of 200,000 shares, of the par value of $10 each. Of this stock, Ole H. Petersen received 53,200 shares; the plaintiff, Wall, 66,666; Peter A. H. Franklin, 33,334; Hans H. Petersen, 133; G. E. Palen, 33,334; and Sarah J. Vance, 13,333. Each of the parties contributed to the corporation 25 per centum of his or her stock, making in all 50,000 shares as working capital. As appears from the evidence, neither Franklin nor Palen contributed property for their shares. On the same day (December 3, 1888) on which the articles of incorporation and the deed were executed and these arrangements made, the contract which has given rise to this controversy was entered into, by the terms of which, and in consideration of the conveying of the mining claims to the corporation, the plaintiff was to be paid, out of the first sale of the 50,000 shares of working capital, 35 per cent. of the proceeds until he had received $3,000. There appears to be no question that the working capital was sold for sufficient to pay the plaintiff's claim in accordance with the terms of the contract. Peter A. H. Franklin was named in the articles of incorporation as president of the company, and the contract was executed by the company through him. * * * After the organization was completed, the corporation retained the property conveyed by the deed, but failed to pay the plaintiff's claim under the contract. At the trial judgment was rendered against the defendant, and it thereupon appealed.

The most important question presented is whether "promoters," or persons who contemplate organizing a corporation, can make contracts which will bind it after it becomes a legal entity. It is contended by counsel for the appellant that a contract made for a corporation before it has an actual existence is not enforceable by or against it. This contention is too broad. It indicates that a corporation cannot, even in the exercise of its powers to make contracts, accept and adopt a contract made for it by the promoters before its existence as an entity. The legitimate sequence of this would be that a corporation, upon full and complete organization under the statute, might accept and adopt such a contract, receive and retain the benefits thereof, and at the same time be absolved from its burdens. We have no sympathy with a doctrine that would lead to such results; that might be employed as an instrument of fraud and injustice to the unwary. It may be assumed as true that promoters and incorporators have no standing in any relation of agency, since that which has no existence can have no agent, and, in the absence of any act authorizing them so to do, can enter into no contract, nor transact any busi-

ness, which shall bind the proposed corporation after it becomes a distinct entity; but, notwithstanding this be true, still such promoters and incorporators may, acting in their individual capacities, make contracts in furtherance of the incorporation, and for its benefit, and, after the incorporation comes into being as an artificial person under the forms of law, it may, at least under the weight of American authority, accept and adopt such contracts, and thereupon they become its own contracts, and may be enforced by or against it. This the corporation may do, not because of an agency, on the part of the incorporators, before the existence of the entity, for there is none, but because of its own inherent powers as a body corporate to make contracts. Moreover, the adoption of such a contract need not be by express action of the corporation, entered on its minutes, but may be inferred from its own acts and acquiescence, or those of its agents, and there need be no express acceptance; or the corporation may be bound by the contracts of its promoters, if made so by its charter, which it has accepted and to which it was agreed. Unless, however, there be an acceptance and adoption thereof in some such way, the corporation will not, in general, be bound by the contracts of its promoters and incorporators, made for it before its complete organization. Where a contract is made by and with promoters, which is intended to inure to the benefit of a corporation about to be organized, such contract will be regarded as in the nature of an open offer, which the corporation, upon complete organization, may accept and adopt or do as it chooses; but, if it does accept and adopt and retain the benefits of it, it cannot reject any liability under it, but in such case will be bound to perform the contract, upon the principle that one who accepts and adopts a contract which another undertook to perform in his name and on his behalf must take the burden with the benefit. In Mor. Priv. Corp. § 548, it is said: "A corporation may, however, make itself responsible for such acts and contracts by subsequently adopting them. The liability of the corporation, under these circumstances, does not rest upon a supposed agency of the promoters, and a ratification of their acts, but upon the immediate and voluntary act of the company. If an agreement is made with promoters or persons about to form a corporation, and the parties intend that the corporation, when formed, shall become a party to the agreement, such agreement would usually constitute or include an open offer, which may be accepted by the corporation after it is formed. And this is true, whether the promoters are primarily liable or not." * * *

Which of the three instruments—the articles of incorporation, the deed, or the contract—was executed first does not appear, but it is shown that they were all completed on the same day. Thereupon the corporation, as appears, took possession of the property conveyed to it by the deed, and referred to in the contract, as the consideration for the $3,000 to be paid to the respondent, and has retained it, with the benefits accruing therefrom, during all these years, but has refused to pay the respondent, al-

though it has sold the working capital admittedly for more than sufficient to pay him in accordance with the terms of the agreement. Under these circumstances, and in consonance with the principles of law hereinbefore considered, this corporation must be held to have accepted and adopted the contract, and to be bound by its terms. The fact that there is nothing to show that the contract was ever adopted at a meeting of the board of directors is, under the circumstances, wholly immaterial. * * * To permit the corporation to retain possession of the property and its proceeds, without paying the agreed price therefor, would be subversive of every principle of justice. In Seymour v. Association, 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859, where similar questions were considered, it was said: "That no formal resolution of purchase was produced from the minutes of the corporation does not prove that there was none, and if, in fact, there was none, because the agreement to that effect preceded by a day or two the actual filing of the corporate certificate, at least the corporation ratified the proposed contract; for it accepted the deeds, took possession of the property, has sold it in burial lots, has kept it and its proceeds for more than 30 years, and put utterly out of its power by its own acts any possible restoration. It must, therefore, pay, or its possession becomes a robbery." * * *

*Judgment affirmed, with costs.*[196]

[196] "It is also generally held that contracts by promoters made on behalf of the corporation, within the scope of its general authority, may be adopted by the latter after its organization. Some of the courts say they may be ratified; but ratification presupposes a principal existing at the time of the agent's action and it seems to us, therefore, that the term is not applicable in its technical sense. McArthur v. Printing Co., [48 Minn. 319], 51 N. W. Rep. 712; Spiller v. Paris Skating Rink Co., 7 Ch. Div. 368.

"With the exception of the law courts of England, the rule is also very generally recognized that if a contract be made on behalf of a corporation by its promoters, and the corporation, after its organization with a knowledge of the facts, accepts its benefits, it must take it with the burdens; and if the other party has performed the stipulation binding upon him, it may be enforced as against the corporation. Spiller v. Rink Co., *supra;* Loucke v. Warehousing Co., 6 Ch. 67. * * *

"Again, when the promoters of a corporation have made a contract in its behalf, to be performed after it is organized, it may be deemed a continuing offer on the part of the other party to the agreement unless withdrawn by him, and may be accepted, and adopted by the corporation after such organization; and the exercise of any right inconsistent with the non-existence of such contract might be deemed conclusive evidence of such adoption." Gaines, J., in Weatherford etc. Ry. Co. v. Granger, 86 Tex. 350, 354-355 (1894).

But in Pennell v. Lothrop, 191 Mass. 357 (1906) Knowlton, C. J., said: "In Abbott v. Hapgood, 150 Mass. 248, it was said that 'if a contract is made in the name and for the benefit of a projected corporation, the corporation after its organization cannot become a party to the contract, even by adoption or ratification of it.' This does not mean that after the organization of the corporation it cannot enter into a contract such as previously had been prepared. Holyoke

Envelope Co. v. U. S. Envelope Co., 182 Mass. 171; Penn Watch Co. v. Hapgood, 141 Mass. 145; Abbott v. Hapgood, *ubi supra*. Such a contract, as between the incorporation and any other party would have its inception when entered into by the corporation, and would require, to make it valid, the existence of all such elements as are necessary in other contracts."

## CHAPTER III.

## THE DOCTRINE OF CONSIDERATION.

James Barr Ames, *Lectures on Legal History*,[1] pp. 129-130, 144-147.

The mystery of consideration has possessed a peculiar fascination for writers upon the English Law of Contract. No fewer than three distinct theories of its origin have been put forward within the last eight years. According to one view, "the requirement of consideration in all parol contracts is simply a modified generalization of *quid pro quo* to raise a debt by parol."[2] On the other hand, consideration is described as "a modification of the Roman principle of *causa*, adopted by equity, and transferred thence into the common law."[3] A third learned writer derives the action of assumpsit from the action on the case for deceit, the damage to the plaintiff in that action being the forerunner of the "detriment to the promisee," which constitutes the consideration of all parol contracts.[4]

To the present writer[5] it seems impossible to refer consideration to a single source. At the present day it is doubtless just and expedient to resolve every consideration into a detriment to the promisee incurred at the request of the promisor. But this definition of consideration would not have covered the cases of the sixteenth century. There were then two distinct forms of consideration: (1) detriment; (2) a precedent debt. Of these detriment was the more ancient, having become established, in substance, as early as 1504. On the other hand, no case has been found recognizing the validity of a promise to pay a precedent debt before 1542. These two species of consideration, so different in their nature, are, as would be surmised, of distinct origin. The history of detriment is bound up with the history of special assumpsit, whereas the consideration based upon a precedent debt must be studied in the development of *indebitatus assumpsit*. * * *

Both in equity[6] and at law, therefore,[7] a remediable breach of a parol promise was originally conceived of as a deceit; that is, a tort. Assumpsit

1 The notes are those of the author quoted, but the note numbers are changed.

For a criticism of the view of Professor Ames, see Robert L. Henry, Consideration in Contracts 601 A. D. to 1520 A. D., 26 Yale L. J. 664.

2 Holmes, Early English Equity, 1 L. Q. Rev. 171; The Common Law, 285. A similar opinion had been previously advanced by Professor Langdell. Contracts, § 47.

3 Salmond, History of Contract. 3 L. Q. Rev. 166, 178.

4 Hare, Contracts, Ch. VII and VIII.

5 It seems proper to say that the substance of this article was in manuscript before the appearance of Judge Hare's book or Mr. Salmond's Essay.

6 Y. B. 12 Hen. VII. 22b, 23, 24b.

7 The Chancellor (Stillington) says, it is true, that a subpoena will lie against a carpenter for breach of his promise to build. But neither this remark nor the statement in Diversitie of Courts, Chancerie, justifies a belief that equity ever enforced gratuitous parol promises. But see Holmes, 1 L. Q. Rev. 172, 173; Salmond, 3 L. Q. Rev. 173. The practice of decreeing specific performance

was in several instances distinguished from contract.[8] By a natural transition, however, actions upon parol promises came to be regarded as actions *ex contractu*.[9] Damages were soon assessed, not upon the theory of reimbursement for the loss of the thing given for the promise, but upon the principle of compensation for the failure to obtain the thing promised. Again, the liability for a tort ended with the life of the wrongdoer. But after the struggle of a century, it was finally decided that the personal representatives of a deceased person were as fully liable for his assumpsits as for his covenants.[10] Assumpsit, however, long retained certain traces of its delictual origin. The plea of not guilty was good after verdict, "because there is a deceit alleged."[11] Chief Baron Gilbert explains the comprehensive scope of the general issue in assumpsit by the fact that "the gist of the action is the fraud and delusion that the defendant hath offered the plaintiff in not performing the promise he had made, and on relying on which the plaintiff is hurt."[12] This allegation of deceit, in the familiar form: "Yet the said C. D., not regarding his said promise, but contriving and fraudulently intending, craftily and subtly, to deceive and defraud the plaintiff," etc.,[13] which persisted to the present century is an unmistakable mark of the genealogy of the action. Finally, the consideration must move from the plaintiff today, because only he who has incurred detriment upon the faith of the defendant's promise, could maintain the action on the case for deceit in the time of Henry VIII.

The view here advanced as to the origin of special assumpsit, although reached by an independent process, accords with, it will be seen, and confirms, it is hoped, the theory first advanced by Judge Hare.

The origin of *indebitatus assumpsit* may be explained in a few words: Slade's case,[14] decided in 1603, is commonly thought to be the source of this action.[15] But this is a misapprehension. *Indebitatus assumpsit* upon

of any promises can hardly be much older than the middle of the sixteenth century. Bro. Abr. Act. on Case, pl. 72 [specific performance of contract, *infra*]. The invalidity of a *nudum pactum* was clearly stated by Saint-Germain in 1522. Doct. & St. Dial. II. Ch. 22, 23 and 24. See a similar statement in A Little Treatise Concerning Writs of Subpoena, Doct. & St., 18th Ed., Appendix, 17; Harg. L. Tr. 334, which was written shortly after 1523.

[8] Y. B. 27 Hen. VIII. 24, 25, pl. 3; Sidenham v. Worlington, 2 Leon. 224; Banks v. Thwaites, 3 Leon. 73; Shandois v. Simpson, Cro. El. 880; Sands v. Trevilian, Cro. Car, 107; Doct. & St. Dial. II. Ch. 23 and 24; Bret v. J. S., Cro. El. 756; Milles v. Milles, Cro. Car. 241; Jordan v. Thompkins, 6 Mod. 77. Contract originally meant what we now call a real contract, that is, a contract arising from the receipt of a *quid pro quo*, in other words, a debt. See 8 Harvard Law Review, 253, n. 3.

[9] Williams v. Hide, Palm. 548, 549; Wirral v. Brand, 1 Lev. 165.

[10] Legate v. Pinchion, 9 Rep. 86; Sanders v. Esterby, Cro. Jac. 417.

[11] Corby v. Brown, Cro. El. 470; Elrington v. Doshant, 1 Lev. 142.

[12] Common Pleas, 53.

[13] In Impey's King's Bench, 5th Ed., 486, the pleader is directed to omit these words in declaring against a Peer: "For the Lords have adjudged it a very high contempt and misdemeanor in any person, to charge them with any species of fraud or deceit."

[14] 4 Rep. 92a; Yelv. 21; Moore, 433, 667.

[15] Langdell, Cont., § 48; Pollock, Cont., 4th Ed., 144; Hare, Cont., 136, 137; Salmond, 3 L. Q. Rev. 179.

an express promise is at least sixty years older than Slade's case.[16] The evidence of its existence throughout the last half of the sixteenth century is conclusive. There is a note by Brooke, who died in 1558, as follows: "Where one is indebted to me, and he promises to pay before Michaelmas, I may have an action of debt on the contract, or an action on the case on the promise."[17] In Manwood v. Burston,[18] (1588), Manwood, C. B., speaks of "three manners of considerations upon which an assumpsit may be grounded: (1) A debt precedent, (2) where he to whom such a promise is made is damnified by doing anything, or spends his labor at the instance of the promisor, although no benefit comes to the promisor * * * (3) or there is a present consideration."[19]

The Queen's Bench went even further. In that court proof of a simple contract debt, without an express promise, would support an *indebitatus assumpsit*.[20] The other courts, for many years, resisted this doctrine. Judgments against a debtor in the Queen's Bench upon an implied assumpsit were several times reversed in the Exchequer Chamber.[21] But the Queen's Bench refused to be bound by these reversals, and it is the final triumph of that court that is signalized by Slade's case, in which the jury found that "there was no other promise or assumption, but only the said bargain;" and yet the judges of England resolved "that every contract executory implied an assumpsit."

*Indebitatus assumpsit,* unlike special assumpsit, did not create a new substantive right; it was primarily only a new form of procedure, whose introduction was facilitated by the same circumstances which had already made Case concurrent with Detinue. But as an express assumpsit was requisite to charge the bailee, so it was for a long time indispensable to charge a debtor. The basis or cause of the action was, of course, the same as the basis of debt, i. e., *quid pro quo,* or benefit. This may explain the inveterate practice of defining consideration as either a detriment to the plaintiff or a benefit to the defendant.

C. C. Langdell, *Summary of Contracts,* §§ 45 to 47, inclusive.

§ 45. The consideration of a promise is the thing given or done by the promisee in exchange for the promise.

§ 46. It is a familiar rule of law that contracts not under seal require a consideration to make them binding, while contracts under seal are binding without a consideration; and hence it is commonly inferred that all contracts not under seal are alike in respect to consideration. In one sense this inference is correct but in another sense it is incorrect. There are two kinds of consideration known to the law, and contracts not under seal may be divided into two classes, according as they are supported by the one or the other of these considerations; and yet either

[16] Br. Abr. Act. on Case, pl. 105 (1542).

[17] Br. Abr. Act. on Case, pl. 5.

[18] 2 Leon. 203, 204.

[19] See further, Anon. (B. R. 1572), Dal. 84, pl. 35; Pulmant's case (C. B. 1585), 4 Leon. 2; Anon. (C. B. 1587), Godb. 98, pl. 12; Gill v. Harwood, (C. B. 1587), 1 Leon. 61. It was even decided that assumpsit would lie upon a subsequent promise to pay a precedent debt due by covenant. Ashbrooke v. Snape, (B. R. 1591), Cro. El. 240. But this decision was not followed.

[20] Edwards v. Burr (1573), Dal. 104; Anon. (1583), Godb. 13; Estrigge v. Owles (1589), 3 Leon. 200.

[21] Hinson v. Burridge, Moore, 701; Turges v. Beecher, Moore, 694; Paramour v. Payne, Moore, 703; Maylard v. Kester, Moore, 711.

kind of consideration is sufficient to render any contract binding. In other words, all contracts not under seal are alike in respect to the consideration required to make them binding, but whether a contract belongs to the one or the other of the two classes above referred to depends upon the kind of consideration by which it is supported. These two classes of contracts are most easily distinguished by the actions by which they are respectively enforced, the action of debt being the original and proper remedy for one class, and the action of assumpsit being the sole remedy for the other class. The former class has existed in our law from time immemorial; the latter class had no legal existence (i. e., they could not be enforced by law) until the introduction of the action of assumpsit, it having been originally the sole object of that action to enforce a class of contracts for which there was previously no remedy. In respect to consideration, the former class of contracts requires that the thing given or done, in exchange for the obligation assumed, shall be given or done to or for the obligor directly; that it shall be received by the obligor as the full equivalent for the obligation assumed, and be in legal contemplation his sole motive for assuming the obligation; and, lastly, that it shall be actually executed, i. e., that the thing to be given or done in exchange for the obligation be actually given or done, it not being sufficient for the obligee to become bound to do it. Unless there is a consideration which satisfies each of these requirements, debt will not lie; and this is equivalent to saying that there is no binding contract according to the ancient law. Whether there is a binding contract at all, or not, depends upon whether there is such a consideration as will support an action of assumpsit. This latter kind of consideration may be best described negatively, namely, by saying that it need not satisfy any one of the requirements before enumerated. If anything whatever (which the law can notice) be given or done in exchange for the promise, it is sufficient; and, therefore, if one promise be given in exchange for another promise, there is a sufficient consideration for each. It is obvious that this more modern species of consideration was derived directly from the more ancient; that in truth it is the ancient consideration relaxed and reduced to a minimum. How and why this relaxation took place, it is not difficult to see. The ancient consideration was required for the creation of a debt because "debt" was the name given to the contract which had been borrowed from the Roman law. A debt (i. e., by simple contract) could be created, therefore, only in the mode in which a *real* contract was made by the Romans; and the consideration in case of a debt corresponded to the *res* which gave the name to the Roman contract. The consideration, therefore, was of the very essence of a debt,—was in fact what created it. But when the action of assumpsit was introduced, and a new class of contracts came to be enforced, it was neither necessary nor possible to require the old consideration to make the new contracts binding. It was not necessary, because it was neither supposed nor claimed that the new contracts created or constituted debts; and it was not possible, because the very reason why a new action was required to enforce these contracts was that they had not a sufficient consideration to support an action of debt. Some relaxation, therefore, was indispensable from the beginning; and the process having begun, there was found to be no satisfactory stopping-place until the result already stated was reached. It may be urged that a more rational course would have been to apply the maxim, *cessante ratione, cessat ipsa lex*, and to hold that the action of assumpsit required no consideration to support it. To this, however, it may be answered, that the courts could not change the law by their own authority; that the action of assumpsit was the creature

of a statute (13 Ed. i, c. 24), and was limited to cases which were analogous to cases for which a legal remedy was already provided; that promises not under seal and without consideration were not analogous to any contracts which had ever been enforced, and that to have enforced such promises would have been to put parol contracts on the same footing with specialties.

§ 47. But whatever may have been the merits of the question originally, it was long since conclusively settled in the manner stated above; and thus the action of assumpsit modified the old consideration instead of wholly superseding it; but so important were the modifications that the relationship of the new consideration to the old has been almost wholly lost sight of. Nay, the old consideration itself has been nearly lost sight of, though it is as necessary now as it ever was for the creation of a debt by simple contract. The reason is obvious. When the old consideration ceased to be necessary to the validity of any contract, it lost in a great measure its practical importance except to lawyers; and when by degrees assumpsit had superseded debt upon simple contracts, it ceased to attract the attention even of lawyers. The result is that the term "consideration" has practically changed its meaning; having formerly meant the consideration necessary to create a debt, it now means the consideration necessary to support assumpsit. It is in this latter sense that it now constitutes an important branch of the law of contracts. * * * The old consideration, however, should never be lost sight of by the student, as it furnishes the best, if not the only, key to the intelligent understanding of the new.

W. T. Barbour, *The History of Contract in Early English Equity,* (Oxford Studies in Social and Legal History, Vol. IV), pp. 59-65, 160-168.[22]

A. *The Doctrine of Consideration:* The history of parol contracts raises two distinct problems: (1) How did parol contracts become actionable at all? (2) How did consideration become the test of the enforceability of such contracts? Before it is possible to classify agreements and determine what are enforceable and what are not, it must be first settled that a contract will support an action. Any classification or generalization is a matter for later consideration. In consequence, nothing but confusion will result if we fail to observe the historical sequence of these two problems.

Now the answer to the first question is to be found in the history of Assumpsit. Starting as an action on the case, it was extended after the struggle of a century from cases of misfeasance to cases of non-feasance. Throughout this struggle there appears no theory of contract, nor was it apparent even that the judges considered the promise as the basis of the action. The delictual origin of the action overshadowed its development. The result is that at the beginning of the sixteenth century Assumpsit has in fact become an action to enforce parol contract, but such an achievement is not realized by contemporary lawyers. The reason is to be found in the principle upon which the action was allowed. A detriment to the plaintiff was an essential condition to its use; or, stated differently, a breach of promise supported an action when, and only when, it could be regarded as a deceit to the plaintiff. There was still a very strong element of tort in the theory of the action.

Some time in the sixteenth century another principle obtained a foothold. Men begin to speak of consideration, of promises as made in con-

[22] Appreciation is expressed of the courtesy of the publisher of the book quoted from, the Oxford University Press, in granting permission to print so extensive a quotation here. The notes are those of the author quoted.

sideration of some act or forbearance. The early history of this doctrine is wrapped in obscurity. We do not know how or when it made its first appearance, and there is much dispute as to its source. But we do know that the first use of the word at common law was in the action of Assumpsit, and that ultimately it became settled that no promise was enforceable unless it were made upon a valid consideration.

To-day in the interests of logic it is deemed advisable to resolve every consideration into a detriment to the promisee. Such a definition, however, does not meet the situation in the sixteenth century. The word was then of wider use than it is today; for when we now speak of consideration, only a valuable consideration is meant.

Historically, consideration seems to have meant any motive or inducement which was sufficient to support a promise.[23] It included such diverse species as (1) a benefit to the promisor, (2) detriment to the promisee, (3) a moral obligation, (4) natural love and affection. All of these are not found in Assumpsit, but it would be a mistake to confine the doctrine to that action. The *quid pro quo* which was essential to Debt became ultimately absorbed by the wider idea. Now in a certain phase, namely as a detriment to the promisee, consideration bears a striking resemblance to the original limitation in Assumpsit, the detriment to the plaintiff. But the question remains, is this more than an analogy? Is there any historical connection between the detriment to the plaintiff in Assumpsit, and the detriment to the promisee into which consideration was ultimately resolved? This is the crux of the matter. We may therefore notice three principal theories of the origin of consideration.

1. "The requirement of consideration in all parol contracts is simply a modified generalization of the requirement of *quid pro quo* to raise a debt by parol."[24]

This is the theory advanced by Mr. Justice Holmes. But there are great difficulties in the way of its acceptance.

(1) It assumes that the doctrine started from a narrow basis and became widened. Originally a benefit to the promisor, consideration came to embrace the notion of detriment to the promisee. But there is no evidence that this is what happened. Consideration as a rule of contract made its first appearance in the action of Assumpsit, and not in Debt. If this theory be correct, then the basis of one action must in some way have become the basis of the other. From the sharp line which was always drawn between Debt and Assumpsit, it seems in the highest degree improbable.

(2) The consideration in *indebitatus assumpsit* was not a modification of *quid pro quo,* but identical with it.[25]

(3) The idea of consideration as a detriment to the promisee never appeared in Debt; though repeated efforts were made to extend *quid pro quo* to cover detriment.[26]

For these reasons we must reject this theory. It fails to take recognition of the wide idea embraced in the word consideration; it requires a transformation of *quid pro quo* which was never effected.

[23] Salmond, Anglo-Am., iii. 331.

[24] L. Q. R., i. 171. And see Holmes, Common Law, 258 ff. Mr. Justice Holmes endeavors to connect the requirement of *quid pro quo* in Debt with the secta, and transaction witnesses. For a criticism of this, see P. & M., ii. 214, n. 4.

[25] Ames, H. L. R., ii. 18.

[26] Salmond, Essays, 222.

II. Another theory is put forward by Professor Ames in a brilliant series of articles in the Harvard Law Review.[27] He there identifies consideration with the detriment to the plaintiff upon which the action of Assumpsit was founded. This theory has a certain decided advantage. It shows a regular and consistent development in Assumpsit culminating in the evolution of the principle of consideration from within the action itself. So far as the Year Book cases are themselves concerned it seems impossible of refutation. But the theory is open to the following objections:

(1) It assumes that consideration is identical with the detriment to the plaintiff. As we have already pointed out, there is a strong analogy between consideration when resolved into a detriment to the promisee and the limitation fixed in the action of Assumpsit. But this analogy does not mean that the principles are identical. It is submitted that Professor Ames has not demonstrated this identity beyond peradventure. The principles may be extremely close to one another, and yet have no historical connection.

(2) It does not account for all the species of consideration, such as moral obligation, for example. A moral obligation is no longer a consideration, but it was once. Moreover, a precedent debt was recognized as a valid consideration in *indebitatus assumpsit*. It is difficult to see how a precedent debt can by any contortion be twisted into a detriment to the plaintiff.

(3) This theory rests upon the assumption that the principle of consideration was a creation of the common law pure and simple. So keen is Professor Ames to emphasize this point that he is led to make certain unwarranted assertions with regard to equity. Not only does he contend that "in equity * * * a remediable breach of a parol promise was originally conceived of as a deceit,"[28] but he goes on to say that "chancery gave relief upon parol agreements only upon the ground of compelling reparation for what was regarded as a tort to the plaintiff or upon the principle of preventing the unjust enrichment of the defendant."[29] We shall take pains to examine both of these statements later on; it is believed that neither of them is correct. If, on the other hand, the Chancellor did exercise a general jurisdiction over parol contracts in the fifteenth century, if in fact he did evolve a principle upon which promises were held binding, it is surely fatuous to suggest that he borrowed this principle from the common law, which did not possess a general contractual action[30] till the sixteenth century. Furthermore, if parol contracts were so recognized in equity that alone throws considerable doubt upon the correctness of this theory.

(4) It should be noticed, finally, that all the early cases in Assumpsit involve a specific undertaking. There is no recognition of agreement or a bargain as such. Indeed, it was found necessary in Slade's case to resolve that every contract executory imported an Assumpsit, That is to say, the fact of agreement did not of itself "raise" any undertaking. In consequence we are forced to the position that originally every enforceable contract took the highly technical form of an undertaking. But does this seem a natural way in which a contract should arise? Men make informal agreements or "accordes" without troubling to incorporate them into a particular form. I venture to suggest that there were many such agreements which fell without the scope of undertakings; that, in fact, the theory which relies upon

[27] H. L. R., ii. pp. 1 and 53. See also H. L. R., viii. 252-64.
[28] H. L. R., ii. 15.
[29] H. L. R., viii. 257.
[30] That, is, an action applicable to parol contracts generally.

the "undertaker" fails to take account of many formless agreements which were the common experience of everyday life.

For these reasons we may question the theory advanced by Professor Ames. We can, however, state our objections with more effect after examining contract in equity.

III. Still another theory is advanced by Mr. Salmond.[31] He refuses to admit that the doctrine of consideration was identical with the detriment to the plaintiff in Assumpsit. Rather does he think that it was not "a logical development from within the action at all, but was a ready-made principle imported *ab extra.*"[32] Now if we go back to the first cases in which Assumpsit lay for non-feasance, we find that the detriment to the plaintiff assumed one particular form.

He had parted with money on the strength of the defendant's promise, and that money had been received by the defendant. If, therefore, we shift our point of view, what on the one side appears to be a detriment to the plaintiff may on the other side be regarded as a benefit to the promisor. The theory that a promise is actionable because the promisee has incurred damage by relying upon it is essentially delictual. From the standpoint of contractual theory, a promise should be actionable if there were a sufficient ground for making it, regardless of whether or no the promisee had suffered damage from its breach. But in the specific case we are considering, the two principles amount to different ways of looking at the same thing. A promises to make an estate of lands to B for £50. B pays the money, but A fails to make estate. B has suffered a detriment, because he has parted with £50 on the strength of A's promise. On the other hand, there was a sufficient inducement for A's promise, namely the payment of £50. Mr. Salmond's contention is this: Somewhere outside the common law the principle was evolved that a promise was binding if there were a "legally sufficient motive or inducement for making it."[33]

Now the promises which were first enforced in Assumpsit were only such as had a legal inducement; for the promisor had always obtained a direct benefit by the payment of money. It therefore became possible that the one principle should be substituted for the other. In short, the doctrine of consideration, already evolved, was thrust into the action of Assumpsit from without; and its entrance into the action was facilitated by the strong analogy which it bore to the limitation already engrafted on Assumpsit. This introduction of a foreign principle "breaks the logical continuity of the development" of the action.

This theory is certainly plausible. But it leaves two questions unanswered:

(1) How and when did consideration gain its entrance into Assumpsit if it came from without? This Mr. Salmond does not answer satisfactorily. Indeed, it is doubted whether this question can be answered at all. The reports do not show effectively the manner of appearance of consideration. In fact the doctrine is at first shrouded in mystery which it is very difficult to pierce. But if consideration was somewhere recognized as a principle before it was adopted in Assumpsit, the presumption that it was introduced from without becomes very strong. We therefore ask:

(2) Whence came the doctrine of consideration? Mr. Salmond asserts that it had become established in equity. This is the weakest point in his

[31] Salmond, Essays in Jurisprudence, Essay No. IV.

[32] Id., p. 212.

[33] Essays, p. 213.

argument. He can produce few cases; he is compelled to reason from inference. An occasional hint from the Year Books, and a brief quotation or two from contemporary writers, are all he has to offer. This, it must be admitted, is not very convincing. Mr. Salmond is not to be blamed for this defect, for he has no access to the materials whence proof might be drawn. But it is at this very point that our real inquiry begins. The burning question, which has been largely ignored, is this: What evidence is there that parol contracts were enforced in equity, and if they were enforced, upon what principle or principles did the chancellor act? To this inquiry the second part of the present essay is devoted. * * *

B. *Enforcement of Parol Contracts:* In the *Diversity of Courts* it is written that "a man shall have remedy in Chancery for covenants made without specialty if the party have sufficient witness to prove the covenants."[34] I do not propose to introduce any further evidence in proof of this statement. I believe it has been shown that the chancellor did enforce certain parol promises, and that he did so upon the principle of reason and conscience. It is granted even by Professor Ames that the chancellor did enforce certain parol agreements, but this admission is qualified by the assertion that he did so "only upon the ground of compelling reparation for what was regarded as a tort to the plaintiff or upon the principle of preventing the unjust enrichment of the defendant."[35]

If then it be said that the promisor is under an obligation to perform his promise, upon what principle did the chancellor enforce this obligation. Now every breach of contract which is accompanied by damage bears a strong analogy to a tort, if in fact it does not amount to one. But an obligation arising from a tort is plainly distinguishable from one arising from contract. In the one case it proceeds contrary to the will of the person bound; in the other it is in accordance with, and in fulfilment of, his will. Does the chancellor then enforce the obligation, because the breach of promise amounts to a tort to the plaintiff, or because he holds that one who has for legitimate cause made a promise ought to carry it out? In other words, in his analysis of agreements, did the chancellor proceed upon a principle of tort or of contract? This is the question which I shall endeavor to answer. But first I shall examine some illustrative cases.

1456. A was to marry B, daughter of C. It was agreed that A should make an estate of lands to himself and B, etc., and that C "for the * * * mariage and ioynture" should make an estate of lands to A and B and their heirs. The marriage took place; A made the estate to himself and B, but C refused to carry out his part. A accordingly brought a subpoena against C. The chancellor, after examining the evidence, decided that the matter set up in the petition was true and just, and decreed that, as B was dead leaving issue, C should make an estate of the land to A and his heirs.[36]

1464-5. A made B *"le proctour de son benefice et luy promise per fidem que il luy garderait indempne."* A resigned the benefice to B's damage and B brought a subpoena for the breach of promise. The chancellor remarked: *"Pur ceo que il est en damages par le non perfourmans de le promise, il avera remedye icy."*[37]

1467-1468. A was bound to B in an obligation of £100. B told A that if he would furnish C (B's son) with goods and money on request, he would

[34] Holmes, Early English Equity, L. Q. R., i. 172.
[35] Ames, H. L. R., viii. 257.
[36] [Bundle of Petitions No.] XXV. [Petition No.] 111 (10 S. S. 141).
[37] Y. B. P. 4 Ed. IV. 4.

make payment therefor. A furnished C with goods and money to the value of £94, receiving from C, in the name of his father, bills witnessing the delivery of the goods &c.; at the same time C promised on behalf of B that A should have deduction of £94 on the obligation of £100. Afterwards A tendered B the bills for £94 and £6 in money, and desired him to receive them on satisfaction of the obligation. B refused, and A brought a subpoena. Much evidence was introduced by both parties. The chancellor decided that A had proved his case, and that the obligation of £100 should be considered *"vacuum et nullius valoris."* Accordingly he ordered it to be cancelled.[38]

1470-1471. A at the request of B and on his promise to save him harmless, became surety to C for the debt of D. D did not pay the debt, and in consequence A was threatened with suit by C. As B had died, A called upon B's executors to carry out the promise; but they refused. He accordingly brought a subpoena. The chancellor decreed that the executors should discharge A against suit from C.[39]

What situation do these cases disclose? There has been a breach of promise by non-feasance which is succeeded by damage, immediate or prospective, to the promisee. This element of damage is frankly suggestive of tort. It would be possible, if we did not scruple to strain our reasoning, to resolve the gist of the cause of action into a tort to the plaintiff, even a deceit. Such would be the line of reasoning followed by the common law. But I do not think one could make a greater mistake than to impose upon the cases in equity the peculiar theory of the common law.

In the first place, why did the common law treat a breach of promise as a deceit to the promisee? I believe a ready and conclusive answer is found in the history of Assumpsit. Here we find another example of the manipulation of the substantive law through the exigencies of procedure. From the standpoint of contract, a breach of contract was a breach of covenant, but I scarcely need remark that a breach of covenant was actionable only in case the covenant was under seal. It was never suggested by any common law judge that a breach of covenant was a tort, a deceit to the plaintiff. Such reasoning was unnecessary. But the promise may be the same in essence whether it be under seal or no. A for £50 in hand paid promises to convey Blackacre to B. A breaks his promise. If the promise is under seal, Covenant lies, because the promise is broken. The law says in effect that one who makes a promise in a deliberate and formal way is bound to fulfill it, irrespective of the situation of the promisee. If, on the other hand, the promise is verbal, Assumpsit lies.[40] But herein the law adopts a different line. Assumpsit lies because by the breach of promise A has deceived B. It does this in order to bring a breach of contract within the scope of an action which sounds in tort. Thus on substantially the same state of facts the law adopts a contractual theory for breach of promises under seal, a theory fundamentally tortious for breach of verbal promises. There is no logical basis for this distinction; counsel and judges were aware of this, as the constant argument in the early cases in assumpsit, "this is a breach of covenant," bears witness. The distinction finds its justification

[38] XXIX. 13, *Cases* [in Appendix of Cases to author's work], p. 214. I have simplified the facts, and omitted consideration of the defendant's answer. (XXIX. 12, *Cases*, p. 216).

[39] XLIV. 142, *Cases*, p. 222. For the defendant's answer, see XLIV. 143, *Cases*, p. 224.

[40] I refer, of course, to the action in the sixteenth century.

in the history of the forms of action and there alone. Had the ingenious suggestion of Blackstone[41] that Assumpsit is an action on the case analogous to Covenant, been literally true, the law might have adopted a different theory for parol contract.

In equity the situation is different. There was no procedural necessity for treating a breach of contract as a tort. There was no division into forms of action; there were no technicalities of pleading to obscure the real issue. We stand, so to speak, before breach of contract as a question of first impression. Analysis may lead us in the direction of tort or contract; but both ways are open, and there is nothing to compel us to take the one in preference to the other. I wish, therefore, to submit such evidence as I have been able to find which indicates the attitude of the chancellor in questions of contract.

1. The chancellor was an ecclesiastic, and probably carried with him into the chancery the principles and theories of the ecclesiastical courts. It is notorious that the ecclesiastical court did assume jurisdiction over *laesio fidei*. What more natural than that the chancellor should have proceeded upon the ground of breach of faith? There is at least a suggestion of this in the petitions. In Wheler v. Huchynden[42] a pledge of faith is alleged, and it is quite common to find a petitioner saying that the defendant, "promitted by hie feith"[43] or "promytted by his feith"[44] or promised "on his faith and troueth."[45] In one of the cases[46] stated at length above, a promise *"per fidem"* is set forth. It would be venturesome, however, to assert that breach of faith was the sole ground upon which chancery took jurisdiction. It has been argued that if the chancellor proceeded upon this ground, "equity would give relief upon any and all agreements, even upon gratuitous parol promises."[47] I do not think it necessary to base the chancellor's jurisdiction on breach of faith alone; but that he did enforce gratuitous promises cannot be doubted.[48] In this connection however, I do not wish to consider breach of faith except in so far as it tends to point to the promise as the essential factor in the chancellor's consideration of parol contract. The fact that some petitioners take occasion to mention a pledge of faith, coupled with our knowledge that gratuitous promises were enforced, seems to me a very strong indication that chancery was employing a purely contractual principle.

2. If we turn to the petitions and notice the way in which complainants state their case, we find that it is the promise of the defendant upon which stress is laid. If in fact the chancellor did consider breach of promise a

[41] Blackstone, iii. 158.

[42] 2 Cal. Ch. ii.

[43] XIX. 345, *Cases*, p. 204.

[44] XVI. 277.

[45] XIX. 91.

[46] Y. B. P. 4 Ed. IV. 4, *supra* [the author's text], p. 161.

[47] Ames, H. L. R., viii. 255.

[48] In XLIV. 142, *Cases*, p. 222, there is a clear case of a gratuitous promise which was enforced against the promisor's executors. See also XIV. 5, *Cases*, p. 188 (Promise made by a surety); XV. 248 (Money advanced to A upon the promise of B, assuring payment); XV. 52, *Cases*, p. 191 (Promise to carry a letter); XXXI. 82, *Cases*, p. 219 (Promise to respite an action); XXXI. 118 (Promise by arbitrators to deliver an award *in writing*). The following promises connected with marriage appear to have been gratuitous: VII, 250, *Cases*, p. 179; XVI. 386, *Cases*, p. 197; XXVIII. 299, *Cases*, p. 213.

deceit to the plaintiff, it is very curious that pleaders who were constantly appearing before him do not make use of so convenient an allegation. But they do not do so. Rather do they say that the defendant has made a promise which reason and conscience require him to perform. The defendants refuse to make a conveyance *"solonque lour covenantz,"*[49] or *"accordantz as covenantz et bargoyne suisditz;"*[50] another defendant is asked "to shewe whi your seid besecher shuld not be content after promys made betwix them."[51] Emphasis is laid upon the promise as the indispensable part of the case.

3. In certain cases the beneficiary brings the subpoena. These cases have been considered at length already;[52] at this point I wish merely to refer to the significance of the right of action in the beneficiary. It seems to mean this. If there is sufficient cause for a promise which is deliberately made, the chancellor holds the promisor to his obligation at the behest of one who has a right to obtain some advantage from the fulfilment of the promise, although he is not the promisee. The principle upon which the subpoena is allowed cannot be "detriment to the promisee," for the complainant is not the promisee; it cannot be a "tort to the plaintiff," for there is nothing but a breach of promise. But there is a reason why the promise should be fulfilled, and this reason lies in the circumstances under which the promise was made; it is suggestive of the fundamental canonistical doctrine of "cause." Marriage seems to have been an adequate "cause" for a promise, and it is for the enforcement of promises given for marriage that we most frequently find beneficiaries appealing to equity.

4. Again, if we look at the conditions under which an implied contract arises, some light may be thrown upon the whole question. The petitioner at the request of X became "plegge" to the king for a farm which X held of the king, and through X's default has had to pay.[53] Again, petitioner "atte request and praier" of B became bound to C as surety for B's debt, and as B has failed to meet his obligation C called upon the petitioner.[54] A at B's request "undertook" for B in Ireland for certain customs; B inconsiderately sailed away and left A to meet his obligation.[55] In none of these cases is there an express promise, but a promise is raised by the relation in which the parties stand to each other. As the petitions phrase it, inasmuch as the petitioner has been put "in charge" for the duty of the defendant and at his request, reason and conscience require that the defendant should discharge him. Even where, under similar circumstances, there is an express promise, the same process of reasoning is adduced to support its enforcement. Reasoning, therefore, from the implied to the express contract, we may conclude that the promise is enforced because there is some imperative reason why the promisor should fulfil his obligation, and this reason is found in the circumstances under which the promise was made.

5. Finally, the suits brought for specific performance of contracts to convey land lend support to the view here advanced. While there are many cases in which the promisee has paid the whole purchase price, there are

[49] IV. 96, *Cases*, p. 173.
[50] IV. 100, *Cases*, p. 173.
[51] LXXI. 7, *Cases*, p. 233.
[52] *Supra*, [the author's text], p. 126.
[53] X. 186.
[54] XVI. 440.
[55] XV. 237.

many others in which he has paid nothing, but alleges that he is ready to pay. The only damage sustained is the "loss of the bargain," that is, the loss of the advantage which would accrue to the promisee, if the promisor carried out his promise. The obligation is purely contractual; there is not the faintest suggestion of a tort.

For these reasons I believe that the attitude of the chancery towards contract was radically different from that of the common law before consideration became the recognized test of the enforceability of promises. The common law looked primarily at the promisee; it compelled him to show that he had sustained damage other than that which resulted directly from the breach of contract. He must convert the breach of promise into a tort, a deceit to himself. Chancery, on the other hand, scrutinized the position of the promisor. It asked whether he had made such a promise as in reason and conscience he ought to perform. In such an inquiry the benefit to the promisor or the immediate detriment to the promisee was a matter of secondary importance. It was forced into the background, while the promise and the circumstances under which it was made held the center of the stage.

It is with considerable hesitancy that I venture to make any generalizations, but an examination of the chancery proceedings has led me to the following conclusions. I believe that the chancellor held that one might make a valid promise to do anything which was reasonable and possible, and that the obligation resulting from such a promise ought to be performed because the promisor had deliberately and intentionally assumed the obligation.[56] By this I do not mean that the chancellor enforced any and all promises. But in his analysis of parol contract he did not require as an essential condition to a right of action that the promisee should have been deceived or that the promisor should have been benefited. Rather did he inquire whether the enforcement of a particular promise would further some general interest. If the promisor has led the promisee to alter his position on the strength of the promise, there lies upon him a moral duty to fulfil that promise. It is desirable, in the interests of the community at large, that such promises should be enforced. A pays B £50 for a conveyance of land, or upon B's promise to deliver a letter A entrusts the letter to him. The cases are different from B's point of view. In the first case he has received a benefit; in the second, there is no benefit. But in determining whether or no B shall be compelled to perform his promise, we look to some larger interest than that of the immediate parties to the contract. B induced A to give him the letter; he placed in A's mind a reasonable expectation that it should be delivered. Is it in the general interest that such an expectation should be fulfilled? The chancellor, I believe, determined that it was.

Closely connected with this factor is another. Some promises appear to have been enforced because of the object for which they were made. Thus money is promised for a marriage; the chancellor decrees that the promise must be performed. We might say that the promise is enforced because on the strength of it the promisee has entered upon marriage. But the fact that the beneficiary could bring the subpoena argues against this. I believe that such a promise was enforced because of the purpose for which it was given.

All this is admittedly speculative. One must be frank, and admit that it is impossible to determine absolutely the ground upon which chancery

[56] Cf. Spence, 852.

proceeded. But it seems to me that we are driven to seek the source of the chancellor's doctrines in the canon law. I have tried to state my reasons for thinking it impossible that the chancellor should have applied the theory of the common law. Hence we must look to the only other system from which he could possibly have borrowed his theory.

In the discussion of "consideration" which St. Germain places in the mouth of the Doctor, we find it stated that a promise, to be enforceable, must have a reasonable cause. This cause may consist in a material advantage to the promisor, or in the object for which the promise was made. I do not think we can completely parallel the whole classification of promises, as set forth by the Doctor, in the cases in equity, but I do believe that all these cases can be explained from the principles of the canon law. Therein seems to me to lie the only adequate and reasonable explanation. It is very probable that the chancellor as a judge in chancery did not proceed to the same lengths as he would have done in the ecclesiastical court. But when confronted with a new situation in chancery, he did apply so far as possible, the principles of that system in which as a churchman he was trained. This indirect reception of the canon law is not demonstrable with mathematical precision; it seems to me, however, that the whole line of decision in equity points unequivocally towards the canon law.

I have attempted to set forth the main outline of equitable jurisdiction in contract. Of the source of the chancellor's doctrines, the canon law, little has been said. But an investigation of the principles of the canon law with regard to contract is in itself a special study.

Roscoe Pound, *Consideration in Equity*, 13 Illinois L. Rev. 667-668.[57] In 1835 Sir Edward Sugden decreed specific performance of a post-nuptial agreement whereby a father undertook to make provision for his child by way of marriage settlement, although there was no common-law consideration and the agreement was not in the form of a covenant to stand seized.[58] As late as 1841 it was possible for able counsel to argue in the court of chancery that "a voluntary settlement, although void against a subsequent purchaser, was good as between the parties,"[59] and there was abundant authority to sustain the proposition.[60] In the older cases, even when the court did not go so far, it by no means required a common-law considera-

[57] The foot notes are those of the author quoted, but are renumbered.

[58] Ellis v. Nimmo, Lloyd & Gould, temp. Sugden, 333. The chancellor put it as a question "whether an agreement for a *meritorious* consideration, resting *in fieri*, is such a contract as a court of equity will enforce" (p. 345), and came to this conclusion: "I have before me a contract which I am bound to enforce if there is a sufficient consideration. The consideration is such as to enable the court to remedy even a defective settlement, where there is no contract. I think it *a fortiori* sufficient to sustain an actual contract, and I shall therefore decree specific performance of the agreement" (p. 349).

[59] Jeffreys v. Jeffreys, Cr. & P. 138, 139.

[60] "It is clear that a voluntary settlement is good as between the parties": Lord Eldon in Pulvertoft v. Pulvertoft, 18 Ves. 84, 90 (1811). "For an agreement, though voluntary, under hand and seal, ought to be decreed by this court": Trevor, M. R., in Beard v. Nutthall, 1 Vern. 427, 428 (1686). "I take it to be clear that if I voluntarily and without any consideration covenant to lay out money in a purchase of land to be settled on me and my heirs, this court will compel the execution of such contract tho' merely voluntary": Lord Macclesfield in Edwards v. Countess of Warwick, 2 P. Wms. 171, 176 (1723). See also Lord King in Randal v. Randal, 2 P. Wms. 465, 467, and cases cited.

tion.[61] In 1841 Lord Cottenham definitely laid it down that "the court will not execute a voluntary contract" and that "the principle of the court to withhold its assistance from a volunteer applies equally whether he seeks to have the benefit of a contract, a covenant, or a settlement."[62]

Since Jeffreys v. Jeffreys, Lord Cottenham's statement has been accepted as the pronouncement of a general rule. But it has not been certain just what promises courts of equity regard as "voluntary" in this connection, nor how far there were not exceptions. Starting with the proposition that equity will not aid a volunteer and assuming it to mean that it will only act where there is a common-law consideration, we must admit, as the authorities go, at least six anomalous cases in which the proposition does not apply or is not wholly true.

These are:

(1) A gratuitous declaration of trust without transmutation of possession;

(2) A covenant to hold real property in trust for another in "consideration" of natural love and affection;

(3) Cases of executory gift which the courts torture into cases of contract in order to enforce the gift;

(4) Parol gifts of land where the donee takes possession and acts upon the gift;

(5) Defective conveyances to a creditor by way of security, to a wife by way of settlement, or to a child by way of advancement, where there was no legal duty but on the basis of the moral duty equity gives reformation under circumstances amounting to specific performance of the promise; and

(6) Options under seal.

O. W. Holmes, Jr., *The Common Law,* p. 273.[63] In one sense everything is form which the law requires in order to make a promise binding over and above the mere expressions of the promisor's will.[64] Consideration is a

[61] Thus Lord Henley said in Wycherley v. Wycherley, 2 Eden 175, 177-8 (1763): "It is certain that in general courts will not compel the performance of voluntary agreements. An agreement, in its nature, imports a reciprocity and a *quid pro quo*, and where that reciprocity does not exist, the power of enforcing it does not exist. I do not mean the cases of specialties where the deed itself is evidence of a consideration. I say I know no instance where a court of equity has compelled a man to execute what was a mere act of volition. But I think the present was not a mere voluntary agreement, and the court will (and I am warranted by the precedents to say that it has done so) attend to slight considerations for confirming family settlement and modifications of property. They pay a regard to reasonable motives and honorable intentions. * * * They consider the ease and comfort and security of families as a sufficient consideration."

[62] Jeffreys v. Jeffreys, Cr. & P. 138, 141; cf. Lord Cottenham in Callaghan v. Callaghan, 8 Cl. & F. 374, 401.

[63] The notes to this passage are supplied by the present editor.

[64] "No man makes a promise for nothing, is the English rule. * * * The Scottish rule is simpler and more consistent with ordinary morality. A man has made a promise, therefore he ought to keep it. Why he made it is a matter personal to himself. The courts have only to make sure that he made it deliberately and knowing what he was about." J. W. Brodie-Innes. Some Outstanding Differences between English and Scots Law: V. The Law of Contracts, 28 Juridical Review, 62, 66.

form as much as a seal.[65] The only difference is that one form [i. e., consideration] is of modern introduction, and has a foundation in good sense, or at least falls in with our common habits of thought, so that we do not notice it,[66] whereas the other [i. e., the seal] is a survival from an older condition of the law, and is less manifestly sensible or less familiar."

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## SIR ANTHONY STURLYN *v.* ALBANY.

(Court of Queen's Bench, 1587. Cro. Eliz. 67.)

Assumpsit. The case was, the plaintiff had made a lease to J. S. of land for life rendering rent. J. S. grants all his estate to the defendant; the rent was behind for divers years; the plaintiff demands the rent of the defendant, who assumed that if the plaintiff could show to him a deed that the rent was due, that he would pay to him the rent and the arrearages; the plaintiff alleged that upon such a day of, etc., at Warwick, he showed unto him the indenture of lease, by which the rent was due, and notwithstanding he had not paid him the rent and the arrearages due for four years. Upon *non assumpsit* pleaded it was found for the plaintiff, and damages assessed to so much as the rent and arrearages did amount unto. And it was moved in arrest of judgment, [1] that there was no consideration to ground an action, for it is but the showing of the deed, which is no consideration. 2. The damages ought only to be assessed for the time the rent was behind, and not for the rent and the arrearages, for he hath other remedy for the rent; and a recovery in this action shall be no bar in another action. But it was adjudged for the plaintiff, for when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action, and here the showing of the deed is a cause to avoid suit, and the rent and arrearages may be assessed all in damages; but they took order that the plaintiff should release to the defendant all the arrearages of rent before execution should be awarded. *Nota.* In this case it was alleged that it hath been adjudged, when one assumeth to another, that if he can show him an obligation in which he was bound to him, that he would pay

[65] See a similar statement by Justice Holmes in Krell v. Codman, 154 Mass. 154 (1891), where the fact that in general the courts will not inquire into the adequacy of consideration is mentioned, and it is said: "This being so, consideration is as much a form as a seal."

[66] "Whatever view may be taken of the suitability of 'consideration' as the test of simple contract, it cannot be denied that it has the singular merit of appealing to the average man, and further, of being remarkably easy for a court mainly concerned with material interests to apply. It avoids all difficult and unsatisfactory enquiries about intention and other mental elements; and substitutes a broad external standard of the kind beloved by the Common Law." Edward Jenks, A Short History of English Law, 298. One may accept most of the first sentence of that statement without sharing the enthusiasm of the second.

him, and he did show the obligation, etc., that no action lieth upon this *assumpsit;* which was affirmed by the justices.

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## BRET *v.* J. S. and WIFE.

**(Court of Common Pleas, 1600. Cro. Eliz. 756.)**

Assumpsit, the case was that William Dracot, first husband to the *feme,* sent his son to table with the plaintiff for three years, and agreed to give unto him, for every year £8, and died within the year. The feme, during her widowhood, in consideration of her natural affection to the son, and in consideration that the son should continue during the residue of the time with the plaintiff, promised to the plaintiff to pay unto him £6 13s. 4d. for the tabling of the son for the time past, and £8 for every year after that he should continue there with the plaintiff; afterwards she married the defendant, and the plaintiff brought his action as well for the £6 13s. 4d. as for the tabling for the two years following. Warberton moved that this action lay not. First, because it was an entire contract by her first husband for the entire year, which cannot be apportioned. Secondly, because natural affection is not sufficient to ground an assumpsit without *quid pro quo.* Thirdly, that this is a contract, for which action of debt lies, and not this action. But all the court held that it well lay. For as to the first, it is well apportionable; because it being for tabling, which he had taken, there ought to be a recompense, although he departed within the year, or that the contractor died within the year. To the second they agreed, that natural affection of itself is not a sufficient consideration to ground an assumpsit; for although it be sufficient to raise an use, yet it is not sufficient to ground an action, without an express *quid pro quo.* But it is here good, because it is not only in consideration of affection, but that her son should afterwards continue at his table, which is good as well for the money due before, as for what should afterwards become due. And as to the third, true it is, that if the contract had been only for the tabling afterwards, then debt would have lain, and not this action, but in regard it is conjoined with another thing, for which he could not have an action of debt (as it is here for this £6 13s. 4d.), an action upon the case lies for all (as debt with other things may be put into an arbitrament). Wherefore it was adjudged for the plaintiff.

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## MAYLARD *v.* KESTER.

**(Court of King's Bench, 1601. Moore, 711.)**

Maylard brings action on the case against Kester on assumpsit, in consideration that he would sell and deliver to Kester woollen cloth for the

funeral of a clerk, Kester assumed to pay him *cum inde requisitus.* And alleges that he sold and delivered divers cloth to him at various prices, viz., thirty-one black striped garments for £19, and so he recites other lots in the same manner, and the sum amounted to £160, which he requested Kester to pay, and he did not pay according to the promise and assumption aforesaid. The defendant pleaded *non assumpsit,* and verdict was for the plaintiff, and judgment given. And on writ of error brought, the judgment was reversed in the Exchequer Chamber, Michaelmas Term, 41 & 42 Elizabeth, because debt properly lies, and not action on the case, the matter proving a perfect sale and contract.

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## SLADE'S CASE.

**(Court of King's Bench, 1602. 4 Coke 92b.)**

John Slade brought an action on the case in the King's Bench against Humphrey Morley (which plea began Hil. 38 Eliz. Rot. 305), and declared, that whereas the plaintiff, 10th of November, 36 Eliz. was possessed of a close of land in Halberton, in the county of Devon, called Rack Park, containing by estimation eight acres for the term of divers years then and yet to come, and being so possessed, the plaintiff the said 10th day of November, the said close had sowed with wheat and rye, which wheat and rye, 8 Maii, 37 Eliz. were grown into blades, the defendant, in consideration that the plaintiff, at the special instance and request of the said Humphrey, had bargained and sold to him the said blades of wheat and rye growing upon the said close (the tithes due to the rector, &c. excepted), assumed and promised the plaintiff to pay him £16 at the feast of St. John the Baptist then to come; and for non-payment thereof at the said feast of St. John Baptist, the plaintiff brought the said action; the defendant pleaded *non assumpsit modo et forma;* and on the trial of this issue the jurors gave a special verdict, *sc.,* that the defendant bought of the plaintiff the wheat and rye in blades growing upon the said close as is aforesaid, *prout* in the said declaration is alleged, and further found, that between the plaintiff and the defendant there was no other promise or assumption but only the said bargain. * * * And after many conferences between the Justices [of the King's Bench and of the Common Pleas] and [the] Barons [of the Exchequer] it was resolved,[67] that the action was maintainable, and that the plaintiff should have judgment. And in this case these points were resolved:

1. That although an action of debt lies upon the contract, yet the bargainor may have an action on the case, or an action of debt at his election.

* * *

[67] Parts of the report of the case are omitted.

3. It was resolved, that every contract executory imports in itself an assumpsit, for when one agrees to pay money, or to deliver anything, thereby he assumes or promises to pay, or deliver it, and therefore when one sells any goods to another, and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much money as such a day, in that case both parties may have an action of debt, or an action on the case on assumpsit, for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case, as well as actions of debt, and therewith agrees the judgment in Read and Norwood's case, Pl. Com. 128.

4. It was resolved, that the plaintiff in this action on the case on assumpsit should not recover only damages for the special loss (if any be) which he had, but also for the whole debt, so that a recovery or bar in this action would be a good bar in an action of debt brought upon the same contract; so *vice versa*, a recovery or bar in an action of debt, is a good bar in an action on the case on assumpsit. *Vide* 12 E. 4. 13 a. 2 R. 3. 14. (32) 33 H. 8. *Action sur le case.* Br. 105.

5. In some cases it would be mischievous if an action of debt should be only brought, and not an action on the case, as in the case *inter* Redman and Peck, 2 & 3 Ph. and Mar. Dyer, 113, they bargained together, that for a certain consideration Redman should deliver to Peck twenty quarters of barley yearly during his life, and for non-delivery in one year it is adjudged that an action well lies, for otherwise it would be mischievous to Peck, for if he should be driven to his action of debt, then he himself could never have it, but his executors or administrators, for debt doth not lie in such case, till all the days are incurred, and that would be contrary to the bargain and intent of the parties, for Peck provides it yearly for his necessary use: so 5 Mar. Br. *Action sur le case* 108, that if a sum is given in marriage to be paid at several days, an action upon the case lies for non-payment at the first day, but no action of debt lies in such case till all the days are past. Also it is good in these days in as many cases as may be done by the law, to oust the defendant of his law, and to try it by the country, for otherwise it would be occasion of much perjury.

6. It was said, that an action on the case on assumpsit is as well a formed action, and contained in the register, as an action of debt, for there is its form; also it appears in divers other cases in the register, that an action on the case will lie, although the plaintiff may have another formed action in the Register. And therefore it was concluded, that in all cases when the Register has two writs for one and the same case, it is in the party's election to take either. But the Register has two several actions, *sc.* action upon the case upon assumpsit, and also an action of debt, and therefore the party may elect either. And as to the objection which has been made, that it would be mischievous to the defendant that he should not wage his law, forasmuch as he might pay it in secret; to that it was answered, that it should be accounted his folly that he did not take suffi-

cient witnesses with him to prove the payment he made; but the mischief would be rather on the other party, for now experience proves that men's consciences grow so large that the respect of their private advantage rather induces men (and chiefly those who have declining estates) to perjury; for *jurare in propria causa* (as one saith) *est sæpenumero hoc seculo præcipitium diaboli ad detrudendas miserorum animas ad infernum;* and therefore in debt, or other action where wager of law is admitted by the law, the Judges without good admonition and due examination of the party do not admit him to it. * * *

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## RANN *v.* HUGHES.

**(House of Lords, 1778. 7 Term Reports, 346, note a.)**

Rann and another, executors of Mary Hughes v. Isabella Hughes, Administratrix of J. Hughes in error; Dom. Proc. The declaration stated that on June 11th, 1764, divers disputes had arisen between the plaintiffs' testator and the defendant's intestate, which they referred to arbitration; that the arbitrator awarded that the defendant's intestate should pay to the plaintiffs' testator £983. That the defendant's intestate afterward died possessed of effects sufficient to pay that sum; that administration was granted to the defendant; that Mary Hughes died, having appointed the plaintiffs her executors; that at the time of her death the said sum of £983 was unpaid, "by reason of which promises the defendant as administratrix became liable to pay to the plaintiffs as executors the said sum, and being so liable she in consideration thereof undertook and promised to pay," etc. The defendant pleaded *non assumpsit, plene administravit,* and *plene administravit,* except as to certain goods, etc., which were not sufficient to pay an outstanding bond debt of the intestate's therein set forth, etc. The replication took issue on all these pleas. Verdict for the plaintiff on the first issue, and for the defendant on the two last; and on the first a general judgment was entered in B. R. against the defendant *de bonis propriis.* This judgment was reversed in the Exchequer Chamber, and a writ of error was afterward brought in the House of Lords, where after argument the following question was proposed to the judges by the Lord Chancellor:

"Whether sufficient matter appeared upon the declaration to warrant after verdict the judgment against the defendant in error in her personal capacity?"

Upon which [question] the Lord Chief Baron Skynner delivered the opinion of the judges to this effect: It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration; such agreement is *nudum pactum ex quo non oritur actio;* and

whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. The declaration states that the defendant being indebted as administratrix promised to pay when requested, and the judgment is against the defendant generally. The being indebted is of itself a sufficient consideration to ground a promise, but the promise must be co-extensive with the consideration unless some particular consideration of fact can be found here to warrant the extension of it against the defendant in her own capacity. If a person indebted in one right in consideration of forbearance for a particular time promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right; but here no sufficient consideration occurs to support this demand against her in her personal capacity, for she derives no advantage or convenience from the promise here made. For if I promise generally to pay upon request what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it. But it is said that if this promise is in writing that takes away the necessity of consideration and obviates the objection of *nudum pactum*, for that cannot be where the promise is put in writing; and that after verdict, if it were necessary to support the promise that it should be in writing, it will after verdict be presumed that it was in writing, and this last is certainly true; but that there cannot be *nudum pactum* in writing, whatever may be the rule of the civil law, there is certainly none such in the law of England. His Lordship observed upon the doctrine of *nudum pactum* delivered by Wilmot, J., in the case of Pillans v. Van Mierop and Hopkins, 3 Burr. 1663,[68] that he contradicted himself, and was also contradicted by Vinnius in his Comment on Justinian.

All contracts are by the laws of England distinguished into agreements by specialty and agreements by parol, nor is there any such third class as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved. But it is said that the Statute of Frauds has taken away the necessity of any consideration in this case. The Statute of Frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable. His Lordship here read those sections of that statute which relate to the present subject. He observed that the words were merely

[68] Wilmot, J. said in that case:

"I cannot find that a *nudum pactum* evidenced by writing has been ever holden bad, and I should think it good; though, where it is merely verbal it is bad. Yet I give no opinion upon its being good always when in writing."

And Lord Mansfield said:

"I take it that the ancient notion about the want of consideration was for the sake of evidence only, for when it is reduced into writing, as in covenants, specialties, bonds, etc., there was no objection to the want of consideration. And the Statute of Frauds proceeded upon the same principle."

negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought or some memorandum thereof was in writing and signed by the party But this does not prove that the agreement was still not liable to be tried and judged of as all other agreements merely in writing are by the common law, and does not prove the converse of the proposition that when in writing the party must be at all events liable. He here observed upon the case of Pillans v. Van Mierop in Burr., and the case of Losh v. Williamson,[69] Mich. 16 G. 3 in B. R., and so far as these cases went on the doctrine of *nudum pactum*, he seemed to intimate that they were erroneous. He said that all his brothers concurred with him that in this case there was not a sufficient consideration to support this demand as a personal demand against the defendant, and that it being now supposed to have been in writing makes no difference. The consequence of which is that the question put to us must be answered in the negative.

And the judgment in the Exchequer Chamber was affirmed.[70]

[69] In that case the writing was witnessed and the holding was that "the instrument being in writing and attested by witnesses, the objection of *nudum pactum* [for want of consideration] did not lie."

[70] 'It is true that in some cases an assumpsit will lie, although the consideration is past, if there was a duty before; but in all of them the duty is coextensive with the promise." Taylor, J., in Mitchell v. Bell, 1 No. Car. 244, 246 (1800).

"In Rann v. Hughes it was held by the highest authority that a debt would support no promise except the one which the law would imply, and, therefore, that the defendant's promise to pay personally a debt which she owed as administratrix was not binding without a new consideration." Langdell's Summary of Contracts, § 93.

We are coming to the view that an express promise to pay an existing debt is not supported by the debt except as regards the statute of limitations, discharges in bankruptcy, etc. "When the statute [of limitations] does not come in question, assuming that the letter does contain an acknowledgment, or even a promise, it amounts to no more than this,—that a man, being liable to pay a debt, promises to pay it. Such a promise, which leaves the legal rights of the parties just where they were, creates no new cause of action." Maule, J., in Deacon v. Gridley, 15 C. B. 295, 309 (1854). But see *dictum* in Webster v. Le Compte, 74 Md. 249, 257 (1891). See 1 Williston on Contracts, § 143. "It was held in Wimer v. Overseers, 104 Pa. St. 317, that where a legal obligation exists, a cumulative promise to perform it, unless upon new consideration is a nullity." Green, J., in Cleaver v. Lenhart, 182 Pa. St. 285, 292 (1897). "When these parties once promised to marry each other, repetitions of that promise on different occasions thereafter, regardless of the number of times, were but ratifications of the first one, and constituted no new contract. There was but one contract, and that was the one created by the original promise." Watson, C. J., in Dyer v. Lalor, (Vt.) 109 Atl. 30, 37 (1920).

## MARCH *v.* CULPEPPER and WIFE.

**(Court of Common Pleas, 1627. Cro. Car. 70.)**

Assumpsit. Whereas One Hugh Goddard was indebted to the plaintiff in £107 for wares sold to him by the plaintiff, and died intestate, the said £107 being due and not paid, and administration committed to the wife of the defendant, for which £107 the plaintiff intended to sue the said wife as administratrix; but the husband of the said Anne, *dum sola fuit,* desiring to know the true debt which the said Hugh, her former husband, at the time of his death owed to the plaintiff, on the 30th day of July, 1 Car. 1, required the plaintiff, *quod quidem Willihelmus Whiteman, Egidius Diggs et Hugo Owen, superviderent compotum* betwixt the plaintiff and the intestate of and concerning the said wares sold, &c., *ut suam certitudinem cognosceret;* whereto the plaintiff assented; and then they finding, *super visum compoti,* that the said Hugh the intestate, at the time of his death, was indebted to the plaintiff in the said sum of £107, gave notice thereof to the defendant Anne the same day, &c; and the said Anne knowing that the intestate at the time of his death was indebted to the plaintiff in the said sum, the said Anne, *Dum sola fuit,* in consideration of the premises, *adtunc et ibidem, scilicet,* the 30 July, 1 Car. 1, promised the plaintiff to pay to him the said £107 in this manner, viz. part thereof before the end of Michaelmas term then next ensuing, and the residue within reasonable time after; and alleges in fact, that the said Michaelmas term began at Reading, and ended such a day, and that neither the said Anne, *dum sola fuit,* nor the husband and wife during the coverture, had paid the said £107 or any part thereof.

The defendant pleaded to issue; and it was found for the plaintiff; and alleged in arrest of judgment, that here is not any sufficient consideration shewn to ground the action; for there is not any matter of profit or advantage to the defendant, nor any matter of charge or trouble to the plaintiff, and without one of them there is not any consideration to charge the defendant, and to make him liable to pay it out of his own proper goods; for the promise of the wife, *dum sola fuit,* shall not tie him without valuable consideration.

But Lord Richardson, Hutton, Harvey and Yelverton conceived, he did a thing at her request which he needed not, viz. shew his accompts to her three friends appointed by her; which is a trouble to him, and more than he needed to have done. And it seemeth the consideration is sufficient, and the breach of promise made thereupon just cause of suit, especially she promising to pay at two days; which implies that in the interim the plaintiff should forbear his suit; which being found by verdict, is a good consideration. And thereupon the plaintiff had judgment.[71]

71 In Williamson v. Clements, 1 Taunt. 523 (1809), the plaintiff seemingly had lost a bill of exchange drawn by the defendant and the latter promised that if the plaintiff would execute to him a bond, conditioned for indemnifying the

## STRANGBOROUGH AND WARNER.

(Court of Queen's Bench, 1588. 4 Leon. 3.)

Note, That a promise against a promise will maintain an action upon the case, as in consideration that you do give me £10 on such a day, I promise to give you £10 such a day after.[72]

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## BAKER *v.* SMITH.

(Court of Upper Bench, 1651. Style, 295.)

Baker brought an action upon the case against Smith, and declared that whereas there was a speech concerning marriage between her, the plaintiff, and Smith, the defendant, in consideration that she the plaintiff would marry the defendant, the defendant did assume and promise to her the plaintiff that he would marry her, and that afterwards the defendant, in consideration that the plaintiff would discharge the defendant of this promise, the defendant did assume and promise that he would pay unto her the plaintiff a thousand pound, and that she did discharge the defendant of his promise of marriage; and yet the defendant had not paid the £1000, according to his promise. Upon *non assumpsit* pleaded, and a verdict found for the plaintiff, it was moved in arrest of judgment that there is mention of two promises in the declaration, and that it is incertain to which promise the declaration relates. 2ly. That there is no temporal consideration alleged, but only a promise to dissolve a contract of mariage, which is a thing illegal, and so no consideration. Roll Chief Justice an-

defendant against his afterwards being compelled to pay the said sum of money, and purporting to acknowledge its having been paid by the defendant to the plaintiff, the defendant would pay the plaintiff the said sum of money upon request. The bond was executed, but the defendant did not pay. The court held that the defendant's promise was supported by sufficient consideration. Lawrence, J., said in part: "It is a disadvantage to the plaintiff to execute the bond, if it is no advantage to the defendant. There is a case in 1 Sid. 57, Traver v. ————, where a woman, after the decease of her husband, promised a creditor, that if he would prove her husband had owed him £20 she would pay it; and it was held a good consideration; because it was trouble and charge to the creditor to prove his debt."

72 "Ames, Essays in Anglo-American Legal History III, 313, n. 2, and Street, *op. cit.* [Foundations of Legal Liability II,] 55 n. 6, cite Pecke v. Redman (1555) Dyer 113a as the earliest case in which effect was given to a purely executory contract; and the case seems to be so treated by Coke in Slade's Case (1602) 4 Rep. at p. 94b; but it does not appear from the report in Dyer whether or no the contract had not been partly performed; however, the case of Strangborough v. Warner (1588) 4 Leo. 3 is quite conclusive, and it was quickly followed by other cases in which the same point was adjudged; see for these cases Street, *op. cit.* 55 n. 8." W. S. Holdsworth, Debt, Assumpsit and Consideration, 11 Mich. L. Rev. 347, 351, n. 16.

swered, that here is a mutual promise made by both parties, and there have been divers actions of late times brought for this cause, and that they have been adjudged good, and the engagement to marry is not merely a spiritual matter, and this action is not to compell the marriage upon the contract, but to recover damages for not doing it, and it is like to a wager, and here is a temporal loss, and therefore a temporal action doth lie. But it was adjourned till next term to be argued again, and then judgment was given for the plaintiff, for the court held, that the dis-engagement shall be intended to the party himself, and here is no need to expresse notice given of it. *Postea.*

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## HUNT *v.* BATE.

**(Court of Common Pleas, 1508. Dyer, 272.)**

The servant of a man was arrested and imprisoned in the Compter in London for a trespass, and he was let to mainprise by the manucaption of two citizens of London (who were well acquainted with the master), in consideration that the business of the master should not go undone. And afterward, before judgment and condemnation, the master upon the said friendly consideration promised and undertook to one of the mainpernors to save him harmless against the party plaintiff from all damages and costs if any should be adjudged, as happened afterward in reality; whereupon the surety was compelled to pay the condemnation, *s.* £31, etc. And thereupon he brought an action on the case, and the undertaking was traversed by the master, and found in London at *nisi prius* against him. And now in arrest of judgment it was moved that the action does not lie. And by the opinion of the court it does not lie in this matter, because there is no consideration wherefore the defendant should be charged for the debt of his servant, unless the master had first promised to discharge the plaintiff before the enlargement, and mainprise made of his servant, for the master did never make request to the plaintiff for his servant to do so much, but he did it of his own head, wherefore, etc.

But in another like action on the case brought upon a promise of £20 made to the plaintiff by the defendant in consideration that the plaintiff, at the special instance of the said defendant, had taken to wife the cousin of the defendant, that was good cause, although the marriage was executed and past before the undertaking and promise, because the marriage ensued the request of the defendant.[73] And land may be also given in frank

[73] "In the early stages of the action of assumpsit, when it was sought to substitute the new action for the action of debt on simple contract, it became customary to declare that the defendants, being indebted to the plaintiff, in consideration of that indebtedness promised to pay the debt to the plaintiff. When the promise in indebitatus assumpsit became a fiction, the real ques-

marriage with the cousin of the donor as well after the marriage as before, because the marriage may be intended the cause, etc. And therefore the opinion of the court in this case this term was that the plaintiff should recover upon the verdict, etc. And so note the diversity between the aforesaid cases.

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## LAMPLEIGH *v.* BRATHWAIT.

**(Court of Common Pleas, 1615. Hobart 105.)**

Anthony Lampleigh brought an assumpsit against Thomas Braithwait and declared, that whereas the defendant had feloniously slain one Patrick Mahume, the defendant, after the said felony done, instantly required the plaintiff to labour, and do his endeavor to obtain his pardon from the King; whereupon the plaintiff upon the same request did, by all the means he could and many day's labour, do his endeavor to obtain the King's pardon for the said felony, viz. in the riding and journeying at his own charges from London to Roiston, when the King was there, and to London back, and so to and from New-market, to obtain pardon for the defendant for the said felony. Afterwards, scil. &c. in consideration of the premisses, the said defendant did promise the said plaintiff to give him £100, and that he had not, &c. to his damage £120.

To this the defendant pleaded *non assumpsit,* and found for the plaintiff damage one hundred pounds. It was said in arrest of judgment, that the consideration was passed.

But the chief objection was, that it doth not appear, that he did any thing towards the obtaining of the pardon, but riding up and down, and nothing done when he came there. And of this opinion was my brother [Warburton] but my self [Hobart, C. J.] and the other two judges were of opinion for the plaintiff, and so he had judgment.

First, it was agreed that a meer voluntary curtesie will not have a consideration to uphold an assumpsit. But if that curtesie were moved by the suit or request of the party that gives the assumpsit, it will bind, for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference. Pasch. 10 Eliz. Dyer 272, Hunt and Bates. See Oneley's Case, 10 Eliz. Dyer 355.[74] * * *

tion at issue came to be the existence of a debt and not the promise to pay it. From the fact that the consideration in such cases, towit, the indebtedness, was alleged to have accrued before the promise, the idea naturally arose that an act performed at the defendant's request would support a subsequent promise." Harriman on Contracts, 2 ed., p. 75, § 138.

[74] Part of the report of the case is omitted.

In Bradford v. Roulston, 8 Irish Common Law, 468 (1858) Pigot, C. B. said:

## ROSCORLA *v.* THOMAS.

**(Court of Queen's Bench, 1842. 3 Q. B. 234.)**

LORD DENMAN, C. J.[75] This was an action of assumpsit for breach of warranty of the soundness of a horse. The first count of the declaration, upon which alone the question arises, stated that, in consideration that the plaintiff, at the request of the defendant, had bought of the defendant a horse for the sum of £30, the defendant promised that it was sound and free from vice. And it was objected, in arrest of judgment, that the precedent executed consideration was insufficient to support the subsequent promise. And we are of opinion that the objection must prevail.

It may be taken as a general rule, subject to exceptions not applicable to this case, that the promise must be co-extensive with the consideration. In the present case, the only promise that would result from the consideration, as stated, and be co-extensive with it, would be to deliver the horse upon request. The precedent sale, without a warranty, though at the request of the defendant, imposes no other duty or obligation upon him. It is clear, therefore, that the consideration stated would not raise an implied promise by the defendant that the horse was sound or free from vice.

But the promise in the present case must be taken to be, as in fact it was, express; and the question is, whether that fact will warrant the extension of the promise beyond that which would be implied by law; and whether the consideration, though insufficient to raise an implied promise, will nevertheless support an express one. And we think that it will not.

The cases in which it has been held that, under certain circumstances, a consideration insufficient to raise an implied promise will nevertheless support an express one, will be found collected and reviewed in the note to Wennall v. Adney, 3 B. & P. 249, note (a), and in the case of Eastwood v. Kenyon, 11 A. & E. 438. They are cases of voidable contracts subsequently ratified, of debts barred by operation of law, subsequently revived, and of equitable and moral obligations, which, but for some rule of law, would of themselves have been sufficient to raise an implied promise. All these cases are distinguishable from, and indeed inapplicable to, the present, which appears to us to fall within the general rule, that a consideration

**"It is clearly established that where a past consideration—that is, a thing previously done by the plaintiff at the request of the defendant—is one from which the law implies a promise, an express promise different from, or in addition to, that which the law implies, is *nudum pactum*, on the ground that the whole consideration is exhausted by the promise which the law implies. * * * But it has also been held, in a long series of decided cases, that where there is a past consideration, consisting of a previous act done at the request of the defendant, it will support a subsequent promise; the promise being treated as coupled with the previous request. The leading authority for this proposition is Lampleigh v. Brathwait, Hob. 105."**

**[75] The statement of facts is omitted.**

past and executed will support no other promise than such as would be implied by law.

The rule for arresting the judgment upon the first count must therefore be made absolute.

*Rule absolute.*[76]

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JOSEPHINE L. MOORE *v.* NELSON L. ELMER & Another, Administrators.

(Supreme Judicial Court of Massachusetts, 1901. 180 Mass. 15, 61 N. E. 259.)

Bill in equity by the owner of certain land subject to a mortgage assumed by her, to restrain the administrators of Willard Elmer, the holders of the mortgage, from foreclosing it, or disposing of it and the note secured thereby, and for an order to the defendants to discharge the mortgage and cancel the note, filed July 7, 1900.

The bill alleged that the plaintiff was the owner of a tract of land to which she derived title by a deed of one Herman E. Bogardus, by which

[76] "In Roscola v. Thomas, the decision went the full length of establishing that no executed consideration would support any actual promise; for there was no debt in that case and hence the law implied no promise, notwithstanding the remark of Lork Denman that the only promise that would result from the consideration stated would be to deliver the horse upon request." Langdell's Summary of Contracts, § 93.

"It is sometimes said that a warranty given before the property in the goods has passed is binding. Douglass v. Moses, 89 Ia. 40; Bowen v. Zaccanti (Mo. App.) 208 S. W. 277; or if given before delivery of the goods. Webster v. Hodgkins, 25 N. H. 128. But such statements are erroneous. The question is whether the warranty was given before the seller was bound to accept title and delivery. See 17 Mich. L. Rev. 519." 1 Williston on Contracts, § 142, p. 318 n.

In Evans v. Heathcote, [1918] 1 K. B. 418, 435, Scrutton, L. J., while saying that "Under the well known doctrine of Lampleigh v. Brathwait (1615) Hob. 105, a past consideration executed on request is a good consideration for a subsequent promise to pay," proceeded to show that he was speaking of the recognized exceptions to the rule that past consideration even though furnished at request is no consideration except where an obligation to pay arose at the time, or to the other rule that moral consideration is no consideration, by instancing merely such cases.

In Stewart v. Casey, [1892] 1 Ch. 115, 116, Bowen, L. J., said: "If it were true, as some scientific students of law believe, that a past service cannot support a future promise, you must look at the document and see if the promise cannot receive a proper effect in some other way. Now, the fact of a past service raises an implication that at the time it was rendered it was to be paid for, and, if it was a service which was to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated either as an admission which evidences or as a positive bargain which fixes the amount of that reasonable remuneration on the faith of which the service was originally rendered."

deed she assumed and agreed to pay a certain mortgage of the premises given by Bogardus, which mortgage and the note for $1,300 thereby secured had been assigned to Willard Elmer, the defendants' intestate, that the defendants' intestate on or about January 11, 1898, executed and delivered to the plaintiff the following agreement: "Springfield, Mass., Jan. 11, 1898. In Consideration of Business and Test Sittings Received from Mme. Sesemore, the Clairvoyant, otherwise known as Mrs. Josephene L. Moore on Numerous occasions I the undersighned do hear by agree to give the above named Josephene or her heirs, if she is not alive, the Balance of her Mortgage note whitch is the Herman E. Bogardus Mortgage note of Jan. 5, 1893, and the Interest on same on or after the last day of Jan. 1900, if my Death occurs before then whitch she has this day Predicted and Claims to be the truth, and whitch I the undersighned Strongly doubt. Wherein if she is right I am willing to make a Recompense to her as above stated, but not payable unless death Occurs before 1900. Willard Elmer."

The bill alleged, that by the foregoing instrument the premises were released and discharged from the operation of the mortgage deed, and the note secured thereby was paid in full and became null and void, upon the death of Willard Elmer, which occurred before the year 1900, to wit, on September 15, 1899.

The bill also alleged, that before the execution of the above agreement, at the request of Willard Elmer, the plaintiff gave to Elmer the business and test sittings referred to in the agreement as the consideration for the agreement, and at his request devoted much time and labor thereto.

The defendants demurred, and among the causes of demurrer alleged, that the above agreement annexed to the bill was a wagering contract and against public policy and void, and that it was without consideration.

In the Superior Court the case was heard by Lawton, J., who made a decree sustaining the demurrer and dismissing the bill. The plaintiff appealed; and, at the request of the plaintiff, the judge reported the case for the determination of this court. If the demurrer was sustained rightly, the bill was to be dismissed; otherwise, the demurrer was to be overruled and the defendants were to answer to the plaintiff's bill.

HOLMES, C. J. It is hard to take any view of the supposed contract in which, if it were made upon consideration, it would not be a wager. But there was no consideration. The bill alleges no debt of Elmer to the plaintiff prior to the making of the writing. It alleges only that the plaintiff gave him sittings at his request. This may or may not have been upon an understanding or implication that he was to pay for them. If there was such an understanding it should have been alleged or the liability of Elmer in some way shown.[77] If, as we must assume and as the writing seems to

[77] On undue influence as related to contracts with spiritualistic mediums, see 1 Am. St. Rep. 88, note.

imply, there was no such understanding, the consideration was executed and would not support a promise made at a later time. The modern authorities which speak of services rendered upon request as supporting a promise must be confined to cases where the request implies an undertaking to pay, and do not mean that what was done as a mere favor can be turned into a consideration at a later time by the fact that it was asked for.[78] See Langdell, Contracts, §§ 92 *et seq.;* Chamberlin v. Whitford, 102 Mass. 448, 450; Dearborn v. Bowman, 3 Met. 155, 158; Johnson v. Kimball, 172 Mass. 398, 400.

It may be added that even if Elmer was under a previous liability to the plaintiff it is not alleged that the agreement sued upon was received in satisfaction of it, either absolutely or conditionally, and this again cannot be implied in favor of the plaintiff's bill. It is not necessary to consider what further difficulties there might be in the way of granting relief.

*Bill dismissed.*

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## ATKINS et Uxor *v.* HILL.

(Court of King's Bench, 1775. Cowper 284.

LORD MANSFIELD.[79] This is a case in which the declaration particularly states that assets have been received by the defendant, the executor, more than sufficient to pay all the testator's debts and legacies. * * * The declaration then goes on to state that, in consideration of there being full sufficient assets as aforesaid, the defendant undertook and promised to pay the plaintiff his legacy [namely, £60 bequeathed by testator to plaintiff's wife]. No doubt then but, at any time after an executor has assented, the property vests; and if it be a pecuniary legacy, an action at law will lie for the recovery of it. Formerly, upon a bill being filed in chancery against an executor, one part of the prayer of it was, that he should assent to the bequests in his testator's will. If he had assets, he was bound to assent. And when he had assented, the legacy became a demand which in law and conscience he was liable to pay. But, in the present case, there is not only an assent to the legacy, but an actual promise and undertaking to pay it; and that promise founded on a good consideration in law, as appears from the cases cited. * * * Here the defendant, by his demurrer, admits he had sufficient to pay. * * * In this case the promise is grounded upon a reasonable and conscientious consideration; namely, that the defendant had assets to discharge the legacy. If so, he was compellable in a

[78] The American cases on this point are in conflict. See note in 53 L. R. A. 353. See also 26 L. R. A. (N. S.) 526, note; 39 Am. St. Rep. 740, note. Probably the weight of American authority is still *contra* to the doctrine of the principal case, but the prediction may be ventured that it will not remain so.

[79] The statement of facts and parts of the opinion are omitted.

court of equity, or in the ecclesiastical court, to pay it. I give my opinion upon this case as it stands; that is, that it is an express promise made upon a good and sufficient consideration.

*Per Cur. Judgment for the plaintiff.*[80]

[80] Of Atkins v. Hill, Langdell's Summary of Contracts, § 75, says: "No consideration was alleged for an express promise and the reason alleged for an implied promise, namely, that the defendant had become liable by virtue of assets (i. e., liable at law) was untrue. Deeks v. Strutt, 5 T. R. 690. His position was simply that of holding a fund in which plaintiff had an interest; which is a ground for a suit in equity to compel the application of the fund, but never imposes any liability at law except in those cases in which an action of account will theoretically lie."

The case of Rann v. Hughes, reported *ante*, p. 280, is later than Atkins v. Hill, and should be considered here, though Rann v. Hughes was a case of a promise to pay a debt and Atkins v. Hill one of a promise to pay a legacy.

"Some of the early cases at common law recognized the action of assumpsit as the appropriate remedy for such a [i. e., pecuniary] legacy. In Atkins v. Hill, Cowper's R. 284, Lord Mansfield goes into an elaborate argument to show that assumpsit is the appropriate remedy, but concludes by saying that he formed his opinion, in that case, upon 'an express promise, made upon a good and sufficient consideration,' i. e., having assets. In Hawkes v. Saunders, Cowper's R. 291, by Buller, J., assumpsit is held to be the proper remedy. The same doctrine is countenanced by two anonymous cases in Mod. reports. 11 Mod. R. 91, 6 do. 27, per Holt, C. J. But since the case of Deeks v. Strutt, 5 Term. R. 690, it has been considered settled law that no such action will lie for a pecuniary legacy." Redfield, J., in Howard v. Brown, 11 Vt. 361, 363 (1839).

But in Goodwin v. Chaffee, 4 Conn. 163, 166 (1822) Hosmer, C. J., said: "If there exists a liability on the executor, by reason of his having assets, an action of assumpsit founded on an implied promise, in my opinion, is maintainable against him for a legacy."

In Dunham v. Elford, 13 Rich. Eq. (S. C.) 190 (1867), the court concluded "that there is, after assent [by the executor who has assets to a pecuniary legacy] a contract or promise, express or implied upon sufficient consideration to pay the legacy to the legatee—but that, like some other classes of contracts, owing to special circumstances and considerations, it can only be enforced in equity."

"The effect of an executor's assent to a general legacy seems not to have engaged the attention of courts to any considerable extent. It was held in South Carolina that the effect of the executor's assent to a pecuniary legacy was a contract on his part to pay it, enforceable in equity (Dunham v. Elford, 13 Rich. Eq. 190, 194, citing Atkins v. Hill, Cowp. 284, and Sto. Eq., § 592 to the effect that it might be enforced at law, but relying on Deeks v. Strutt, 5 Term. R. 690, that an action at law would not lie); but it seems that a verbal promise by an executor, either with or without assets, to a legatee to pay a legacy, imposes no personal liability upon him, as it comes under the Statute of Frauds, and hence no right of action arises therefrom (Smith v. Carroll, 112 Pa. St. 390) * * * It is provided by statute in Delaware that assets in the hands of an executor to pay a legacy shall create a legal liability, and raise a consequent promise to pay it.

"It is to be observed that the subject of the executor's assent is of little or no importance in those states whose statutes determine the time and man-

## EASTWOOD *v.* KENYON.

**(Court of Queen's Bench, 1840. 11 Adolphus & Ellis 438.)**

LORD DENMAN, C. J.[81] * * * The second point arose in arrest of judgment, namely, whether the declaration showed a sufficient consideration for the promise. It stated, in effect, that the plaintiff was executor under the will of the father of the defendant's wife, who had died intestate as to his real estate, leaving the defendant's wife, an infant, his only child; that the plaintiff had voluntarily expended his money for the improvement of the real estate, while the defendant's wife was sole and a minor; and that, to reimburse himself, he had borrowed money of [one] Blackburn, to whom he had given his promissory note; that the defendant's wife, while sole, had received the benefit, and, after she came of age, assented and promised to pay the note, and did pay a year's interest; that after the marriage the plaintiff's accounts were shown to the defendant, who assented to them, and it appeared that there was due to the plaintiff a sum equal to the amount of the note to Blackburn; that the defendant in right of his wife had received all the benefit, and, in consideration of the premises, promised to pay and discharge the amount of the note to Blackburn.

Upon [this] motion in arrest of judgment this promise must be taken to have been proved, and to have been an express promise, as indeed it must of necessity have been, for no such implied promise in law was ever heard of. It was then argued for the plaintiff that the declaration disclosed a sufficient moral consideration to support the promise.

Most of the older cases on this subject are collected in a learned note to the case of Wennall v. Adney, 3 B. & P. 249, and the conclusion there arrived at seems to be correct in general, "that an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original cause of action, if the obligation, on which it is founded, never could have been enforced at law, though not barred by any legal maxim or statute provision." Instances are given of voidable contracts, as those of infants ratified by an express promise after age, and distinguished from void contracts, as of married women, not capable of ratification by them when widows; Loyd v. Lee, 1 Stra. 94; debts of bankrupts revived by subsequent promise after certificate, and similar cases. Since that time some cases have occurred upon this subject, which require to be more particularly examined. Barnes v. Hedley, 2

ner of paying and delivering legacies and point out the conditions under which the executor may fully protect himself against liability. * * * The same is true of the question of assent before or without probate of the will, which is within the executor's power at common law, but not in any of those states in which the executor's authority is derived from the grant of the probate court." 2 Woerner's American Law of Administration, 2 ed., § 453, pp. *993-994.

[81] The statement of facts and parts of the opinion are omitted.

Taunt. 184, decided that a promise to repay a sum of money, with legal interest, which sum had originally been lent on usurious terms, but, in taking the account of which, all usurious items had been by agreement struck out, was binding. Lee v. Muggeridge, 5 Taunt. 36, upheld an assumpsit by a widow that her executors should pay a bond given by her while a *feme covert* to secure money then advanced to a third person at her request. On the latter occasion the language of Mansfield, C. J., and of the whole Court of Common Pleas, is very large, and hardly susceptible of any limitation.[82] * * * The case of Lee v. Muggeridge * * * is a decision of great authority. It should, however, be observed that in that case there was an actual request of the defendant during coverture, though not one binding in law. * * *

The eminent counsel who argued for the plaintiff in Lee v. Muggeridge spoke of Lord Mansfield as having considered the rule of *nudum pactum* as too narrow, and maintained that all promises deliberately made ought to be held binding. I do not find this language ascribed to him by any reporter, and do not know whether we are to receive it as a traditional report, or as a deduction from what he does appear to have laid down. If the latter, the note to Wennall v. Adney shows the deduction to be erroneous. If the former, Lord Tenterden and this court declared that they could not adopt it in Littlefield v. Shee, 2 B. & Ad. 811. Indeed the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.

The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult.

Taking, then, the promise of the defendant, as stated on this record, to have been an express promise, we find that the consideration for it was past and executed long before, and yet it is not laid to have been at the request of the defendant, nor even of his wife while sole (though if it had, the case of Mitchinson v. Hewson, 7 T. R. 348, shows that it would not have been sufficient), and the declaration really discloses nothing but a benefit voluntarily conferred by the plaintiff and received by the defendant, with [subsequently] an express promise by the defendant to pay money. * * *

In holding this declaration bad because it states no consideration but a past benefit not conferred at the request of the defendant, we conceive that

[82] Mansfield, C. J., said: "It has been long established, that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action."

we are justified by the old common law of England * * *; while the principle of moral obligation does not make its appearance till the days of Lord Mansfield, and then under circumstances not inconsistent with this ancient doctrine when properly explained.

Upon the whole, we are of opinion that the rule must be made absolute to arrest the judgment.

*Rule to arrest judgment, absolute.*[83]

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## ALLEN *v.* BRYSON.

**(Supreme Court of Iowa, 1885. 67 Iowa 591, 25 N. W. 820, 56 Am. Rep. 358.)**

Both parties are attorneys at law, and this action was brought to recover for professional services performed by the plaintiff for the defendant and for personal property sold. Verdict and judgment for the plaintiff and defendant appeals.

SEEVERS, J.[84] * * * III. The defendant pleaded that he and the plaintiff were brothers-in-law, and, in substance, that each of them was engaged in the practice of the law, and had been in the habit of assisting each other as a matter of mutual accommodation, and that "all and each of the professional services for which plaintiff seeks to recover in this action were rendered by him as matters of mutual accommodation and interchange of courtesies, and without charge or expectation of payment or reward by one as against the other." The court instructed the jury: "If, however, such services were rendered by the plaintiff without expectation of reward, or intention on his part to charge therefor, or by any agreement or understanding that the services were to be gratuitous, the plaintiff cannot recover unless, after such services were rendered and in consideration thereof, defendant agreed with or promised plaintiff to pay for the same. In the latter case the valuable character of the service, and the moral obligation to pay for the same, would be a sufficient consideration to support the promise, and enable the plaintiff to recover the reasonable value of such service." We understand this instruction to mean that where one person renders services for another gratuitously, and with no expectation of being

[83] In Watson v. Turner, Buller N. P. 129 (1767), where overseers of the poor who had made no previous request for the service were held bound by a promise to pay the bill of an apothecary for attending and curing a pauper who boarded with her son out of the parish and was suddenly taken ill, the court said that "overseers are under a moral obligation to provide for the poor." But in Cook v. Bradley, 7 Conn. 57, 64 (1828), Daggett, J., said of Watson v. Turner: "It is no longer doubted that the defendants in that case, the overseers of the poor, were under a legal obligation to furnish the support for which the promise was made."

[84] Parts of the opinion are omitted.

paid therefor, that a moral obligation is incurred by the latter which will support a subsequent promise to pay. In our opinion, this is not the law. If the services are gratuitous, no obligation, either moral or legal, is incurred by the recipient. No one is bound to pay for that which is a gratuity. No moral obligation is assumed by a person who receives a gift. Suppose the plaintiff had given the defendant a horse, was he morally bound to pay what the horse was reasonably worth? We think not. In such case there never was any liability to pay, and therefore a subsequent promise would be without any consideration to support it. That there are cases which hold that where a liability to pay at one time existed, which because of the lapse of time or for other reasons cannot be enforced, the moral obligation is sufficient to support a subsequent promise will be conceded.

These cases are distinguishable because the instructions contemplate a case where an obligation to pay never existed until the promise was made. We do not believe a case can be found where a moral obligation alone has been held to be a sufficient consideration for a subsequent promise. To our minds, however, it is difficult to find a moral obligation to pay anything, in the case contemplated in the instructions, prior to the promise. The following cases support the view above expressed: Cook v. Bradley, 7 Conn. 57; Williams v. Hathaway, 19 Pick. (Mass.) 387; Dawson v. Dawson, 12 Iowa 515; McCarty v. Hampton Building Assn., 61 Iowa 287. * * *

*Reversed.*

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## KENT *v.* RAND.

**(Supreme Court of New Hampshire, 1886. 64 N. H. 45, 5 Atl. 760.)**

Assumpsit for money had and received by the defendant's intestate, Mary Snow, to the plaintiff's use. Facts found by a referee. In the summer of 1855 Mary Snow, being then a married woman, borrowed from the plaintiff $275 for the use of her husband in his own business. At that time she had title by deed from her father of his homestead in Rochester, of which her father held a life lease from her. Her husband died in 1858, her father in 1859, and her mother in 1860. The referee also found facts which, it was claimed, showed promises by Mary Snow to pay the debt, made on several occasions between 1855 and the time of her death in 1883, while she was sole and the owner of property in her own right, the latest of which was within six years before her death.

SMITH, J. When the defendant's intestate borrowed the sum of $275 of the plaintiff in 1855 she was a married woman. The money was borrowed for the use of her husband in his business, and there is no evidence that it was otherwise used or applied. She had, at the time of the loan, title by deed to her father's homestead in Rochester, subject to her lease to him for the term of his life. It does not appear that she held this property to her

sole and separate use, or that the promise made by her to the plaintiff was in respect to her separate property. Her common-law disability, therefore, rendered her contract void. Bailey v. Pearson, 29 N. H. 77; Ames v. Foster, 42 N. H. 381; Shannon v. Canney, 44 N. H. 592; Hammond v. Corbett, 51 N. H. 311; Batchelder v. Sargent, 47 N. H. 262; Muzzey v. Reardon, 57 N. H. 378; Read v. Hall, 57 N. H. 482; Messer v. Smyth, 58 N. H. 298; Penacock Savings Bank v. Sanborn, 60 N. H. 558. The question then is, whether assumpsit can be maintained upon her promise to pay the debt made after the death of her husband; or, in other words, whether a moral obligation to pay money or perform a duty is a good consideration for a promise to pay or to do the duty.

In a note to Wennall v. Adney, 3 Bos. & Pull. 249, is a review of many of the English cases, the result being summed up as follows: "An express promise, therefore, as it should seem, can only revive a precedent good consideration, which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision." The doctrine of this note is approved in Smith v. Ware, 13 Johns. 257; Mills v. Wyman, 3 Pick. 207; Goodright v. Straphan, Cowp. 201; Littlefield v. Shee, 2 B. & Ad. 811; Meyer v. Haworth, 8 A. & E. 467; Eastwood v. Kenyon, 11 A. & E. 438; Jennings v. Brown, 9 M. & W. 501, and in 1 Pars. Cont. 432-436.

In Loyd v. Lee, 1 Stra. 94 (decided in 1718), the facts were these: A married woman gave a promissory note as a *feme sole,* and after her husband's death, in consideration of forbearance, promised to pay it. In an action against her it was insisted that though being under coverture at the time of giving the note, it was voidable for that reason; yet by her subsequent promise, when she was of ability to make a promise, she had made herself liable, and the forbearance was a new consideration. "But the Chief Justice held the contrary, and that the note was not barely voidable, but absolutely void; and forbearance, where originally there is no cause of action, is no consideration to raise an assumpsit. But he said it might be otherwise where the contract was but voidable. And so the plaintiff was called."

Lee v. Muggeridge, 5 Taunt. 36 (decided in 1813), a similar case, was decided the other way. The facts were as follows: A married woman, having an estate settled to her separate use, gave a bond for repayment by her executors of money advanced at her request on security of the bond to her son-in-law. After her husband's decease she wrote a letter addressed to the plaintiff, stating "that it was not in her power to pay the bond off, her time here was short, and that it would be settled by her executors." The plaintiff brought assumpsit on this promise against her executors, and recovered a verdict. The defendants moved in arrest of judgment, on the ground that no sufficient consideration was shown for the promise. The

verdict was sustained upon the ground that a moral obligation is a good cause for a promise to pay.

In Littlefield v. Shee, 2 B. & Ad. 811 (A. D. 1831), the facts were these: The plaintiff's testate in his lifetime supplied the defendant, a married woman whose husband was absent, with butcher's meat. After the death of her husband the defendant promised to pay when it should be in her power, and her ability to pay was proved at the trial. The plaintiff was nonsuited, and the nonsuit was sustained upon the ground that it appeared the goods were supplied to the wife while her husband was living, so that the price constituted a debt due from him. Lord Tenterden, C. J., in alluding to Lee v. Muggeridge, said: "The doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation."

In Meyer v. Haworth, 8 A. & E. 467 (A. D. 1838), the defendant pleaded coverture to a declaration in assumpsit for goods sold and delivered. The plaintiff replied that the defendant was at the time of the contract separated from her husband, and living in open adultery; that the plaintiff did not know of the marriage or adultery; and that the defendant, after her husband's death and before action brought, in consideration of the premises, promised to pay. Upon demurrer Lord Denman, C. J., said the subsequent promise was "not sufficient. The debt was never owing from her. If there was a moral obligation, that should have been shown." Littledale, J., said: "If there was any moral obligation, it should have been stated. The replication does not support the declaration. The promise in the declaration was altogether void. This is not like the case of an infant whose promise is voidable only."

Eastwood v. Kenyon, 11 A. & E. 438 (A. D. 1840), decides that a pecuniary benefit voluntarily conferred by the plaintiff and accepted by the defendant is not such a consideration as will support an action of assumpsit on a subsequent express promise by the defendant to reimburse the plaintiff. Lord Denman, C. J., commenting on Lee v. Muggeridge, said the remark of Lord Tenterden in Littlefield v. Shee, "that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation," amounts to a dissent from the authority of that case.

Cockshott v. Bennett, 2 T. R. 763 (A. D. 1788), decides that a subsequent promise to pay a note void on the ground of fraud, is a promise without consideration which will not maintain an action; and in Jennings v. Brown, 9 M. & W. 501, it was said, "A mere moral consideration is nothing."

Attempts have been made to distinguish the case of Lee v. Muggeridge from Loyd v. Lee and subsequent cases; but the doctrine of the note in Wennall v. Adney, that a mere moral obligation is not sufficient to support

an express promise is generally recognized as correct.[85] Mills v. Wyman, 3 Pick. 207; Loomis v. Newhall, 15 Pick. 159; White v. Bluett, 24 E. L. & E. 434; Cook v. Bradley, 7 Conn. 57; Hawley v. Farrar, 1 Vt. 420; Ingraham v. Gilbert, 20 Barb. 152; Bates v. Watson, 1 Sneed, 376; Parker v. Carter, 4 Munf. 273; M'Pherson v. Rees, 2 Penr. & W. 521; Frear v. Hard-

[85] On moral obligation as consideration, see notes in 39 Am. St. Rep. 735, 53 L. R. A. 353 and 26 L. R. A. (N. S.) 519.

In Mills v. Wyman, 3 Pick. (Mass.) 207, 209-211 (1825), Parker, C. J., said: "It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some pre-existing obligation, which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the statute of limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such pre-existing equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a *quid pro quo;* and according to the principles of natural justice the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises therefore have a sound legal basis. They are not promises to pay something for nothing; not naked pacts; but the voluntary revival or creation of obligation which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the *interior* forum, as the tribunal of conscience has been aptly called. * * * A deliberate promise, in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, of the debtor discharged by the statute of limitations or bankruptcy, the principle is preserved by looking back to the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value; though here the courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

"These principles are deduced from the general current of decided cases upon the subject, as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for

enbergh, 5 Johns. 272; Society v. Wheeler, 2 Gall. 143; Broom Legg. Max. 746; 1 Pars. Cont. 432 note t, 435; Langdell, Sum. Law. of Cont., §§ 71-79.

an express promise, is to be limited in its application to cases where at some time or other a good or valuable consideration has existed."

But in Ferguson v. Harris, 39 So. Car. 323, 332 (1893) McIver, C. J., said: "The new departure [from the doctrine of moral consideration], as it may be called, seems to rest upon a learned note to the case of Wennell v. Adrey, 3 Bos. & P. at page 249. It seems to me, however, that a more correct view of the law is presented in a note to the case of Comstock v. Smith, 7 Johns. at page 89. All of the authorities admit that where an action to recover a debt is barred by the statute of limitations, or by a discharge in bankruptcy, a subsequent promise to pay the same can be supported by the moral obligation to pay the same, although the legal obligation is gone forever; and I am unable to perceive any just distinction between such a case and one in which there never was a legal, but only a moral obligation to pay. * * * In both cases at the time the promise sought to be enforced is made, there, is nothing whatever to support it, except the moral obligation."

In Muir v. Kane, 55 Wash. 131 (1909), it was held that though the state statute provided that any agreement authorizing an employee, as an agent or broker, to sell or purchase real estate for a commission should be void, unless the agreement or promise or some note or memorandum thereof should be in writing, a written agreement to pay the broker, executed after a sale under an oral agreement, was sustained by the moral obligation of the owner of the land to pay. Fullerton, J., for the court, said:

"The moral obligation to pay for services rendered as a broker in selling real estate under an oral contract where the statute requires such contract to be in writing is just as binding as is the moral obligation to pay a debt that has become barred by the statute of limitations; and there is no reason for holding that the latter will support a new promise to pay while the former will not. There is no moral delinquency that attaches to an oral contract to sell real property as a broker. This service cannot be recovered for because the statute says the promise must be in writing, not because it is illegal in itself. It was not intended by the statute to impute moral turpitude to such contracts. The statute was intended to prevent frauds and perjuries, and, to accomplish that purpose, it is required that the evidence of the contract be in writing; but it is not conducive to either fraud or perjury to say that the services rendered under the void contract or voluntarily will support a subsequent written promise to pay for such service. Nor is it a valid objection to say there was no antecedent legal consideration. The validity of a promise to pay a debt barred by the statute of limitations is not founded on its antecedent legal obligation. There is no legal obligation to pay such a debt; if there were there would be no need for the new promise. The obligation is moral solely, and, since there can be no difference in character between one moral obligation and another, there can be no reason for holding that one moral obligation will support a promise while another will not. * * * A case in point on the principle involved, however, is Ferguson v. Harris, 39 S. C. 323, 17 S. E. 782, 39 Am. St. Rep. 731."

See also Bagaeff v. Prokopik, 212 Mich. 265 (1920). But see Stout v. Humphrey, 69 N. J. L. 436 (1903). On agreements unenforceable because of the statute of frauds as consideration, see 19 Ann. Cas. 1182, note, citing cases both ways. See also 53 L. R. A. 370, note; 26 L. R. A. (N. S.) 524, note: 52 L. R. A. (N. S.) 341, note.

In cases of bankruptcy and the statute of limitations the law only suspends the remedy. It does not extinguish the debt. Bank v. Wood, 59 N. H. 407; Badger v. Gilmore, 33 N. H. 361; Wiggin v. Hodgdon, 63 N. H. 39.[86] The contracts of infants are voidable, and may be ratified by an express promise after age.[87] In this respect they are distinguished from the contracts of married women, which, owing to the disability of coverture, are void at common law. Being void, no debt ever existed; and hence they furnish no consideration for a subsequent promise made during widowhood.

The weight of American authority is, however, decidedly against the moral consideration doctrine and in favor of the view that "the only moral obligation which affords consideration for a promise is one which has at some time been a legal duty." Scott, J., in Schwerdt v. Schwerdt, 235 Ill. 386, 390 (1908).

[86] "It was formerly held in England that a promise by a bankrupt made either before or after his discharge, to pay the unpaid balance notwithstanding his discharge, was enforceable at law, the past debt being a sufficient consideration. See Trueman v. Fenton (1777) Cowp. 544; Kirkpatrick v. Tatterall (1845), 13 M. & W. 766. The English Bankruptcy Acts of 1849 and 1861 provided that such promises should not be binding. The later Bankruptcy Acts of 1869, 1883 and 1914 contain no such provision, and yet the courts hold that the new promise is not enforceable in the absence of a new consideration. Heather v. Webb (1876), 2 C. P. D. 1; Jakeman v. Cook, (1878), 4 Ex. D. 26; Re Bonacina, [1912] 2 Ch. 394. See 1 Smith's Lead. Cas. 168 (12th Ed.). The prevailing rule in the United States is that the new promise is enforceable, the past consideration being sufficient." Corbin's Anson on Contracts, p. 156, n.

Some state statutes require the new promise by the discharged bankrupt to be in writing, and many states by statute require promises to pay debts, or acknowledgments of debts to be in writing to raise or postpone the bar of the statute of limitations. Some such statutes apply only to raising the bar of the statute when it has fallen and have no applications to promises made before then. Welles-Kahn Co. v. Klein (Fla.) 88 So. 315 (1921). Local statutes should be consulted.

[87] By the Infant's Relief Act of 1874 (37 and 38 Vict. C. 62) all contracts of infants for the repayment of money lent or to be lent or for goods supplied or to be supplied, other than contracts for necessaries and all accounts stated with infants are absolutely void and "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." No American statute seems to go so far, though some states have copied an English statute of 1828 (9 Geo. IV, C. 14, § 5) which required an infant's ratification to be in writing. Ratification of an executory contract is itself voidable if it occurs during infancy. Stack v. Cavanagh, 67 N. H. 149 (1890); Ex parte McFerren, 184 Ala. 223 (1913). Apart from statute it is clear under the common law that an adult's promise to perform a contract entered into when he was an infant ends his ability to avoid the contractual obligation. Whether in such case the action should be brought on the old contract or on the ratifying promise is a matter about which the cases differ. See note 97 *post*, this chapter.

Watkins v. Halstead, 2 Sandf. 311; Waters v. Bean, 15 Geo. 358; 1 Pars. Cont. 435. This doctrine has received assent in this state. French v. Benton, 44 N. H. 28, 31.

It has been assumed in this discussion that the defendant's testate promised to pay the debt within six years of her death. Whether the evidence was sufficient to warrant such a finding is a question we have no occasion to consider. The defendant is entitled to judgment on the report.

*Case discharged.*[88]

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## BENTLEY *v.* MORSE.

**(Supreme Court of New York, 1817. 14 Johns. 468.)**

In error, on *certiorari* to a justice's court.

The plaintiff in error had an account, for work, against the defendant in error which the latter paid, and took the receipt of the plaintiff in error for 24 dollars and 20 cents. In November, 1815, the plaintiff in error brought an action against the defendant in error, on his account, and recovered judgment. It did not appear that any defence was made. In December, in the same year, the parties happening to be together, the defendant observed to the plaintiff that he had paid him a sum of money, and held his receipt for it, (alluding to the receipt above mentioned) and had been since compelled to pay him a second time; the defendant [plaintiff] denied any knowledge of the payment or of giving a receipt, but promised, that if the defendant had such receipt, he would repay him the amount of it. The present action was founded on that promise; and the defendant in error, who was plaintiff in the court below, at the trial produced the receipt in evidence. The defendant below offered the record of the former judgment in evidence, as a bar to the action, but it was overruled, and a verdict and judgment was rendered for the defendant in error.

PER CURIAM. In consequence of the omission of the defendant in error to make a defence in the former action against him, and to produce his receipt to show the payment of the debt, he was forever barred from maintaining an action to recover back the money he had paid; and the question now is, whether the promise to repay the amount of the money expressed in the receipt is valid in law.

The debt having been paid, the recovery in the former action was clearly unjust; and though, in consequence of his neglect, the defendant in error lost all legal remedy to recover back his money, yet there was such a moral

[88] On the effect of a new promise after the removal of the disability of coverture which existed when the original obligation was attempted, see 53 L. R. A. 363, note; 7 L. R. A. (N. S.) 1053, note; 33 L. R. A. (N. S.) 741, note.

obligation on the part of the plaintiff in error, to refund the money, as would be a good consideration to support an assumpsit or express promise to pay it. The moral obligation is as strong as any in the cases in which it has been held sufficient to revive a debt barred by statute or some positive rule of law. It is like the promise of an infant to pay a debt contracted during his non-age, or of an insolvent or bankrupt to pay a debt from which he is discharged by his certificate.

*Judgment affirmed.*[89]

[89] In Stebbins v. Crawford County, 92 Pa. St. 289 (1879) a county treasurer had settled his accounts, there being no appeal taken from the auditor's report which when filed became a judgment and by lapse of time without appeal final and conclusive, and then, errors being discovered showing a larger amount had been payable by him, the treasurer, who had not known of the errors, promised to pay that amount. Assumpsit being brought on that promise, Church, P. J., in the lower court said: "A moral obligation is sufficient to support an express promise, where there has been a pre-existing obligation which has become inoperative by positive law. Express promises, founded on pre-existing equitable obligations, may be enforced as founded on good consideration. They merely remove an impediment erected by law to the recovery of debts honestly due, but which the statute law and public policy protect the debtors from being compelled to pay. * * * Now, applying this rule to the facts in this case, what do we have? An actual pre-existing debt owing by this defendant to the plaintiff—a debt for trust moneys, which, *in foro conscientiæ*, is of a higher character than the ordinary debts which arise on account of dealings between individuals. This debt is barred by positive law by a judgment entered, in which the debtor is unwittingly, but none the less positively, released. According to the common sense and feeling of mankind, the debt exists until it is actually paid; the mind of the defendant assented to this principle. He felt the obligation of the unsatisfied debt, and in the language of the verdict, specifically and definitely admitted it, and positively and unconditionally promised to pay it. There can be no doubt, therefore, that this moral obligation was a sufficient consideration upon which to base this promise of the defendant to pay the debt." And in the Supreme Court, Gordon, J., after approving the opinion below, and in affirmance of the judgment in favor of the county, said:

"That a moral obligation is sufficient to support an assumption to pay a debt, which cannot be collected by reason of the intervention of some positive law, as the statute of limitations, the operation of a judgment, or a discharge in bankruptcy, is a doctrine now so well established that a discussion of it would be mere waste of logic. In Anspach v. Brown, 7 Watts (Pa.) 140, it is admitted that there is an obligation in morals, to pay a debt barred by a judgment, which will support an express promise to that effect. Such a debt, it is true, is put upon a higher footing than one barred by the statute of limitations, for, it is said, there must be not only an acknowledgment of the debt, but a distinct and formal promise to pay; nevertheless, when these conditions are complied with, the promise is binding. What, then, though the auditors' report was equivalent to a judgment? That there was a clear mistake in it of some $1,700, is not denied; and that Stebbins acknowledged that mistake, and clearly and unconditionally promised to pay the amount thus discovered to be due the county, is found by the legal arbitrator."

"A moral obligation is an imperative duty, which would be enforceable by

## RICHARDSON *v.* KULP.

**(Supreme Court of New Jersey, 1911. 81 N. J. L. 123, 78 Atl. 1062.)**

Action by Percy B. Richardson against Samuel C. Kulp. From a judgment for plaintiff, defendant appeals. Affirmed.

BERGEN, J.[90] This action was brought to recover the amount due upon a promissory note which the defendant had indorsed for the accommodation of the maker, and the plaintiff had judgment in the district court, from which defendant appeals. * * *

We must therefore assume that the trial court in finding for the plaintiff in this case determined that the indorser, although discharged from liability for want of proper notification, subsequently waived his right to have advantage of the neglect of the plaintiff to give him timely notice of the dishonor of the note. * * * He knew the date of maturity, and he also knew that the note had not been paid, so his promises oral and by letter must be considered as having been made with knowledge that he was released from liability for want of proper notice. A promise to pay or its equivalent, made by a person entitled to insist on want of notice of dishonor, who was then aware that he was released from liability for want of it, amounts to a waiver of the right to have the benefit of such neglect, and admits the right of action. Tebbetts v. Dowd, 23 Wend. (N. Y.) 379, and the cases there cited. * * *

The judgment below is

*Affirmed.*[91]

law, were it not for some positive rule which, with a view to a general benefit, exempts a party in that particular instance." Per Curiam in Gilman v. Hannewell, 181 N. Y. Supp. 202 (1920).

[90] Parts of the opinion are omitted.

[91] See Burgettstown Nat. Bk. v. Nill, 213 Pa. St. 456 (1906). But see Sebree Deposit Bank v. Moreland, 96 Ky. 150 (1894), where the question related to accommodation drawers and indorsers.

§ 109 of the Uniform Negotiable Instruments Law deals with the matter as one of waiver. On new promises by discharged sureties see First National Bank of Monmouth v. Whitman, 66 Ill. 331 (1872); Hooper v. Pike, 70 Minn. 84 (1897); Bramble v. Ward, 40 Oh. St. 267 (1883); First Natl. Bank v. Jones, 92 Wis. 36 (1896). See Perkins v. Cheney, 114 Mich. 567 (1897) where the promise was made after the statute of limitations had run. But see Walters v. Swallow, 6 Whart. (Pa.) 446 (1841). On the necessity of new consideration to bind the surety, indorser or guarantor who signs as such after the execution and delivery of the original contract by the principal, see 44 L. R. A. (N. S.) 481, note; L. R. A. 1918E, 579, note.

In Walker v. Arkansas Nat. Bk., 256 Fed. 1, 4 (1919), Trieber, J., said: "The next contention is that the renewal of the former notes [of a married woman as surety for her husband, when she could by statute, since repealed, contract only in reference to her separate property] and consequent extension of time is not a sufficient consideration for the execution of the note sued on, and as she was not liable, by reason of her coverture, on the notes executed prior to 1915, this note [given when she could be a surety for her husband] is

## WILLIAM O. LUDLOW *v.* AUGUST HARDY.

**(Supreme Court of Michigan, 1878. 38 Mich. 690.)**

Case made from Kent.

GRAVES, J.[92] Ludlow, as plaintiff, recovered in the court below, and Hardy removed the cause to this court upon a case.

In the fall of 1874 Ludlow sold a quantity of liquors to Hardy and the sale is claimed to have been contrary to the act then in force to prevent the manufacture and sale of spirituous and intoxicating liquors as a beverage. After the repeal of that statute, Hardy, in consideration of the sale and of an extension of the time of payment, made a new promise and in fact paid $22. The court below allowed recovery upon this new promise, and the only question is upon the validity of that ruling. * * *

The original transaction was within the operation of the statute, and was condemned by it. As a sale it was forbidden and illegal as a gift; and although like transactions subsequent to the repeal of the statute referred to would not stand forbidden and illegal, the act in question, which occurred during the existence of the statute, has never become lawful. It had no legal vitality originally, and nothing has occurred since to breathe life into it. It has never been transformed into a valid act. Hence it has never been sufficient to afford any consideration for a promise.

The judgment is erroneous and must be reversed, and judgment must be entered here for defendant with costs below and here.

The other Justices concurred.[93]

**without consideration. But the law of the state, as settled by the decisions of its highest court, is that—**

**" 'One who gives a note in renewal of another note, with knowledge at the time of a partial failure of the consideration for the original note, is estopped from setting up the defense of failure of consideration, in an action on the renewal note.' Stewart v. Simon, 111 Ark. 358, 163 S. W. 1135, Ann. Cas. 1916A, 825, where the authorities are fully considered.**

**"This case has been reaffirmed in Haglin v. Friedman, 118 Ark. 465, 177 S. W. 429."**

**Where a party made a promise without new consideration after being discharged by a material alteration of a written instrument, he was held bound by the promise in Montgomery v. Crosthwait, 90 Ala. 553 (1890). See 39 L. R. A. (N. S.) 131, note.**

**[92] Part of the opinion is omitted.**

**[93] On effect on contract, made void by statutory or constitutional provision, of subsequent repeal of such provision, see Ann. Cas. 1913C, 1398, note. On the effect of a new promise when the original promise was illegal, see 53 L. R. A. 370, note.**

**On a new promise as consideration where the original promise was in violation of the statute of frauds, see 53 L. R. A. 370, note; 26 L. R. A. (N. S.) 524, note. See also 19 Ann. Cas. 1182, note.**

## WOLFFE *v.* EBERLEIN.

**(Supreme Court of Alabama, 1883. 74 Ala. 99, 49 Am. Rep. 809.)**

SOMERVILLE, J.[94] The proposition is not denied, that where a debt has been discharged by a decree in a court of bankruptcy, it may, in a certain sense, be revived, so as to renew its legal obligation, by an express and unequivocal promise to pay it, made by the debtor subsequent to the date of discharge. The authorities are in perfect harmony as to this principle, the only conflict of opinion being as to cases where the debtor makes a promise to pay prior to obtaining his certificate of discharge. Evans v. Carey, 29 Ala. 99; Bishop on Contr. § 448; Allen v. Ferguson, 18 Ala. 1; Knap v. Hoyt, 57 Ia. 591; s. c. 42 Amer. Rep. 59; Nelson v. Stewart, 54 Ala. 115. This case is clearly of the former class, the promise to pay being express, and subsequent to the discharge in bankruptcy.

The present action was brought on a judgment, in defense of which the appellant, in the court below, set up by way of plea his discharge in bankruptcy. The plaintiff made replication of an express promise by defendant to pay the claim unconditionally. The main point of contention is on the form of the pleadings. It is insisted that the replication of a verbal promise is a departure from the original cause of action, which declared on a judgment, and that the action should have been based upon the new promise, and not upon the judgment, which was extinguished by the fact of defendant's discharge in bankruptcy.

There are two views of this subject, presented in the books, as to the effect of a new promise to pay in its relation to a plea of bankruptcy. The more logical and sounder view, perhaps is, that the new promise, and not the old debt, is the meritorious cause, or real foundation of the action. The old debt has become extinguished by operation of law, and no longer exists. But the moral obligation to pay still exists, and this, coupled with the antecedent valuable consideration, is sufficient to support a new promise, if clear, distinct, and unequivocal in nature. The moral obligation, uniting to the new promise, makes what was designated by Lord Mansfield, in Trueman v. Fenton, Cowp. 544, "a new undertaking and agreement." De Puy v. Swart, 3 Wend. 135; s. c., 20 Amer. Dec. 673; Fraley v. Kelly, 88 N. C. 227; s. c. 43 Amer. Rep. 743.

There is another class of cases, supported by perhaps the weight of authority, which refer the efficacy of such promises exclusively to the principle that the defendant may renounce the benefit of the law designed for his protection, and that the effect of the new promise is to waive any discharge that may be obtained in bankruptcy, at least to an extent commensurate with the promise itself. * * *

The past decisions of this court seem to have proceeded upon this theory of the law, and the prevailing system of pleading, by which the plaintiff is

[94] The statement of facts and parts of the opinion are omitted.

accustomed to declare upon the original promise, and to introduce the new promise by way of replication to the plea of bankruptcy, is manifestly an outgrowth of it. Dearing v. Moffitt, 6 Ala. 776; Branch Bank v. Boykin, 9 Ala. 320; Evans v. Carey, 29 Ala. 99, 107.

It is not required that we should decide which of these two theories is correct. The better view, in our judgment, is that suggested by Mr. Parsons, that the plaintiff may, at his election, bring suit either upon the new promise, and declare upon it, in the first instance, as the foundation of his action, thus himself assuming the onus of proving the discharge in bankruptcy, without which the new promise would be unavailing; or he may sue upon the old or original promise, and when the plea of bankruptcy is interposed as a defense, may set up the new promise in his replication to the plea, as in analogous cases involving the defense of infancy, and the statute of limitations. 1 Parsons Contr. 434-5 (6th Ed.) Note (v) and cases cited. * * *

A strong analogy is found in cases involving the plea of the statute of limitations. Bankruptcy, it is true, extinguishes the debt as a legal subsisting demand, while the operation of the statute is only to destroy the remedy. Yet it is settled in the one class of cases, as well as in the other, that the new promise is the true and real foundation of the cause of action, and strictly speaking, upon it alone can a recovery be had. Such is the settled doctrine of this court, and since the case of Bell v. Morrison, 1 Pet. 351, decided by Judge Story more than fifty years ago, it may be regarded as the recognized doctrine in this country. Bradford v. Spyker, 32 Ala. 134; Angell on Lim. (6th Ed.) §*212. Notwithstanding this fact, the rules of pleading permit the plaintiff to declare upon the original debt, and, when the statute of limitations is pleaded, to reply the new promise. Angell on Lim. § 288. In Bradford v. Spyker, 32 Ala. 148, this feature of pleading was said to be an anomaly in the law; but the court approved it, as sanctioned by long practice rather than on principle, quoting the language of Best, C. J., in Upton v. Else, 12 Moore, 303 (22 Eng. Com. Law, 451) where he said: "Probably the new promise ought in strictness to be declared on specially; but the practice is inveterate the other way and we cannot get over it."

The practice adopted in the present action of declaring on the original debt, where bankruptcy of the defendant is pleaded, has prevailed for a long time in this state. Though an anomaly, we can see no good to result from abolishing it by judicial decision, but rather inconvenience and confusion. Admitting it to be wrong in principle, we feel justified in permitting it to stand, if for no other reason, because it is supported, with few exceptions, by the antiquity of uninterrupted practice, not only in this state, but generally in the courts of England and America. * * *

In Evans v. Carey, 29 Ala. 99, it was decided that an express promise by a bankrupt, to pay a particular debt to a creditor would "avoid the effect

of such discharge, as well when the words constituting such promise are spoken to a third person as when they are spoken to the creditor personally or to his agent." On this principle, the promise made to the agent of the assignor of the present judgment must be held to enure to the benefit of the assignee. We follow this authority, although it can probably be justified solely on the theory, that the effect of the new promise is only, using the language of Mr. Parsons, "to do away with the obstruction otherwise interposed by the bankruptcy and discharge." 1 Parsons Contr. 454; Otis v. Gazlin, 31 Me. 567. It harmonizes with the practice however, of declaring upon the original debt in such cases, and of introducing the new promise by way of replication to the plea of bankruptcy. * * *

The judgment of the court below is, in our opinion, free from error, and it is accordingly

*Affirmed.*[95]

[95] "Thus it seems that [where there has been a new promise after a discharge in bankruptcy] the plaintiff may, at his election, sue either upon the new promise or the old, nor is it very apparent which is the more eligible form of declaring, though Judge Parsons [in his treatise on Contracts] seems to consider it the better course to count upon the new promise. Upon the hypothesis that the defendant will not rely upon his discharge in bankruptcy, declaring upon the old promise is the most simple and concise form of proceeding. Upon the opposite hypothesis, the only difference is that by declaring on the old promise the discharge in bankruptcy and the new promise are brought out in the plea and replication, whilst by declaring on the new they are brought out in the declaration and the plea, and thus the issue by one stage or process of pleading the sooner ended." Thompson, J., in Horner v. Speed, 2 Pat. & H. (Va.) 616, 622 (1857).

In Herrington v. Davitt et al., 220 N. Y. 162 (1917), Collin, J., for the court said:

"The action was properly brought upon the note. For the purpose of the remedy, the original debt might still be considered the cause of action. Dusenbury v. Hoyt, 53 N. Y. 521, 13 Am. Rep. 543. It might, had the plaintiff so elected, have been brought upon the new promise. It would be more accurate and consistent with the provisions of section 481 of the Code of Civil Procedure and the other sections regulating the pleadings in an action to allege the new promise as the real foundation of the action. The note was a debt provable in the bankruptcy proceedings. The legal obligation which it created or evidenced was, by virtue of the confirmation of the composition offer and the discharge in the proceedings, discharged by force of the statute, and the remedy of plaintiff existing at the time the discharge was granted to recover her debt by action barred. The right of action is given by a new and efficacious promise. The practice of bringing the action upon the original demand is, however, sanctioned by usage. The discharge in bankruptcy is, under such practice, regarded as a discharge of the debt *sub modo* only, and the new promise as a waiver of the bar to the recovery of the debt created by the discharge. The new promise with such other facts as are essential to constitute it a valid cause of action may, however, be alleged. See Wolffe v. Eberlein, 74 Ala. 99, 49 Am. Rep. 809; Taylor v. Hotchkiss, 81 App. Div. 470, 80 N. Y. Supp. 1042, affirmed 179 N. Y. 546, 71 N. E. 1140; Scheper v. Briggs, 28 App. Div. 115, 50 N. Y. Supp. 869."

## BLISS, WILLIAMS & CO., Plaintiffs in Error, *v.* WILLIAM PERRYMAN, Defendant in Error.

(Supreme Court of Illinois, 1838. 2 Ill. [1 Scam.] 484.)

WILSON, C. J.[96] This case originated before a justice of the peace. The bill of exceptions taken on the trial, contains all the proceedings, from which it appears that the plaintiff sued the defendant on a bond given by him for $28. The defendant pleaded infancy, and sustained his plea by proof. The plaintiff then set up a promise made by the defendant after he came of age, to pay the plaintiff $18 in lieu of the bond, but having failed in establishing this promise by disinterested testimony, he applied to the court (under the statute making the oath of the party evidence in certain cases) to have the defendant sworn to prove his subsequent promise. The court decided the evidence to be inadmissible, and refused to allow the party to

In Rodgers v. Byers, 127 Cal. 528, (1900), Henshaw, J., stated the California rule in reference to the statute of limitations as follows:

"(1) That when the statute of limitations has barred the remedy upon the original obligation, and an acknowledgment or a promise made after such time is relied upon, the action is not upon the original obligation, but is upon the new acknowledgment, and the implied promise raised by the law, or is upon the new express promise. McCormick v. Brown, 36 Cal. 180; Chabot v. Tucker, 39 Cal. 434; Biddel v. Brizzolara, 56 Cal. 374; Lambert v. Schmals, 118 Cal. 33, 50 Pac. 13.

"(2) If the acknowledgment or the promise be made while the original obligation is legally enforceable, and, if no conditions be attached to the promise, then the action, though brought after the statute of limitations would have ordinarily barred the remedy against the original obligation, is still upon the original obligation, which becomes 'a continuing contract' under section 360 of the Code of Civil Procedure, because the bar of the statute has been lifted and removed. McCormick v. Brown, 36 Cal. 186; Chaffee v. Browne, 109 Cal. 211, 41 Pac. 1028; Southern Pac. Co. v. Prosser, 122 Cal. 413, 55 Pac. 145.

"(3) But, upon the other hand, in the case of a new promise, made while the original obligation is legally enforceable, if that promise be not a general promise to pay the obligation according to its tenor and terms, but is a promise coupled with any condition, and an action is brought after the statute of limitations would have barred the remedy upon the original obligation, the action of plaintiff is then upon the substituted, conditional promise, and not upon the original obligation. Such substituted, conditional promise must be pleaded, the breach of it averred, and the recovery had after such showing. Curtis v. City of Sacramento, 70 Cal. 412, 11 Pac. 748."

Whether the action is brought on the old promise or the new, recovery is limited by the conditions of the new promise. That would necessarily be true where the new promise is sued upon, and has been held to be true in Massachusetts where the old promise is sued upon. Gillingham v. Brown, 178 Mass. 417 (1901). On promises to pay when able, as tolling the statute of limitations, see 27 L. R. A. (N. S.) 300, note; L. R. A. 1918A, 902, note. On the effect of conditional promises on the statute of limitations, see 102 Am. St. Rep. 775, note.

[96] The statement of facts is omitted.

be sworn. To reverse which opinion this writ of error is prosecuted.

It is clear that the plaintiff has mistaken the contract upon which he ought to have brought his action, and that the evidence which he offered was properly rejected. This evidence went to establish a different and distinct cause of action, from that upon which suit was brought. The action was instituted upon a contract under seal for the payment of a specific sum of money, while that sought to be established on trial, by the testimony which was rejected, was a parol agreement, entered into at a different time, and for the payment of a different amount. The admission of such testimony would not only have changed the character of the action, and the nature of the defense, but would have been a surprise on the defendant. The plaintiff should have brought his action upon the subsequent parol promise, and not upon the bond. An infant cannot bind himself by bond, even for necessaries, and when the plaintiff relies upon a new promise made after full age, it is always necessary that he should declare upon the simple contract, which the new promise was meant to establish; and the infant will then be bound to the extent of his promise, even if the consideration of the original contract, (for which the latter is substituted) was not for necessaries.

The judgment of the Circuit Court is affirmed with costs.[97]

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## ARMSTRONG *v.* LEVAN.

**(Supreme Court of Pennsylvania, 1885. 109 Pa. St. 177, 1 Atl. 204.)**

PAXSON, J.[98] The defendant below was sued for breach of official duty as prothonotary in not properly entering a judgment, by means whereof its lien was postponed and the plaintiff suffered a loss.

The defendant pleaded the general issue and the statute of limitations. To meet the plea of the statute the plaintiff called a witness, who testified as follows: "After I discovered that there was no judgment in favor of Hannah Levan against Enoch Rohrbach, but there was one against Enoch Rothenberger, which I knew from the number to be meant as the one against Rohrbach, I went to see Mr. Armstrong in reference to the matter. I said to him that he had made this mistake, or if not he his clerk, and that unless this matter was fixed up, I would be obliged to sue. He then made

**97 But on the other hand, "It may well be answered that the promise of an infant when he becomes of age operates only to remove the legal bar to a recovery on a contract made before. The suit is on the original contract * * * It is not necessary, therefore, that there should be a new contract, according to the technical definition of a contract. There is no need of a new bargain between the creditor and debtor. The infant may ratify after he is of age, even against the consent of the other party." Parker, C. J., in Hoit v. Underhill, 10 N. H. 220, 221-222 (1839).**

**98 The statement of facts and part of the opinion are omitted.**

the remark that he would have to see his lawyer first, Mr. Reber. On the afternoon of the same day, I think it was, he came to my office, alone that time, and he said that I should see Mr. Reber; and I said to him again what I said in the morning in reference to suing. He said that I should not sue; that if Mrs. Levan suffered any loss by reason of this mistake, he would make it good to her; that she should not lose anything through his mistake. That was in the spring of 1879, I think during the first days of April."

The court below held that this evidence, if believed by the jury, was sufficient to bar the running of the statute; and that the six years would only commence to run from the date of such promise.

The plaintiff in error has given us an elaborate argument to show that a promise to pay after the statute has run will not revive a tort, and has cited numerous authorities in support of this proposition. We concede his law to be sound; his authorities fully sustain his point.[99] The difficulty in his way is they do not meet his case. It was not the question of the revival of a tort by a promise to pay made after six years. The conversation referred to occurred before the statute had run, and it was a distinct promise to pay in consideration that the plaintiff below would not sue. If, therefore, she relied upon this promise; if she was thereby lulled into security, and thus allowed the six years to go by before she commenced her suit, with what grace can the defendant now set up the statute? The promise operated not to revive a dead tort, but as by way of estoppel. It has all the elements of an estoppel. The plaintiff relied and acted upon it; she has been misled to her injury; but for the defendant's promise she would have commenced her action before the six years had expired. We think the learned judge below was right in holding that the six years would only commence to run from the date of the promise. * * *

*Judgment affirmed.*[100]

[99] As to torts the bar of the statute of limitations is not removed by a new promise. Nelson v. Petterson, 229 Ill. 240 (1907). See 13 L. R. A. (N. S.) 912, note. As to contracts under seal there is a conflict of authority. It is held not removed as to them in Toothaker v. Boulder, 13 Colo. 219 (1889) because the subsequent promise is of less solemnity. It is held removed as to them, but with action only on the new promise in assumpsit in Trustees of St. Mark's Evangelical Lutheran Church v. Miller, 99 Md. 23 (1904), though in Carll v. Hart, 15 Barb. (N. Y.) 565, action was allowed on the bond on the theory that the new promise, and the part payment made, rebutted the presumption of payment in full. So as to judgments there is a conflict of authority. The statute of limitations is held not removed as to them by a new promise or part payment in City of Harper, Kans. v. Daniels, 211 Fed. 57 (1914); Olson v. Dahl, 99 Minn. 433 (1906); Berkson v. Cox, 73 Miss. 339 (1895). But *contra* see Olcott v. Scales, 3 Vt. 173 (1831) where the new promise was replied to the plea of the statute in debt on the judgment and the court held the replication good. See 8 L. R. A. (N. S.) 440, note.

[100] See Holman v. Omaha, etc. Railway & Bridge Co., 117 Ia. 268 (1902). On estoppel to plead the statute of limitations, see 104 Am. St. Rep. 746, note.

## T. P. SHEPARD & CO. *v.* JAMES A. RHODES and Another.

(Supreme Court of Rhode Island, 1863. 7 R. I. 470, 84 Am. Dec. 573.)

Assumpsit to recover the sum of two thousand dollars, due from the defendants to the plaintiffs. The declaration contained a special count to which the defendants demurred, generally.

BULLOCK, J.[101] The count demurred to states, in substance, that the plaintiff had discharged the defendants from a certain debt, then due and owing from them to the plaintiffs, in consideration of dividends to be received from the proceeds of certain stock assigned by the defendants; and that, subsequent to such discharge, the defendants feeling themselves honorably bound to pay to the plaintiffs this debt, in consideration thereof and of one dollar to them paid, made the following new promise, to wit, to pay to the plaintiffs in one year after a final dividend, any difference that might then exist between their full debt and interest and the amount of any dividend or dividends the plaintiffs might have previously received. The count further states, that more than one year has elapsed since the plaintiffs received notice that no dividend would be paid them from the assigned effects.

This statement of the cause of action shows, in effect, two separate and distinct considerations, as the foundation of the new promise; first, a moral consideration, that the defendants, notwithstanding their discharge, felt themselves in honor bound to pay the plaintiffs' debt; and second, the valable consideration of one dollar, paid to the defendants by the plaintiffs when the new promise was made.

Are these considerations, as stated, sufficient in law to sustain the promise? Passing by the earlier cases, referred to at length in a note to the report of Wennall v. Adney, 3 Bos. & Pul. 249, and some of which hold to the opposite, it may now be deemed settled that no action can be maintained upon a promise founded upon a mere moral consideration. Mills v. Wyman, 3 Pick. 207; Eastwood v. Kenyon, 11 Ad. & Ell. 438; Beaumont v. Reeve, 8 Ad. & Ell. (N. S.) 483; s. c. 55 Eng. C. L. 483. It has been said that such a doctrine is not creditable to the common law, but the rule has its origin in the widely diversified character of moral duties and the consequent difficulty of measuring them with exactness, and determining which are so high and obligatory in their nature as to demand, in their performance, the payment of money.

There is a class of cases which, for the most part, have been regarded as not falling within the rule, that a mere moral consideration will not support a promise. Of such is the case of a promise barred by the statute of limitations, where the party is under no legal liability to pay when the promise is made. And so, of the promise of an infant, made after he becomes of age, to pay a debt incurred during his minority, and which

[101] The statement of facts is abbreviated and part of the opinion is omitted.

debt he is then at liberty to ratify or avoid. Upon the same principle a promise to pay a debt originally usurious, where usury avoids the contract, but freed from all usury at the time the new promise is made, is binding, because the original contract is not void, but voidable only at the election of the borrower. And so, the promise of a bankrupt, made after certificate of discharge granted, may be enforced, although now, in England, by statute (6 Geo. IV, c. 16) the promise must be in writing. But it is settled, that such considerations as love, friendship, natural affection, even the close relation existing between parent and child, are not, of themselves sufficient to support an express promise. * * *

The principle, recognized in, and which, almost without exception, has controlled this class of cases, is this: That when the precedent original consideration was sufficient to sustain the promise, but the right of action was suspended or barred by some positive rule of statutory or common law, the debtor might, by a subsequent promise, waive the exemption which the law has interposed indirectly for his benefit, but, mainly, from reasons of sound policy.

The case here is one where the original right of action was extinguished, not by the act of the law, but by the act of the parties. It was a voluntary release of the debt by the creditor to the debtor. In Willing v. Peters, 12 S. & R. 179, the question arose how far a promise to pay a debt, thus discharged might be enforced; and, because of the analogy between waiving a discharge created by act of law and one created by act of the parties the court upheld the action. Shaw, C. J., in Valentine v. Foster, 1 Metc. 522, admits the closeness of the analogy, and suggests, if the rule be not narrow that allows the waiver in the one case to bind the party and rejects it in the other; but he adds, that the Pennsylvania authority is the only one he has been able to find in support of the doctrine; and in the case then before him, ruled, that when a creditor released a debtor to make him a witness, the subsequent promise of the debtor was not binding. Considering his own decision, and that the case of Willing v. Peters was subsequently overruled in the same court, in Snevily v. Read, 9 Watts, 396, while in other courts it has been repeatedly adjudicated that after the voluntary release of a debt, an express promise does not revive it, nor does it form a sufficient consideration to support a new promise, we may affirm that such, at present is the settled law. Warren v. Whitney, 24 Me. 561; Stafford v. Bacon, 1 Hill. 533.[102]

[102] See Grant v. Porter, 63 N. H. 229 (1884).

In Taylor v. Hotchkiss, 81 App. Div. 470, 80 N. Y. Supp. 1042 (1903, affirmed. 179 N. Y. 546 (1904)) and in Straus v. Cunningham, 159 App. Div. 718, 144 N. Y. Supp. 1014 (1913) it was held that if in the case of a voluntary extinguishment of his debts the debtor before and at the time of such extinguishment expressly reserves a moral obligation to pay them in full, if able, or in any event, such moral obligation will serve as consideration to support a subsequent promise by him to pay.

So if in the bankruptcy proceeding the creditors accept a composition offered

But the plaintiffs aver an additional consideration for the defendant's promise, and this raises another question: because the former consideration not being illegal, but only insufficient, the latter may sustain the

by the debtor, the duress inherent in the situation leaves the debtor's moral obligation to pay intact. In Herrington v. Davitt, 220 N. Y. 162 (1917), Collin, J., for the court, said:

"The letter of the defendant's testator constituted a distinct and unqualified promise to pay the debt [discharged in bankruptcy proceeding after creditors had accepted debtor's offer of a composition]. * * * The rule of law is well-nigh universal that such a promise made has an obligating and validating consideration in the moral obligation of the debtor to pay. The debt is not paid by the discharge in bankruptcy. It is due in conscience, although discharged in law, and this moral obligation, uniting with the subsequent promise to pay, creates a right of action. Dusenbury v. Hoyt, 53 N. Y. 521, 13 Am. Rep. 543. The appellant asserts that the rule does not obtain or have applicability where, as in the present case, there was a composition between the bankrupt and his creditors, assented to and accepted by the creditors seeking to enforce the unpaid debt. The clear weight of judicial opinion and correct reasoning declare such assertion erroneous. In Cohen v. Lachenmaier, 147 Wis. 649, 133 N. W. 1099, the facts, in the particular under consideration, were as are the facts here. The trial court awarded judgment for the balance unpaid on the note. The Supreme Court of Wisconsin in affirming the judgment said:

" 'It is further contended that each promise, if made, is *nudum pactum*, because the plaintiff, as one of the creditors, joined with the majority of the creditors in number and amount in accepting the defendant's offer of a composition with the creditors in settlement of their claims. This claim is based upon the ground that a discharge in bankruptcy in a composition is not a discharge by operation of law but is one effected by the voluntary assent of the creditors. The adjudications are to the effect that a debt which has been extinguished by a voluntary agreement of the debtor and creditor will not support a new promise and that one discharged by operation of law will support one. The proceeding resulting in the discharge of a debtor from liability, based on a composition after bankruptcy proceedings are instituted, is not in its nature such a voluntary act of the creditor as is considered in law as being a voluntary assent of the creditor to the satisfaction of the debt.'

"In Matter of Merrimam's Estate, 44 Conn. 587, the court * * * enunciated that * * * a discharge by performance of the terms of a bankruptcy composition is a discharge by operation of law; the composition is as to the assenting creditor both a voluntary act and an act of the law, but its efficiency is derived from the compulsory power of the law. * * * In Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914D, 664, the plaintiffs accepted the composition offer of the defendant in bankruptcy proceedings. Thereafter the defendant promised plaintiffs, upon a loan to them of $500, that he would pay the balance of their claim proved in the proceedings. The action was to recover such balance. The plaintiffs recovered. Mr. Justice Pitney in the opinion of the court recognized the general rule that a discharge, while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt, and ignored the composition and its acceptance. The reasoning and the conclusions of those decisions are harmonious with and applicable to the provisions of the Bankruptcy Act of 1898."

See 1 A. L. R. 1704, note.

promise declared upon. This additional consideration is one dollar, for which, it is alleged, the defendants promised, &c., to pay a sum greater than $1,000.

Ordinarily courts do not go into the question of equality or inequality of considerations; but act upon the presumption that parties capable to contract are capable, as well, of regulating the terms of their contracts, granting relief only when the inequality is shown to have arisen from mistake, misrepresentation, or fraud. A different rule would, in every case, impose upon the court the necessity of inquiring into, and of determining the value of the property received by the party giving the promise. Such course is obviously impracticable. In all cases, therefore, where the assumption or undertaking is founded upon the sale or exchange of merchandise or property, or upon other than a money consideration, and the promise has been deliberately made, the law looks no further than to see that the obligation rests upon a consideration, that is, one recognized as legal, and of some value. But the reason of the rule ceases, and, hence, the rule ceases, when applied to contracts to pay money and founded solely upon a money consideration. How far a forbearance to sue, or the giving of time, or the mere waiver of some rights, may support a promise, we do not consider, since the question does not arise. Nor for the like reason, do we consider how far the rule is qualified or limited by special statutes regulating interest; or in that class of cases peculiar to the law merchant, as bottomry, respondentia, and the course of exchange. Aside from these and some other exceptions, at common law a contract for the exchange of unequal sums of money at the same time, or at different times, when the element of time is no equivalent, is not binding; and, in such cases, courts may and do enquire into the equality of the contract; for its subject-matter, upon both sides, has not only a fixed value, but is itself the standard of all values; and so for the difference of value, there is no consideration. In this principle, the earliest prohibitions,—earlier even than the time of Alfred,—and the later legislative enactments against usury, both in England and in this country, have their origin. The rule is deemed to be founded in good policy.

In the case before us, the only legal consideration the defendants received was one dollar, for which they engaged to pay a much larger sum. The case, therefore, falls within the principle adverted to. The consideration was not only unequal, but grossly so. It was a mere nominal consideration; if even received by the defendants, it was, no doubt, regarded as such by them, and intended as such by the promisees. It was, at best, purely technical and colorable, and obviously is wanting in that degree of equitable equality sufficient to support the promise declared upon.

*The demurrer to the first count is therefore sustained.*

## SCHNELL *v.* NELL.

**(Supreme Court of Indiana, 1861. 17 Ind. 29, 79 Am. Dec. 453.)**

PERKINS, J. Action by J. B. Nell against Zacharias Schnell, upon the following instrument:

"This agreement, entered into this 13th day of February, 1856, between Zach. Schnell, of Indianapolis, Marion County, State of Indiana, as party of the first part, and J. B. Nell, of the same place, Wendelin Lorenz, of Stilesville, Hendricks County, State of Indiana, and Donata Lorenz, of Frickinger, Grand Duchy of Baden, Germany, as parties of the second part, witnesseth: The said Zacharias Schnell agrees as follows: whereas his wife, Theresa Schnell, now deceased, has made a last will and testament, in which, among other provisions, it was ordained that every one of the above named second parties should receive the sum of $200; and whereas the said provisions of the will must remain a nullity, for the reason that no property, real or personal, was in the possession of the said Theresa Schnell, deceased, in her own name, at the time of her death, and all property held by Zacharias and Theresa Schnell jointly therefore reverts to her husband; and whereas the said Theresa Schnell has also been a dutiful and loving wife to the said Zach. Schnell, and has materially aided him in the acquisition of all property, real and personal, now possessed by him; for, and in consideration of all this, and the love and respect he bears to his wife; and, furthermore, in consideration of one cent, received by him of the second parties, he, the said Zach. Schnell, agrees to pay the above named sums of money to the parties of the second part, to wit: $200 to the said J. B. Nell; $200 to the said Wendelin Lorenz; and $200 to the said Donata Lorenz, in the following installments, viz., $200 in one year from the date of these presents; $200 in two years, and $200 in three years; to be divided between the parties in equal portions of $66⅔ each year, or as they may agree, till each one has received his full sum of $200.

"And the said parties of the second part, for, and in consideration of this, agree to pay the above named sum of money (one cent), and to deliver up to said Schnell, and abstain from collecting any real or supposed claims upon him or his estate, arising from the said last will and testament of the said Theresa Schnell, deceased.

"In witness whereof, the said parties have, on this 13th day of February, 1856, set hereunto their hands and seals.

"ZACHARIAS SCHNELL, (SEAL.)[168]
"J. B. NELL, (SEAL.)
"WEN. LORENZ." (SEAL.)

The complaint contained no averment of a consideration for the in-

[168] In Indiana by statute the distinction between sealed and unsealed writings was abolished.

strument, outside of those expressed in it; and did not aver that the one cent agreed to be paid had been paid or tendered.

A demurrer to the complaint was overruled.

The defendant answered, that the instrument sued on was given for no consideration whatever.

He further answered, that it was given for no consideration, because his said wife, Theresa, at the time she made the will mentioned, and at the time of her death, owned, neither separately, nor jointly with her husband, or any one else (except so far as the law gave her an interest in her husband's property), any property, real or personal, &c.

The will is copied into the record, but need not be into this opinion.

The court sustained a demurrer to these answers, evidently on the ground that they were regarded as contradicting the instrument sued on, which particularly set out the considerations upon which it was executed. But the instrument is latently ambiguous on this point. See Ind. Dig., p. 110.

The case turned below, and must turn here, upon the question whether the instrument sued on does express a consideration sufficient to give it legal obligation, as against Zacharias Schnell. It specifies three distinct considerations for his promise to pay $600:

1. A promise, on the part of the plaintiffs, to pay him one cent.

2. The love and affection he bore his deceased wife, and the fact that she had done her part, as his wife, in the acquisition of property.

3. The fact that she had expressed her desire, in the form of an inoperative will, that the persons named therein should have the sums of money specified.

The consideration of one cent will not support the promise of Schnell. It is true, that as a general proposition, inadequacy of consideration will not vitiate an agreement. Baker v. Roberts, 14 Ind. 552. But this doctrine does not apply to a mere exchange of sums of money, of coin, whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value, for money, or perhaps, for some other thing of indeterminable value. In this case, had the one cent mentioned been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken. As it is, the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void, at first blush, upon its face, if it be regarded as an earnest one. Hardesty v. Smith, 3 Ind. 39. The consideration of one cent is, plainly, in this case, merely nominal, and intended to be so.[104] As the will and testament of Schnell's wife

[104] In Velie Motor Car Co. v. Kopmeier Motor Car Co., 194 Fed. 324, 331 (1912) Kohlsaat, J., for the court said:

"The phrase of the contract which reads 'and of $1.00 each to the other

imposed no legal obligation upon him to discharge her bequests out of his property, and as she had none of her own, his promise to discharge them was not legally binding upon him, on that ground. A moral consideration, only, will not support a promise. Ind. Dig., p. 13. And for the same reason, a valid consideration for his promise cannot be found in the fact of a compromise of a disputed claim; for where such claim is legally groundless, a promise upon a compromise of it, or of a suit upon it, is not legally binding. Spahr v. Hollingshead, 8 Blackf. 415. There was no mistake of law or fact in this case, as the agreement admits the will inoperative and void. The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal considerations for Schnell's promise, on two grounds: 1. They are past considerations. Ind. Dig., p. 13. 2. The fact that Schnell loved his wife and that she had been industrious, constituted no consideration for his promise to pay J. B. Nell, and the

paid,' etc., imports no consideration. As said by the trial judge, it may well mean the exchange of the same dollar."

In Roark v. Turner, 29 Ga. 455 (1859), where an indorsee was suing an indorser and it was held that recovery could not be reduced by showing that the indorsement of the note was made on a sale of it for less than its face, Stephens, J., for a majority of the court said of the argument that there must be an equipoise of values whenever the nature of the case permits (pp. 457-458): "If the consideration on both sides was money, this reasoning might do, for in that case an exact equipoise of values might be had; but the fallacy of the reasoning when applied to other cases, consists in assuming that in such other cases, equality of values is attainable. When a man gives his due-bill for a hundred dollars in consideration of only fifty dollars which he receives cash in hand, who can say he has necessarily made a bad trade? There are some men who would make exactly fifty dollars by every such operation which they could get a chance to perform. There are others who would lose fifty and others still who would probably come out about even, for their estates after death (an event which might well happen before payment of their due-bills) would pay about fifty dollars in the hundred. A promise is a species of property, a chose in action, and has no more fixed money value than a horse or a negro [slave] has. The value of each is a matter of judgment. It is not pretended that the law can ascertain the exact equivalent for a horse, and how can it ascertain the exact value of a promise? I understand the rule of law to be that the obligation of the promise is not limited by the size of the consideration (where there is any consideration at all, as there is in this case) but only by its own terms. For the reason that the law cannot weigh the value of the promise, it leaves the parties to adjust it by their contract. Where there is any consideration, the contract of the parties is the law of the case, unless the contract is against law." But the judge was there speaking of a contract, where the parties intended to exchange equivalents (compare Riegel v. Wollenshlager, (Cal. App.) 193 Pac. 160 (1920)) and not of a contract like that in Schnell v. Nell, where they did not so intend.

By § 25 of the Uniform Negotiable Instruments Law "value is any consideration sufficient to support a simple contract." On the adequacy of monetary consideration as affecting the law of bills and notes, see a comment in 21 Col. L. Rev. 461.

Lorenzes, a sum of money. Whether, if his wife, in her lifetime, had made a bargain with Schnell, that, in consideration of his promising to pay, after her death, to the persons named, a sum of money, she would be industrious, and worthy of his affection, such a promise would have been valid and consistent with public policy, we need not decide. Nor is the fact that Schnell now venerates the memory of his deceased wife a legal consideration for a promise to pay any third person money.[105]

The instrument sued on, interpreted in the light of the facts alleged in the second paragraph of the answer, will not support an action. The demurrer to the answer should have been overruled. See Stevenson v. Druley, 4 Ind. 519.

PER CURIAM. The judgment is reversed with costs. Cause remanded, etc.

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## FILCOCKS and HOLTS Case.

**(Court of Exchequer, 1591. 1 Leon. 240.)**

In an action by Filcocks against Holt, administrator of A, the plaintiff declared, how that the husband of the defendant, who died intestate, was indebted to the plaintiff in ten pounds by bill, and that the defendant in consideration, that the plaintiff would permit the defendant to take letters of administration, and give to her further day for the payment of the said ten pounds, promised to pay the said ten pounds to the plaintiff at the day; and upon a writ of error brought in the Exchequer, upon a judgment in the King's Bench, in that case, it was assigned for error, that here is not any consideration, for by the law she is to have administration, being wife of the intestate; and as to the giving of further day for the payment of the ten pounds, the same will not make it good, for it doth not appear that she was administratrix at the time of the promise made, and that she is not chargeable, and then, &c. And such was the opinion of the court. * * *

**105 "The consideration of blood, or natural love and affection, is sufficient in a deed, against all persons but creditors and bona fide purchasers; and yet there is no case where a personal action has been founded on an executory contract, where a consideration was necessary, in which the consideration of blood, or natural love and affection, has been held sufficient. In such a case, the consideration must be a valuable one, for the benefit of the promisor, or to the trouble, loss, or prejudice of the promisee." Spencer, C. J., in Fink v. Cox, 18 Johns. (N. Y.) 145, 149 (1830). See note on love and affection as consideration for executory promise to pay existing debt of another in L. R. A. 1918C, 543.**

## MORRIS *v.* NORTON.

(United States Circuit Court of Appeals, Sixth Circuit, 1896. 75 Fed. 912, 21 C. C. A 553.)

This is a writ of error to review a judgment rendered by the Circuit Court for the Eastern District of Michigan in favor of Elizabeth Norton, administratrix of John D. Norton, against Frank H. Morris, on two promissory notes. The action was begun by Morris against John D. Norton, then living, to recover the proceeds of the sale of certain real estate in Mississippi, belonging to Morris, which had come into Norton's hands as agent or trustee for Morris. The amount of these proceeds was undisputed, and the liability of Norton to account for them to Morris was conceded. The controversy arose over the right of Norton to set off against this claim two promissory notes—one for $500, and the other for $4,500—made by Morris to Norton, and held by the latter, and to have judgment for the remainder against Morris, as permitted under the common-law practice in Michigan. The defense which Morris made to the notes was that they were given for an illegal consideration; that they were given in a gambling transaction, to wit, the buying of options in oil, with no intention of acquiring property in oil, but merely to bet on the rise and fall in the market; and that they were therefore void. * * *

The court directed the jury to return a verdict for defendant, Norton, for the difference between the amounts due Morris from Norton for the land sold, and the amount of the notes. To these rulings of the court, counsel for Morris duly excepted.

TAFT, J.[106] * * * We are of opinion, therefore, that there was evidence before the jury tending to show that Norton gave Morris $4,000 to gamble with in margins on oil; that the investment was successful, in that, according to the agreement of the brokers [Merriman & Rockefeller,] he was entitled to $5,000; that no proceeds were realized, however, because of the failure of the brokers; and that Morris, with Norton's knowledge and acquiescence, then assumed the loss into which he had led Norton by recommending the brokers, and gave him his note for the same. The evidence leaves it a question, upon which reasonable minds may differ, whether in the agreement of settlement it was stipulated as the consideration for the notes that Norton should transfer to Morris all his beneficial interest in the claim against the Rockefeller firm, [the brokers], or whether the assumption by Morris was merely a matter of honor, based on no valuable consideration at all. The decision of the question involves disputable inferences of fact, and is peculiarly within the province of the jury to decide. It is to be observed with reference to these alternative conclusions that there is a distinction between consideration and motive. "The motive for making a promise may be something entirely different

[106] The statement of facts is abbreviated and parts of the opinion are omitted.

from the act, or forbearance or promise thereof, which is offered and accepted in exchange for the promise." Wald, Pol. Cont. (2d Ed.) Am. editor's note, p. 9; Philpot v. Gruninger, 14 Wall. 570, 577.[107]

[107] In Philpot v. Gruninger, cited in the text, *supra*, Strong, J., said: "It is, however, not to be doubted that there is a clear distinction sometimes between the motive, that may induce to entering into a contract and the consideration of the contract. Nothing is consideration that is not regarded as such by both parties. It is the price voluntarily paid for a promisor's undertaking. An expectation of results often leads to the formation of a contract, but neither the expectation nor the result is 'the cause or meritorious occasion requiring a mutual recompense in fact or in law.'"

In Ellis v. Clark, 110 Mass. 389 (1872), it was held that a promise by a creditor to forbear to sue his debtor on a note was not consideration for the defendant's indorsement of the note, even though the creditor forbore because of the indorsement, if the forbearance agreement was not made at his request or communicated to him at or before the time of the making of the indorsement.

"Thus in Philpot v. Gruninger, 14 Wall. 570, 577, it is stated that 'nothing is consideration that is not regarded as such by both parties.' To constitute a valid agreement there must be a meeting of minds upon every feature and element of such agreement, of which the consideration is one. The mere presence of some incident to a contract which might under certain circumstances be upheld as a consideration for a promise does not necessarily make it the consideration for the promise in that contract. To give it that effect, it must have been offered by one party and accepted by the other as one element of the contract." Brown, J., in Fire Ins. Assoc., Ltd. v. Wickham, 141 U. S. 564, 579 (1891).

"In the case at bar, of course, the building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present. But the other elements are that the promise and the detriment are the conventional inducements each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting." Holmes, J., in Wisconsin & Mich. Ry. Co. v. Powers, 191 U. S. 379, 386 (1903).

In E. F. Spears & Sons v. Winkle (Ky.), 217 S. W. 691, 692 (1920), Thomas, J., said:

"There is quite a difference in law between what constitutes an 'inducement' for entering into a contract and what constitutes the 'consideration' for the contract. * * * In other words, the term 'inducement' implies only that which influences an act, while 'consideration' means the parting with something by the one from whom it moves."

But Professor Corbin asserts that "there are many cases justifying the statement that consideration may consist of acts in reliance upon a promise even though they are not specified as the agreed equivalent and inducement, provided the promisor ought to have foreseen that such action would take place and the promisee reasonably believes it to be desired." Corbin's Anson on Contracts, p. 124, n.

On the distinction between condition and consideration, see Wald's Pollock on Contracts, Williston's Ed., 216, note 24, where the learned editor says: "If A

A sense of honor might have induced Morris to agree with Norton that, in consideration of a transfer of his claim against the Rockefeller firm, he would give the note. In that case the legal consideration would be the transfer, and the sense of honor only the motive. On the other hand, if Morris had said to Norton, "I'll assume this obligation of the broker, because I feel in honor bound to do so," and accordingly gave him the note, without any agreement between them as to the claim against the brokers, the sense of honor would have been, not only the motive, but also the consideration. "Nothing is consideration that is not regarded as such by both parties." Wald, Pol. (2d Ed.) 9; Ellis v. Clark, 110 Mass. 389; Sterne v. Bank, 79 Ind. 549, 551; Holmes, Com. Law, 293, 295. Hence the question as to the real consideration for this note is to be determined by what the parties regarded as the consideration when the notes were given, and that depends on what they said and did at the time. This is wholly a matter of conjecture from the circumstances, the conduct of the parties, and the correspondence afterwards in regard to the giving of the notes. It is our province to consider the rights of the parties on each of the alternative hypotheses above suggested. The transfer of Norton's claim against the brokers for his winnings, on a gambling transaction would be a good consideration to support the obligation of Morris' note. This would be so on two grounds: First, the assignment of the right to the fruits of an illegal transaction after the transaction has been closed is not illegal. The assignment would not be in furtherance of the illegal purpose of the original contract, and no public policy forbids a transfer of the unenforceable rights which may grow out of such a contract after the contract and its purpose are things of the past. McBlair v. Gibbes, 17 How. 231, 235, 237; Armstrong v. Toler, 11 Wheat. 258, 269; Rothrock v. Perkinson, 61 Ind. 39; Buchanan v. Bank, 5 C. C. A. 83, 6 U. S. App. 566, 577, 55 Fed. 223; Wald, Pol. Cont. (2d Ed.) 325; Greenh. Pub. Pol. 36. In such a case there is the possibility that the person owing the illegal debt may not rely on the illegality as a defense, and considering it a matter of honor, may pay it. This possibility makes the assignment of the claim a valuable consideration. More than this, under the act of 1882 (79 Ohio Laws, p. 118), and section 4270 of the Revised Statutes of Ohio, as construed by the Supreme Court of Ohio in Lester v. Buel, 49 Ohio St. 240, 30 N. E. 821, Norton would have the right to recover back the $4,000 from the brokers with whom the gambling was done; and we see no reason why an assignment by Norton of his

says to B, I will give you $100 if you break your leg, it is not probable that A means to require B to break his leg, as the exchange or equivalent for the promise. The breaking of the leg is merely the event upon the happening of which A will give a gratuity. In theory any act may be stated either as the condition or the consideration of a promise. See Langdell Summ. Cont. § 66; Holmes Common Law, p. 292; but the courts favor the construction of consideration."

claim against the brokers would not carry this right with it. The right to recover $4,000 from the brokers would certainly constitute a good and valuable consideration to support Morris' note. On the hypothesis that the jury may find from the evidence that the note was given by Morris for the consideration that he felt in honor bound to reimburse the loss Norton had made through trust in brokers recommended by him, and that there was no stipulation as to the transfer of the claim from Norton to Morris, a different result follows. The note could not be enforced, because Morris' sense of honor was not a valuable consideration. Eastwood v. Kenyon, 11 Adol. & E. 438, 446; Mills v. Wyman, 3 Pick. 207; Dodge v. Adams, 19 Pick, 429; Wiggins v. Keizer, 6 Ind. 252; Hendricks v. Robinson, 56 Miss. 694; Dearborn v. Bowman, 3 Metc. (Mass.) 155; Updike v. Titus, 13 N. J. Eq. 151; Cook v. Bradley, 7 Conn. 57; Wald. Poh. Cont. (2d Ed.) 169. More than this, the note would be void for illegality, because it would merely be evidence of Morris' assumption of the brokers' obligation to pay a gambling debt, without any consideration. It would be the same debt, with only a change of debtors, and would be subject to the same defense of illegality by the new debtor as by the old. Coulter v. Robertson, 14 Smedes & M. 18; Edwards v. Skirving, 1 Brev. 548; Blasdel v. Fowle, 120 Mass. 447.

The result of our consideration of this case is that upon the testimony admitted, and which should have been admitted, there was evidence enough to sustain a special verdict by the jury, upon which judgment would have to be entered in favor of Morris on the question of the legality and binding effect of the two notes in suit, which were only renewals of the original note. The action of the court below in excluding evidence, and in directing a verdict for Norton's administratrix, was therefore erroneous. The judgment of the Circuit Court is reversed, at the costs of defendant in error, with directions to order a new trial.

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## WHEATLEY *v.* LOW.

**(Court of King's Bench, 1623. Cro. Jac. 668.)**

Action on the case. Whereas he was obliged to J. S. in £40 for the payment of £20, and the bond being forfeited, he delivered £10 to the defendant to the intent he should pay it to J. S. in part of payment *sine ullâ morâ;* that *in consideratione inde* the defendant assumed, etc., and assigns for breach, that he had not paid, whereupon the other had sued him for this debt, etc.

The defendant pleaded *non assumpsit,* and verdict for the plaintiff.

It was moved in arrest of judgment that this is not any consideration, because it is not alleged that he delivered it to the defendant upon his

request, and the acceptance of it to deliver to another *sine morâ* cannot be any benefit to the defendant to charge him with this promise.

*Sed non allocatur,* for being that he accepted this money to deliver, and promised to deliver it, it is a good consideration to charge him. Wherefore it was adjudged for the plaintiff. A writ of error being brought, and this matter only assigned for error, the judgment was

*Affirmed.*[108]

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## WOLFORD *v.* POWERS, Administratrix.

**(Supreme Court of Indiana, 1882. 85 Ind. 294, 44 Am. Rep. 16.)**

ELLIOTT, J.[109] The appellant's complaint is founded upon a promissory note executed by the appellee's intestate. The answer of the appellee alleges that the only consideration for the note sued on was the sum of $40 paid to the intestate by the appellant, and the agreement of the latter to bestow upon one of his children the name of Charles Lehman Wolford. [Reply setting out consideration in more detail. Demurrer to reply sustained. Judgment for defendant and plaintiff appealed.] * * *

It is the general rule that where there is no fraud, and a party gets all the consideration he contracts for, the contract will be upheld. In Hardesty v. Smith, 3 Ind. 39, it was said: "When a party gets all the consideration he honestly contracted for, he cannot say that he gets no consideration, or that it has failed. If this doctrine be not correct then it is not true that parties are at liberty to make their own contracts." * * * In Pollock's Principles of Contract, the author quotes approvingly from a philosophic treatise this statement: "The value of all things contracted

[108] In Brown v. Ray, 10 Ire. L. (N. C.) 72 (1849), where the defendant, an execution debtor, promised the sheriff, who had sold the debtor's corn under executions, that he would attend to the measuring and delivery of the corn to the purchasers because it was inconvenient for the sheriff to do so, but afterwards refused to let the plaintiff have the corn he had purchased at the sale, Farson, J., said: "Nobody could have compelled the defendant to undertake to measure out and deliver the corn, when applied for; but as the trust was reposed in him, and he kept the corn, and undertook to deliver it, he is bound to do so, and is liable to this action for refusing, whether he had used the corn or still has it in his crib. In the language of Lord Holt, [in Coggs v. Barnard, 2 Raym. 909, 919] 'the owner trusted him with the goods, and he entered upon the trust.' But for this promise, the plaintiff would have required the sheriff to deliver the corn. This puts the plaintiff to inconvenience, and there is an expressed trust, and an undertaking to do the act. If one undertakes to lead my horse to Statesville, and turns him loose on the road or refuses to deliver him, he is liable, although no compensation was to be given; for he has entered upon the trust, and I have been put to inconvenience by reason of his undertaking."

[109] Parts of the opinion are omitted.

for is measured by the appetite of the contractors, and, therefore, the just value is that which they be contented to give." An examination of the decided cases will prove this to be an unusually accurate statement of the law. In the case of Sturlyn v. Albany, 1 Cro. Eliz. 67, where the defendant promised the plaintiff that if he would show him a lease he would pay him a certain sum, the contract was held valid. The report of the decision reads thus: "But it was adjudged for the plaintiff: for when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action." It is laid down in an old book that, "If A, in consideration that B will deliver to him a recognizance to read over, assumes and promises within six days to redeliver the same to B, or to pay him £1,000, this is a good promise, upon which B may have an action against A, for the consideration is sufficient." 1 Bacon's Abridgement, 420. In Bainbridge v. Firmstone, 8 A. & E. 743, the defendant promised the plaintiff that if he would allow him, the defendant, to weigh certain boilers, he would return them within a reasonable time, and the consideration was held sufficient, Lord Denman saying: "The defendant had some reason for wishing to weigh the boilers; and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive." In Haigh v. Brooks, 10 A. & E. 309, Lord Denman said, in speaking of the sufficiency of the consideration of a contract: "Both" (of the parties) "being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded. He may have had other objects and motives; and of their weight he was the only judge." This case came up on appeal and Lord Abinger, C. B., speaking for the court, said: "The actual surrender of the possession of the paper to the defendant was a sufficient consideration, without reference to its contents."[110] Brooks v. Haigh, 10 A. & E. 323, 334. In the argument the case of Wilkinson v. Oliveria, 1 Bing. N. C. 490, was cited, wherein it was held that the surrender of a letter would support a promise to pay £1,000. Turning from the English to the American courts, we find many illustrations of the principle under discussion. In Hempler

[110] The paper was a guaranty in the sum of £10,000. The defendant set up that the guaranty was void and its surrender to him constituted no consideration for his promise to see paid at maturity certain bills of exchange aggregating £9666 odd. The judges of the Exchequer Chamber thought that the guaranty was not void, but for the majority of them Lord Abinger, C. B., made the statement quoted in the principal case. That view is supported by other cases.

Yet it has been held in Alabama that there is no consideration for a note given for paper of no value under the mistaken belief that it was of value. McCollum v. Edmonds, 109 Ala. 322 (1895). And see Anderson v. Nystrom, 103 Minn. 168 (1908).

v. Schneider, 17 Mo. 258, the consideration for the promise was the agreement that a third person should return to St. Louis within fifty days; and it was held sufficient, the court saying: "This court is not aware of any law which would justify it in releasing men from their lawful contracts, unless in cases of fraud, imposition, accident, or mistake in their creation. The plaintiff may have sustained no damages in consequence of Nauman not having returned in fifty days, but there was a sufficient consideration for his undertaking, and he must abide the consequences of his own bargain deliberately entered into." In Train v. Gold, 5 Pick. (Mass.) 380, it is said: "So if A promises B to pay him a certain sum of money, if he will call for it at a particular time, and B calls accordingly, the promise is binding, the calling for the money being a sufficient consideration. For any gain to the promisor or loss to the promisee, however trifling, is a sufficient consideration to support an express promise." The Supreme Court of South Carolina said: "Every man was free to make a contract, and free to refuse it; but when once made, he was bound by it, where there was no fraud, concealment, or latent defect. * * * Inadequacy of consideration is not alone any ground for setting aside a contract solemnly entered into." Whitefield v. McLeod, 1 Am. Dec. 650. * * *

There are, it is commonly but not altogether accurately said, two exceptions to the general rule we have stated:

First. Where the sole consideration is money, and the amount is greatly disproportioned to the value of the promise.

Second. Where the consideration is so grossly disproportionate to the value of the promise as to indicate fraud, shock the conscience of the court, and make the enforcement of the contract unconscionable.

Of these in their order:

First. A money consideration is capable of exact and definite admeasurement; its value is fixed and unalterable, and there cannot be any uncertainty as to its adequacy or inadequacy. The parties really exercise no judgment in passing upon its value, for that never is in doubt. Courts can, therefore, pass upon its sufficiency without infringing the rule that where the parties have for themselves determined the sufficiency of the consideration, courts will not review their decision. Schnell v. Nell, 17 Ind. 29; Shepard v. Rhodes, 7 R. I. 470. But where the consideration is something else than money, there must be some exercise of judgment in ascertaining and settling its value.

Second. Where the consideration is so grossly inadequate as to shock the conscience, courts will interfere, although there has been some exercise of judgment by the parties in fixing it. But it will be found upon an analysis of the cases that courts interfere upon the ground of fraud, and not upon the ground of inadequacy of consideration. The courts never do interfere unless the consideration is so grossly inadequate as to amount to fraud or oppression. Mr. Pomeroy has given the subject careful in-

vestigation, and concludes his discussion with this remark: "Even then fraud, and not inadequacy of price, is the true and only cause for the interposition of equity and the granting of relief." Pomeroy Eq. Jur. § 927. Judge Story is still more emphatic in his statement of the rule. "Mere inadequacy of price, or any other inequality in the bargain, is not, however, to be understood as constituting, *per se*, a ground to avoid a bargain in equity. For courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, and profitable or unprofitable, or otherwise, are considerations, not for courts of justice, but for the party himself to deliberate upon. Inadequacy of consideration is not, then of itself, a distinct principle of relief in equity. The common law knows no such principle. The consideration, be it more or less, supports the contract." 1 Story Eq. Jur., §§ 244, 245. * * *

The consideration in the case before us was, except as to the $40 paid in money, an indeterminate one, and one which the parties alone were competent to measure and determine * * * No person in the world, other than the promisor, can estimate the value of an act which arouses his gratitude, gratifies his ambition, or pleases his fancy. * * * The cases of Schnell v. Nell [17 Ind. 29] and Shepard v. Rhodes [7 R. I. 470] decide that where the consideration is money and nothing else, courts may determine its adequacy; but they both declare that where the consideration is an indeterminate one, the rule is otherwise. * * *

The surrender, at the intestate's request, of the right or privilege of naming the appellant's child, was the yielding of a consideration. The right to give his child a name was one which the father possessed, and one which he could not be deprived of against his consent. If the intestate chose to bargain for the exercise of this right, he should be bound, for by his bargain he limited and restrained the father's right to bestow his own or some other name upon the child. We can perceive no solid reason for declaring that the right with which the father parted at the intestate's request was of no value. It is difficult, if not impossible, to invent even a plausible reason for affirming that such a right or privilege is absolutely worthless. The father is the natural guardian of his child, and entitled to its services during infancy, and within this natural right must fall the privilege of bestowing a name upon it. In yielding to the intestate's request, and in consideration of the promise accompanying it, the appellant certainly suffered some deprivation and surrendered some right. * * * Conceding that the intestate derived no benefit, still, as the appellant suffered some detriment and yielded a right, there is a legal consideration.

The concession that the intestate secured no benefit is one that cannot be justly made, for he himself determined that the act done by the

appellant, at his request, was a benefit to him. It is not necessary that the consideration for a promise should be a property one. It is true that the courts and text-writers use the words "valuable consideration," but this is done for the purpose of distinguishing the consideration from a good one, that is, one based upon love and affection, and from one resting on a purely moral obligation. "It is a familiar doctrine," says the Supreme Court of Texas, in Hendricks v. Snediker, 30 Tex. 296, "that there need be no pecuniary benefit passing to the vendor to make a consideration valuable." In most of the cases cited in discussing the first branch of this case, the consideration was something else than one having a pecuniary or property value. Others may be added. Thus, in Gurvin v. Cromartie, 11 Ired. (N. Car.) 174, the consideration was the undertaking of the plaintiff to take a wife and have a child born unto him. In Adams v. Honness, 62 Barb. (N. Y.) 326, the consideration was the removal of the promisee to a place near the home of the promisor; and this was also the consideration in Halsa v. Halsa, 8 Mo. 303, and Rumbolds v. Parr, 51 Mo. 592. In Worrell v. First Presbyterian Church, etc., 23 N. J. Eq. 96, the consideration was the resignation of the position of pastor of a church. In Anson on Contracts, 64 cases are collected upon this general subject, and the author says that courts "will not ask whether the thing which forms the consideration does in fact benefit the promisor, or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made, as consideration for the promise made to him." We find scattered through the books cases where devises of property are made upon conditions having no pecuniary value at all, and yet they are always enforced; and so we find men in life making subscriptions to colleges on condition that they shall bear their names, or endowing professorships upon condition that they shall be given their names, and, so far as our observation has extended, the validity of such conditions has never been challenged. It is evident that the naming of a college, professorship or the like has always been considered as a matter of importance and value, for to declare otherwise would be to affirm that courts and law-writers have for ages been solemn respecters of worthless trifles. It will not do to say that the bestowal of a name is a valueless act, and if once it be granted to be of some value, then, in the absence of fraud or oppression, it must be held to possess the value placed upon it by the contracting parties. * * *

*Judgment* [*for defendant*] *reversed.*[111]

111 On privilege of naming child as consideration, see 11 Ann. Cas. 482, note; 51 L. R. A. (N. S.) 1108, note.

## BROOKS *v.* BALL.

(Supreme Court of New York, 1820. 18 Johns. 337.)

Ball brought an action of assumpsit against Brooks, in the court below. The declaration contained a special count, stating that the plaintiff claimed of the defendant the sum of $100, which the defendant denied that he owed to the plaintiff, but promised that if the plainiff would make oath to the correctness of his claim, he, the defendant, would pay the amount thereof; and averred that the plaintiff did make oath to the truth and correctness of his claim, but that the defendant, notwithstanding his promise, refused to pay the $100, etc. The declaration also contained the common money counts. The defendant pleaded the general issue.

After the plaintiff's counsel had stated his case, the defendant's counsel insisted that admitting the facts stated to be proved, they were not sufficient to support the action, because the promise of the defendant was without consideration and void, and the plaintiff could not lawfully support his claim on his own affidavit. He, therefore, moved that the plaintiff should be nonsuited, but the objection was overruled by the court. The plaintiff then went into the evidence in support of his case. It was proved that the defendant made the promise alleged; that the plaintiff had made the affidavit and demanded payment of the $100; and that the defendant had admitted his liability to pay the money, and intended to pay, but was advised to the contrary.

The defendant's counsel then offered to prove that the plaintiff, in his affidavit, had sworn falsely, or was grossly mistaken. This evidence was objected to and overruled by the court. And the counsel for the defendant tendered a bill of exceptions. The jury, under the direction of the court, found a verdict for the plaintiff for $110.50.

SPENCER, C. J. The principal question presented by this case is, whether a promise to pay a sum claimed to be due by one party and denied by the other, if the party claiming would swear to the correctness of the claim, and he does so swear, is a valid promise. Another question was made on the trial whether it was competent to the defendant below to prove that the plaintiff below either swore falsely or was grossly mistaken in the affidavit which he made.

It has been frequently decided that a promise to pay money, in consideration that the plaintiff would take an oath that it was due, was a valid and binding promise. Thus in Bretton v. Prettiman (T. Raym. 153) the plaintiff declared that the defendant promised, in consideration that the plaintiff would take an oath that money was due to him, he would pay him, and the plaintiff averred that he swore before a master in chancery. On demurrer it was adjudged for the plaintiff, and, as the reporter states, because it was not such an oath for which he may be indicted. In Anin & Andrews (1 Mod. 166) there was a promise to pay,

if the plaintiff would bring two witnesses before a justice of the peace, who should depose that the defendant's father was indebted to the plaintiff; and two judges against one thought it not a profane oath, because it tended to the determining a controversy, and the plaintiff had judgment. This case occurred before the Statute of Frauds; the promise would now be holden to be void unless in writing, it being to pay the debt of a third person. The case of Bretton v. Prettiman is differently stated in 1 Sid. 283 and 2 Keb. 26, 44. It is there stated to be a promise to pay, if the plaintiff would procure a third person to make oath that the money was due. But this makes no difference in principle, for in either case the oath was extra-judicial.

In Stevens and Others v. Thacker (Peake's N. P. Rep. 187) the defendant was sued as the acceptor of a bill, and alleged it to be a forgery, and offered to make affidavit that he never had accepted it. The plaintiff agreed not to sue the defendant if he would make the affidavit. The affidavit was drawn, but not sworn to. Lord Kenyon said that had the defendant sworn to the affidavit, he should have held that he had discharged himself, though the affidavit had been false; for the plaintiffs who had agreed to accept that affidavit, as evidence of the fact, should not, after having induced the defendant to commit the crime of perjury, maintain an action on the bill. In Lloyd v. Willan (1 Esp. Rep. 178) the defendant's attorney proposed to the plaintiff's attorney that the defendant should pay the demand, if the plaintiff's porter would make an affidavit that he had delivered the goods in question to the defendant. The affidavit was made, and Lord Kenyon held it to be conclusive, and that the defendant was precluded from going in to any defense in the case.

These cases, which stand uncontradicted, abundantly show that such a promise as the present is good in point of law, and that the making the proof or affidavit, whether by a third person or by the party himself, is a sufficient consideration for the promise. It is not making a man a judge in his own case, but it is referring a disputed fact to the conscience of the party. It is begging the question to suppose that it will lead to perjury. If the promise is binding, because the making the proof or affidavit is a consideration for it, the defendant must necessarily be precluded from gainsaying the fact. He voluntarily waives all other proof; and to allow him to draw in question the verity or correctness of the proof or affidavit would be allowing him to alter the conditions of his engagement and virtually to rescind his promise.

*Judgment affirmed.*

## MANSON & MACPHEE *v.* FLANAGAN.

(Supreme Judicial Court of Massachusetts, 1919. 233 Mass. 150, 123 N. E. 614.)

Action by Manson & MacPhee against Bridget M. Flanagan. Verdict for plaintiffs, and defendant excepts. Exceptions overruled.

CARROLL, J.[112] The defendant made a contract with Louis Fisher to build a four-family house for the sum of $7,000. Fisher was to furnish all material and provide all the labor. The plaintiffs agreed with Fisher to do the stair work on the premises, furnishing labor and material for the entire price of $120. The work was completed September 28, 1915; demand for payment was made on Fisher, and refused. Within 30 days from the completion of the work, on October 26, 1915, one of the plaintiffs called on the defendant and informed her that he would place a lien on the premises unless she agreed to pay their claim. Thereupon the defendant agreed in writing to pay the amount due on the contract. * * *

There was evidence that * * * at the time when the defendant agreed to pay the plaintiffs they could have filed a valid lien for the labor performed or furnished, under their contract, in the erection of the building. The defendant's promise to pay the plaintiffs was based upon a legal consideration, and although the lien could be enforced for the labor only, and the value of the labor formed but a small part of the entire claim, the mere inadequacy of the consideration, in the absence of fraud, is no defense to the plaintiff's right to recover. Dean v. Carruth, 108 Mass. 242.

*Exceptions overruled.*[113]

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## LUING *v.* PETERSON.

(Supreme Court of Minnesota, 1919. 143 Minn. 6, 172 N. W. 692.)

Action by John Luing, as guardian, etc., against M. O. Peterson. Judgment for plaintiff in part, and defendant appeals. Affirmed.

[112] The statement of facts and part of the opinion are omitted.

[113] In Smith v. Algar, 1 B. & Ad. 603 (1830), Parke, J., said: "If a plaintiff has a *fieri facias* indorsed to levy £60, there is no reason why the forbearing to execute such a writ should not be a good consideration for a promise by a third person to pay double the amount at the end of seven days. What damages the plaintiff may recover in an action on such promise, is another question."

"Adequacy or inadequacy of consideration is a subject to be considered by the parties at the time they make the contract. There is no law regulating the amount of consideration necessary to support a particular promise. If the parties have capacity to contract and there is no fraud or misplaced confidence, and there is any valuable consideration, the courts will enforce the contract according to its terms." Atkinson, J., in Atlanta & West Point R. R. Co. v. Camp, 130 Ga. 1, 4 (1907).

PER CURIAM. Defendant is a collector at Canby, Minn. He held for collection more than a score of claims against Barney Sorrenson, amounting in the aggregate to over $1,400. In April, 1916, Barney Sorrenson desired to go to Rochester, Minn., for medical treatment. For the purpose of paying his expenses his mother, Ragnhild Sorrenson, applied to defendant for a loan of $200, offering to give a mortgage on certain real estate. Defendant agreed to make the loan if Ragnhild Sorrenson would "secure up the debts of Barney" which he held for collection, by a mortgage on the same property, and she assented. Defendant made the loan, and Ragnhild Sorrenson gave two notes and mortgages, one for $1,015, securing the loan and part of the claims, the other for $635.60 securing the balance of the claims. Both mortgages bore the same date and were executed at the same time and as part of the same transaction. Both notes were payable one year after date. There is no evidence that defendant had any authority to extend the time of the payment of the claims held by him. Ragnhild Sorrenson was then an old lady 88 years old. She was not then under guardianship. Plaintiff has since been appointed guardian of her estate. He brought this action to set aside the notes and mortgages. The court granted this relief, except as to the money advanced by defendant.

There is no claim made on this appeal that plaintiff was incompetent at the time of the giving of the mortgages, or that she was imposed upon. Apparently the security she had would have secured the loan she wanted from any money lender. She is said to have stated at the time of the loan that she intended that her son should have this property. The sole ground of the court's decision was that the notes and mortgages were without consideration except to the extent of the amount advanced by defendant. This is the question on this appeal.

A naked collateral promise of Ragnhild Sorrenson to pay her son's debts would be unenforceable. Security Bank of Minnesota v. Bell, 32 Minn. 409, 21 N. W. 470; Turle v. Sargent, 63 Minn. 211, 65 N. W. 349, 56 Am. St. Rep. 475. To support a promise to pay the debt of another previously incurred, there must be some new consideration. An agreement to extend the time of payment or to forbear to sue would furnish such a consideration (Nichols & Shepard Co. v. Dedrick, 61 Minn. 513, 63 N. W. 1110), but it is not shown that the agreement for extension was binding on the owners of these claims. See Mason v. Edward Thompson, 94 Minn. 472, 103 N. W. 507.

A majority of the court are of the opinion that the making of the new loan to Ragnhild Sorrenson was not a sufficient consideration for her promise to pay the debts of her son which defendant held for collection, and that the notes and mortgages which she gave therefor are void and unenforceable obligations.

Justices HALLAM and DIBELL dissent. They are of the opinion that the loan of money to Ragnhild Sorrenson was a sufficient consideration

to support, not only a promise to repay the money loaned, but to support the promise to pay the other debts as well. See Bennett v. Morse, 6 Colo. App. 122, 39 Pac. 582; Barton v. Farmer National Bank, 122 Ill. 352, 13 N. E. 503; Loewen v. Forsee, 137 Mo. 29, 38 S. W. 712, 59 Am. St. Rep. 489.

*Judgment affirmed.*[114]

[114] A difference of judicial opinion has developed in regard to options. In Miller v. Kimmel, 76 Okla. 233, 184 Pac. 762, 765 (1919), Rainey, J., said:

"An option contract based upon an adequate consideration is not voidable on the ground that one party is bound and the other is not.

"Was $100 an adequate consideration for the option contract? There are cases which hold that a nominal consideration, such as 50 cents and $1, is inadequate; but the weight of authority seems to be that $1 is an adequate consideration for an option to run a reasonable period in the absence of fraud or undue influence. Twenty-five dollars has been held to be a sufficient consideration for an option to purchase real estate within four weeks for $4,975. Mueller v. Nortmann, 116 Wis. 468, 93 N. W. 538, 96 Am. St. Rep. 997; Guyer v. Warren, 175 Ill. 328, 51 N. E. 580. In Guyer v. Warren, the consideration expressed in the option was $1; the real consideration was $50 to purchase in one year a farm for $8,000, which was held adequate."

Twenty-five cents down served in Marsh v. Lott, 8 Cal. App. 384, 97 Pac. 163 (1908) and $1.00 in Smith v. Baugham, 156 Cal. 359 (1909), Guyer v. Warren, 175 Ill. 328 (1898) and Morrison v. Johnson (Minn.) 181 N. W. 945 (1921). But that $1.00 is insufficient, see Murphy, Thompson & Co. v. Reed, 125 Ky. 585 (1907) where O'Rear, C. J., said (pp. 589-591):

"The consideration for the agreement to give the optionee the definite time within which to exercise his choice, called the 'option,' is in these cases the $1 recited. It might have been more, or an entirely different consideration. Though there are authorities holding a consideration of $1 as sufficient to uphold such an agreement, we are not disposed to go so far. Such consideration is so flagrantly disproportionate to the value of the privilege in these cases—the options extending over a year—that it is merely nominal. It is not substantial, and the parties could not have regarded it as in any sense an equivalent of the privilege which was being contracted for. While upon demurrer the courts will be slow to say that a recited consideration is no consideration, if it has any appearance of having been regarded by the parties as the agreed value of the thing contracted for, where the stated consideration is so manifestly inadequate and disproportionate to the value of the thing being sold (the privilege or option) as to represent no value, or only a nominal value, it will be construed on demurrer, as a matter of law, as not having a consideration at all. If there is doubt about the matter, then the question of its value or adequacy is a defense to be pleaded. An option, to be binding upon the owner, in the sense that it is irrevocable upon him during the period for which it is given, must be upon a valuable and sufficient consideration. It may consist in money paid or to be paid for it, or in property, services, or counter benefits accruing to the owner, or disadvantage incurred by the optionee. In short, it may be such consideration as will support any other sort of contract. In this view of the matter, the options in these cases were not supported by sufficient consideration to have bound the owners not to withdraw them during the term for which they were given. They could have been withdrawn before acceptance, without liability to the giver of the options. But, as they were not withdrawn, they constituted, instead of binding options, voluntary

## BOLTON *v.* MADDEN.

(Court of Queen's Bench, 1873. L. R. 9 Q. B. D. 55.)

Declaration for money paid by the plaintiff for the defendant at his request. Plea, never indebted. Issue thereon. Plaintiff nonsuited, with leave to the plaintiff to move to enter a verdict for £7 7s. Rule *nisi* to enter a verdict for plaintiff.

BLACKBURN, J.[115] * * * There was no dispute as to the facts. The plaintiff and defendant were both subscribers to a charity, the objects of which are elected by the subscribers who have votes proportioned in number to the amount they have subscribed. The plaintiff and defendant expressly agreed that if the plaintiff would give twenty-eight votes for an object of charity whom the defendant favoured, the defendant would at the next election give twenty-eight votes for such object of charity as the plaintiff should then favor. The plaintiff performed his part of this agreement, and voted for the candidate favoured by the defendant; but the defendant made default, and did not furnish any votes for the candidate favoured by the plaintiff at the next election. The plaintiff in consequence subscribed £7 7s. to the charity so as to obtain twenty-eight more votes in his own right, which he used in lieu of those which the defendant had promised to supply him.

There can be no doubt that there was an express promise by the defendant and a breach of that promise; but the doubt raised was, whether the consideration was such as to make that promise enforceable at law.

The general rule is, that an executory agreement, by which the plaintiff agrees to do something on the terms that the defendant agrees to do something else, may be enforced, if what the plaintiff has agreed to do is "either for the benefit of the defendant or to the trouble or prejudice of the plaintiff;" see Com. Dig. Action on the case in assumpsit, B. 1. If it be either, the adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the court when it is sought to be enforced.

The argument for the defendant was that the subscriber to a charity is under an obligation to give his votes for the best object, and that the plaintiff, if he gave his votes at the first election to what he thought the best candidate, incurred neither trouble nor prejudice, so that there was in that point of view no consideration; and if he gave his votes to the candidate whom he did not think the best, the whole agreement is void as against public policy.

But though some of us, at least, much disapprove of this kind of traf-

offers to sell, which, like any other valid offer, were, when accepted, binding upon the person making them." See also Axe v. Tolbert, 179 Mich. 556 (1914).

On the necessity of consideration to support an option under seal, see 2 A. L. R. 631, note. Compare as to oil and gas leases, 3 A. L. R. 380, note.

[115] Part of the opinion is omitted.

fic, we can find no legal principle to justify us in holding that the subscriber to a charity may not give his votes as he pleases, answering only to his own conscience and reputation for the way he exercises his power.

We think, therefore, the nonsuit cannot be supported, and as there was evidence justifying the jury in assessing the damages as they have done, the rule must be made absolute to enter verdict for the plaintiff.

*Rule absolute.*

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## THE PRESBYTERIAN CHURCH OF ALBANY *v.* COOPER.

**(Court of Appeals of New York, 1889. 112 N. Y. 517, 20 N. E. 352, 3 L. R. A. 468, 8 Am. St. Rep. 767.)**

Appeal from order of the General Term of the Supreme Court in the third judicial department, made the first Tuesday of May, 1887, which reversed a judgment in favor of plaintiff, entered upon the report of a referee, and ordered a new trial. (Reported below, 45 Hun, 453.)

This was a reference under the statute of a disputed claim against the estate of Thomas P. Crook, defendant's intestate. The claim arose under a subscription paper, of which the following is a copy:

"We, the undersigned, hereby severally promise and agree to and with the trustees of the First Presbyterian Church in this city of Albany, in consideration of $1 to each of us in hand paid and the agreements of each other in this contract contained, to pay on or before three years from the date hereof to said trustees the sum set opposite to our respective names, but upon the express condition, and not otherwise, that the sum of $45,000 in the aggregate shall be subscribed and paid in for the purpose hereinafter stated; and if within one year from this date said sum shall not be subscribed or paid in for such purpose, then this agreement to be null and of no effect. The purpose of this subscription is to pay off the mortgage debt of $45,000, now a lien upon the church edifice of said church, and the subscription or contribution for that purpose must equal that sum in the aggregate to make this agreement binding.

"Dated May 18th, 1884."

The defendants' intestate made two subscriptions to this paper, one of $5000 and the other of $500. He paid upon the subscription $2000. The claim was for the balance.

ANDREWS, J. It is, we think, an insuperable objection to the maintenance of this action, that there was no valid consideration to uphold the subscription of the defendant's intestate. It is, of course, unquestionable that no action can be maintained to enforce a gratuitous promise, however worthy the object intended to be promoted. The performance of such a promise rests wholly on the will of the person making it. He can refuse to perform, and his legal right to do so cannot be disputed,

although his refusal may disappoint reasonable expectations, or may not be justified in the forum of conscience. By the terms of the subscription paper the subscribers promise and agree to and with the trustees of the First Presbyterian Church of Albany, to pay to said trustees, within three years from its date, the sums severally subscribed by them, for the purpose of paying off "the mortgage-debt of $45,000 on the church edifice," upon the condition that the whole sum shall be subscribed or paid in within one year. It recites a consideration—viz., "in consideration of $1 to each of us (subscribers) in hand paid and the agreement of each other in this contract contained." It was shown that the $1 recited to have been paid was not in fact paid, and the fact that the promise of each subscriber was made by reason of and in reliance upon similar promises by the others constitutes no consideration as between the corporation for whose benefit the promise was made and the promisors. The recital of consideration paid does not preclude the promisor from disputing the fact in a case like this, nor does the statement of a particular consideration which, on its face, is insufficient to support a promise, give it any validity, although the fact recited may be true.

It has sometimes been supposed that when several persons promise to contribute to a common object, desired by all, the promise of each may be a good consideration for the promise of others, and this although the object in view is one in which the promisors have no pecuniary or legal interest, and the performance of the promise by one of the promisors would not in a legal sense be beneficial to the others. This seems to have been the view of the chancellor as expressed in Hamilton College v. Stewart when it was before the court of Errors (2 Den. 417), and *dicta* of judges will be found to the same effect in other cases. (Trustees, etc., v. Stetson, 5 Pick. 508; Watkins v. Eames, 9 Cush. 537.) But the doctrine of the chancellor, as we understand, was overruled when the Hamilton College Case came before this court (1 N. Y. 581), as have been also the *dicta* in the Massachusetts cases, by the court in that state, in the recent case of Cottage Street Methodist Episcopal Church v. Kendall (121 Mass. 528). The doctrine seems to us unsound in principle. It proceeds on the assumption that a stranger both to the consideration and the promise, and whose only relation to the transaction is that of donee of an executory gift, may sue to enforce the payment of the gratuity for the reason that there has been a breach of contract between the several promisors and a failure to carry out as between themselves their mutual engagement. It is in no proper sense a case of mutual promises, as between the plaintiff and defendant.[116]

[116] Yet in New York, as elsewhere, a different view is entertained in the case of compositions with creditors. As was said by Earl, J., in White v. Kuntz, 107 N. Y. 518, 524 (1887): "It is a general rule of law that the acceptance of a lesser sum or an agreement to accept it, does not bar a demand for a greater sum. There is an exception to this general rule, however, in the

In the disposition of this case we must, therefore, reject the consideration recited in the subscription paper as ground for supporting the promise of the defendant's intestate, the money consideration, because it had no basis in fact, and the mutual promise between the subscribers, because there is no privity of contract between the plaintiff and the promisors. Some consideration must, therefore, be found other than that expressly stated in the subscription paper, in order to sustain the action. It is urged that a consideration may be found in the efforts of the trustees of the plaintiff during the year, and the time and labor expended by them during that time to secure subscriptions in order to fulfill the condition upon which the liability of the subscribers depended. There is no doubt that labor and services, rendered by one party at the request of another, constitute a good consideration for a promise made by the latter to the former, based on the rendition of the service. But the plaintiff encounters the difficulty that there is no evidence, express or implied, on the face of the subscription paper, nor any evidence outside of it, that the corporation or its trustees did or undertook to do anything upon the invitation or request of the subscribers. Nor is there any evidence that the trustees of the plaintiff, as representatives of the corporation, in fact did anything in their corporate capacity, or otherwise than as individuals, interested in promoting the general object in view.[117]

Leaving out of the subscription paper the affirmative statement of the consideration (which, for reasons stated, may be rejected), it stands as a naked promise of the subscribers to pay the several amounts subscribed by them for the purpose of paying the mortgage on the church property upon a condition precedent limiting their liability. Neither the

case of a composition by a debtor with his creditors, in which they agree to accept less than their entire demands. Such an agreement, if entered into by a debtor with a number of creditors, each acting on the faith of the engagement of the others, will be binding upon them, for each in that case has the undertaking of the rest as a consideration for his own undertaking."

By the weight of authority the view that the promise of each is the consideration for the promises of the others, if so intended, is accepted as applied to charitable subscriptions. On consideration for subscriptions to charity, see 48 L. R. A. (N. S.) 785, note.

117 In Keuka College v. Ray, 167 N. Y. 96, 100 (1901), Gray, J., said that in First Presbyterian Church v. Albany, *supra*. "Judge Andrews re-asserts the doctrine, as laid down in the earlier cases, that a naked promise to pay money, bare of any condition, accepted by the promisee, to do something, will not be sustained; but he, very distinctly, recognizes the rule that where there is a request to the promisee to go on and render services, or to incur liabilities, on the faith of a subscription, which request is complied with, the subscription would be binding. It may be observed that the difficulty in the case last mentioned, and which prevented the maintenance of the action upon the defendant's subscription, was, as Judge Andrews stated, that there was 'no evidence, express or implied, on the face of the subscription paper, nor any evidence outside of it, that the corporation, or its trustees, did, or undertook to do, anything on the invitation or request of the subscribers.' "

church nor the trustees promise to do any thing, nor are they requested to do anything, nor can such a request be implied. It was held in Hamilton College v. Stewart (1 N. Y. 581) that no such request could be implied from the terms of the subscription in that case, in which the ground for such an implication was, to say the least, as strong as in this case. It may be assumed from the fact that the subscriptions were to be paid to the trustees of the church for the purpose of paying the mortgage, that it was understood that the trustees were to make the payment out of the moneys received. But the duty to make such payment, in case they accepted the money, would arise out of their duty as trustees. This duty would arise upon the receipt of the money, although they had no antecedent knowledge of the subscription. They did not assume even this obligation by the terms of the subscription, and the fact that the trustees applied money, paid on subscriptions, upon the mortgage debt, did not constitute a consideration for the promise of the defendant's intestate. We are unable to distinguish this case in principle from Hamilton College v. Stewart (1 N. Y. 581). There is nothing that can be urged to sustain this subscription that could not, with equal force, have been urged to sustain the subscription in that case. In both, the promise was to the trustees of the respective corporations. In each case the defendant had paid part of his subscription and resisted the balance. In both, part of the subscription had been collected and applied by the trustees to the purpose specified. In the Hamilton College Case (which in that respect is unlike the present one) it appeared that the trustees had incurred expense in employing agents to procure subscriptions to make up the required amount, and it was shown, also, that professors had been employed upon the strength of the fund subscribed. That case has not been overruled, but has been frequently cited with approval in the courts of this and other states. The cases of Barnes v. Perine (12 N. Y. 18) and Roberts v. Cobb (103 *id.* 600) are not in conflict with that decision. There is, we suppose, no doubt that a subscription invalid at the time for want of consideration may be made valid and binding by a consideration arising subsequently between the subscribers and the church or corporation for whose benefit it is made. Both of the cases cited, as we understand them, were supported on this principle. There was, as was held by the court in each of these cases, a subsequent request by the subscriber to the promisee to go on and render service or incur liabilities on the faith of the subscription, which request was complied with, and services were rendered or liabilities incurred pursuant thereto. It was as if the request was made at the very time of the subscription, followed by performance of the request by the promisor. Allen, J., in his opinion in Barnes v. Perine, said, "the request and promise were, to every legal effect, simultaneous," and he expressly disclaims any intention to interfere with the decision in the Hamilton College Case. In the present case it was shown that individual trustees were active in procuring subscriptions.

But, as has been said, they acted as individuals, and not in their official capacity. They were deeply interested, as was Mr. Crook, in the success of the effort to pay the debt on the church, and they acted in unison. But what the trustees did was not prompted by any request from Mr. Crook. They were co-laborers in promoting a common object. We can but regret that the intention of the intestate in respect to a matter in which he was deeply interested, and whose interest was manifested up to the very time of his death, is thwarted by the conclusion we have reached. But we think there is no alternative, and that the order should be affirmed.

All concur.

*Order affirmed and judgment accordingly.*

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## BROKAW *v.* McELROY.

**(Supreme Court of Iowa, 1913. 162 Ia. 288, 143 N. W. 1087, 50 L. R. A. (N. S.) 835.)**

This is an action on four promissory notes. It is brought on behalf of the Kansas City University against the administrator of John W. Murphy, deceased, the maker of the notes. At the close of the plaintiff's evidence, the trial court directed a verdict for the defendant, on the ground that there was no consideration for any of the notes. Judgment was entered against plaintiff for costs, and he appeals. Reversed.

EVANS, J.[118] Four notes are involved. The first note was for $2,000, dated September 24, 1904. The second was for $4,000, dated July 24, 1908. The third was for $4,000, dated October 22, 1908. The fourth was for $10,000, dated June 18, 1909. The following is a copy of the first note: "For value received by me, and for the purpose of securing a fund for the endowment of the Kansas City University, of Kansas City, Kansas, I hereby bind myself, and my heirs, executors, and administrators, to pay to the order of the treasurer of said Kansas City University, of Kansas City, Kansas, the sum of two thousand dollars, with interest thereon at the rate of 1/10 of 1 per cent. per annum from the date hereof. The principal sum hereby secured shall be due and payable on or before the expiration of one year after my decease. Date: September 24, 1904. Post office: Murphy, Jasper County, Iowa. [Signed] John W. Murphy." The others were all drawn in like form. These notes were each delivered at or about the date thereof and were accepted by the payee. The purpose of the maker was to contribute the amounts named to the payee to carry out the purpose of its organization as a university. The special purpose for which such funds were to be used was indicated upon the face of the notes, and to some extent by letters. This was that the proceeds of the

[118] Parts of the opinion are omitted.

first three notes should be used for the purpose of securing an endowment fund. The proceeds of the fourth note were to be used for "erecting a building on the campus." Other subscriptions were subsequently solicited by the university and received from other contributors. Previous gifts, including those of Murphy, were made public as an inducement to subsequent contributions. This was done, to some extent, at least, with the express consent of Murphy.

In view of the directed verdict below, we are only concerned with the question whether the evidence in the record affirmatively discloses want of consideration so as to justify the trial court in taking the case from the jury. We reach a conclusion contrary to such ruling of the trial court * * *

I. A sufficient consideration in such a case as this may assume various forms. It is not necessary that the benefit accrue to the promisor. It is frequently, if not usually, true that written promises of this kind are made for the purpose of assisting in the maintenance of the beneficiary institution within the scope of the purpose for which it was organized. Other assistance from other sources is expected. A contribution by one naturally operates as an inducement to contributions by others. It is not unusual that publicity is given to contributions already made as an inducement to others. If it is within the contemplation of a contributor that the fact of his contribution may be announced to others as an inducement to contributions by them, and if additional contributions be made by reason of such inducement even in part, it operates as a sufficient consideration for the promise of the first contributor. It is not essential, in such a case, that the additional contributions thus induced should be devoted to the same fund or to the erection of the same building. If the original promise, when made, was intended to induce activities and expenditures by the beneficiary in pursuance of the purpose of its organization, and if such activities and such expenditures were induced thereby even in part, it is a sufficient consideration. In either case, it is not necessary that such promise be the sole inducement either to additional contributions by other contributors or to burdensome activities and substantial expenditures by the beneficiary and its appropriate officers. It is not indispensable that direct evidence be had that such activities and expenditures or additional contributions were thus induced, or that such inducement was within the contemplation of the parties. If these facts can be found by fair inference from all the circumstances in evidence, it is sufficient at least to make a jury question.

Such an institution as the beneficiary herein is necessarily supported by the co-operation of many people who have a common and unselfish interest in its success. Ordinarily, one man could not carry the load alone. Co-operation is usually within the contemplation of each contributor. His gift would become mere waste if it must stand alone. A contribution, therefore, may be in the nature of a response to a previous contribution

by another, or it may be in the nature of an invitation to future contributions by others, or it may partake of the nature of both. All this may become a question of fact in a particular case. It would be manifestly unjust to permit a promisor of a contribution to withdraw his promise after it had served the function of inducing other contributors to incur obligations to the same beneficiary and for the same general purpose. We think that notes of this kind rest upon a somewhat different foundation from a note executed in a transaction, in contemplation of a pecuniary benefit to the maker or to some other person selected by him, other than the payee. Such notes are frequently, if not usually, executed, not as evidence of a promise to make a future gift, but for the specific purpose of creating a present asset for its beneficiary. A very substantial part of the assets of such institutions exist in this form. To lightly withhold judicial sanction from such obligations would be to destroy millions of assets of the most beneficent institutions in our land, and to render such institutions helpless to carry out the purpose of their organization. Undoubtedly, authorities are in conflict at this point, and some courts have applied a very narrow rule to this class of obligations. We think the trend of modern judicial opinion is in the other direction.
* * *

A case somewhat similar to the case at bar was considered by the Supreme Court of Ohio in Irwin v. Lombard University, 56 Ohio St. 9, 46 N. E. 63, 36 L. R. A. 239, 60 Am St. Rep. 727. We quote from the opinion: "It is equally apparent from that, prompted by the promises and gifts of Gilpin and others, 'responsibility has been undertaken' by the university. It did not abandon the educational enterprise which these donors and promisors were desirous of promoting. Whether the object of the promisors was to secure the opportunity of educating their own children under such influences as they desired, or more generally to contribute to the public welfare by increasing the facilities for higher education, it has been accomplished. It has been accomplished by the expenditure of money and the incurring of obligations in reliance upon their promises and similar promises from others. Institutions of this character are incorporated by public authority for defined purposes. Money recovered by them on promises of this character cannot be used for the personal and private ends of an individual, but must be used for the purposes defined. To this use the university is restricted, not only by the law of its being, but as well by the obligations arising from its acceptance of the promise. A promise to give money to one, to be used by him according to his inclination and for his personal ends, is prompted only by motive. But a promise to pay money to such an institution, to be used for such defined and public purposes, rests upon consideration. The general course of decisions is favorable to the binding obligation of such promises. They have been influenced, not only by such reasons as those already stated, but in some cases, at least, by state policy as indi-

cated by constitutional and statutory provisions. The policy of this state, as so indicated, is promotive of education, religion, and philanthropy. In addition to the declarations of the Constitution upon the subject, the policy of the state is indicated by numerous legislative enactments providing for the incorporation of colleges, churches, and other institutions of philanthropy, which are intended to be perpetual, and which, not only for their establishment, but for their perpetual maintenance, are authorized to receive contributions from those who are in sympathy with their purposes, and methods—the only source from which, in view of their nature, their support can be derived. Looking to the plainly declared purpose of the lawmaking department, promises made with a view to discharging the debts of such institutions, to providing the means for the employment of teachers, to establishing endowment funds to give them greater stability and efficiency, and whatever may be necessary or helpful to accomplish their purposes or secure their permanency, must be held valid. A view which omits considerations of this character is too narrow to be technically correct. It is not contemplated by the parties, nor is it required by the law, that in cases of this character the institution shall have done a particular thing in reliance upon a particular promise. Not only do the law and the parties contemplate the permanency of the institution, but all promisors understand that the proceeds of their promises will be mingled with prior and subsequent donations, and together constitute the financial support of the enterprise. The case must be rare indeed in which such contributions or promises would be made if others had not been made before and rarer still in which they would be made but for the belief that others will be made afterwards. The requirements of the law are satisfied, the objects of the parties secured, and the perpetration of frauds prevented by the conclusion that the consideration for the promise in question is the accomplishhment, through the university, of the purposes for which it was incorporated, and in whose aid the promise was made. The defense properly failed because there was neither allegation nor proof of abandonment of those purposes. * * * Indeed, the validity of such promises is supported by all the cases in which it has been held that subscriptions for public purposes of such a nature are enforceable. For the law, regarding the substance rather than the form, permits no distinction because of the promises being in one instrument or several instruments. And the mutuality of the interests of the several promisors is not to be determined as a matter of time from the dates of their promises, but from the continuity and perpetuity of the object to be accomplished."

This case was followed by the Supreme Court of Minnesota in the case of Albert Lea College v. Brown, 88 Minn. 524, 93 N. W. 672, 60 L. R. A. 870. We quote from the opinion of that court: "One of the first cases to depart from the earlier decisions, which held strictly to the necessity of a pecuniary consideration moving to the promisor, is Collier v. Society, 8 B. Mon. [Ky.] 68. In that case a promissory note was given,

whereby the maker promised and agreed to pay the Kentucky Baptist Educational Society the sum of $250, to further the interests and aid in the payment of the expenses of its management. The maker refused to pay the note when due, and an action was brought against him to recover thereon. There was no pecuniary consideration moving to him nor does it appear that the society to which it was given ever incurred any debts or obligations upon the strength of it; but the court held the maker of the note liable, on the ground that as the charter of the society authorized it to accept and receive such donations and gifts, and it was required, under the law, to carry out the directions of donor, a sufficient consideration was shown. A well-considered case (also a departure from the old rule) is Trustees of Troy Academy v. Nelson, 24 Vt. 189. In that case defendant, with others, signed a subscription paper, thereby promising to pay to the trustees of the academy the sum of $100 for the purpose of enabling them to pay its debts, provided the sum of $20,000 was subscribed for the same purpose by a certain date. This amount was fully subscribed. Defendant paid one-half of his subscription, but refused to pay the balance. The court held that the obligations imposed upon and assumed by the trustees of the academy to make application of the money as directed by the subscribers to the fund so consummated the contract that defendant could not avoid payment on the ground that there was no consideration for his promise, and that, whether the relation each subscriber bore to the other, or the relation each bore to the academy itself, be considered, defendant was estopped from denying the obligation of the contract. It will be observed in that case that the executory promise of defendant was for the purpose of raising a fund to discharge a past-due indebtedness of the academy, and nothing appears to have been done by the officers in reliance on the promise. In the case of Trustees v. Cowls, 6 Pick. [Mass.] 427, 17 Am. Dec. 387, the court held a promissory note by defendant, by which he agreed to pay plaintiff, an educational institution, a sum of money to further its objects and purposes, viz., to educate indigent young men of promising talents and hopeful piety, valid and enforceable, though it does not appear that any particular obligations were contracted by the officers of the institution on the faith of the promise. The court said: 'Was there a consideration for the note? In one sense there was not—that is, the promisor receiving nothing from the payee at the time it was given which was of pecuniary value; but it was sufficient to create a consideration that the other party, the payee, should have assumed an obligation in consequence of receiving the note, which he was compellable, either at law or equity, to perform, unless the promisor should be able to show, when sued, that the payee had refused, or was unable or had unreasonably neglected to perform the engagement on his part, in which case a defense might be raised on the ground of no consideration.' * * * In the case at bar the trustees, upon the delivery of the note to them, expressly accepted the same, and thereby

assumed the obligations imposed by the terms of the promise; and upon the strength of this promise, and others, were enabled to continue the purposes of the college, when, without it, it would have been necessary that they suspend operations and dissolve the corporation. As already stated, plaintiff was incorporated as an educational institution, and depended for its support, and to enable it to carry out its purposes, upon donations of philanthropists and other charitably disposed persons. Such institutions are expressly authorized, under the provisions of the statute under which plaintiff was incorporated, to accept and receive such donations, and may be compelled and required by the courts to carry out faithfully the purposes of a particular donation. Money contributed to it for the purpose of an endowment fund may not be diverted from that purpose, and its application may be compelled by proper judicial proceedings. Many of the colleges of the present day depend almost wholly upon voluntary contributions for their support, and philanthropists who contribute thereto are impelled to do so by their sentiments of charity, benevolence, and good will; and the opportunity amply repays the outlay, and to them is far greater than any considerations of a pecuniary nature."

None of our own previous cases are decisive of the case at bar. In the conflict of authority, we think the foregoing presents the sounder and perhaps the more modern view. Such view has also the merit that it is direct and practical, in that it gives legal sanction to the voluntary conduct and manifest purpose of the parties to the notes. The purpose to be thus subserved has the sanction of the law in a special and statutory sense, and there is no apparent reason of public policy why the consideration of such notes should be lightly impeached, or should be determined by artificial tests foreign to the purpose of the parties. Of course, if fraud or deceit or undue influence or breach of obligation were charged, the fact that the consideration was wholly altruistic would be a circumstance proper to be considered and would be available to the defendant as such. In the case at bar, there was evidence that, in reliance on these notes and others, the beneficiary enlarged its plans and increased its work and incurred added expenditures therefor, all of which was done within the scope of its corporate purpose. We think such evidence tended to show consideration.

II. It is urged by the appellant that it incurred expenses in the form of commissions in obtaining these very contributions from Mr. Murphy. It contends that these very expenditures for commissions are a sufficient consideration to support the notes. The suggestion is quite abhorrent, and we know of no legal principle to justify it. Such an expenditure cannot be deemed a consideration. Such an expenditure is essentially different in its nature and in its equity from expenditures and obligations incurred in carrying on the enterprise for which the institution was organized, in reliance upon the promise in question. * * *

The judgment below must be reversed, and it is so ordered.

*Reversed.*[119]

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## RICKETTS *v.* SCOTHORN.

**(Supreme Court of Nebraska, 1898. 57 Neb. 51, 77 N. W. 365, 42 L. R. A. 794, 73 Am. St. Rep. 491.)**

SULLIVAN, J. In the District Court of Lancaster county, the plaintiff, Katie Scothorn, recovered judgment against the defendant, Andrew D. Ricketts, as executor of the last will and testament of John C. Ricketts, deceased. The action was based upon a promissory note, of which the following is a copy: "May the first, 1891. I promise to pay to Katie Scothorn on demand, $2,000, to be at 6 per cent. per annum. J. C. Ricketts." In the petition the plaintiff alleges that the consideration for the execution of the note was that she should surrender her employment as bookkeeper for Mayer Bros., and cease to work for a living. She also alleges that the note was given to induce her to abandon her occupation, and that, relying on it, and on the annual interest, as a means of support, she gave up the employment in which she was then engaged. These allegations of the petition are denied by the administrator.

The material facts are undisputed. They are as follows: John C. Ricketts, the maker of the note, was the grandfather of the plaintiff. Early in May—presumably on the day the note bears date—he called on her at the store where she was working. What transpired between them is thus described by Mr. Flodene, one of the plaintiff's witnesses: "A. Well, the old gentleman came in there one morning about nine o'clock, probably a little before or a little after, but early in the morning, and he unbuttoned his vest, and took out a piece of paper in the shape of a note; that is the way it looked to me; and he says to Miss Scothorn, 'I have fixed out something that you have not got to work any more.' He says, none of my grandchildren work, and you don't have to. Q. Where was she? A. She took the piece of paper and kissed him, and kissed the old gentleman, and commenced to cry." It seems Miss Scothorn immediately notified her employer of her intention to quit work, and that she did soon after abandon her occupation. The mother of the plaintiff was a witness, and testified that she had a conversation with her father, Mr. Ricketts, shortly after the note was executed, in which he informed her that he had given the note to the plaintiff to enable her to quit work; that none of his grandchildren worked, and he did not think she ought to. For something more than a year the plaintiff was without an occupation, but in September, 1892, with

[119] See note in 48 L. R. A. (N. S.) 783 on the validity and enforceability of subscriptions for charity.

the consent of her grandfather, and by his assistance, she secured a position as bookkeeper with Messrs. Funke & Ogden. On June 8, 1894, Mr. Ricketts died. He had paid one year's interest on the note, and a short time before his death expressed regret that he had not been able to pay the balance. In the summer or fall of 1892 he stated to his daughter, Mrs. Scothorn, that if he could sell his farm in Ohio he would pay the note out of the proceeds. He at no time repudiated the obligation.

We quite agree with counsel for the defendant that upon this evidence there was nothing to submit to the jury, and that a verdict should have been directed peremptorily for one of the parties. The testimony of Flodene and Mrs. Scothorn, taken together, conclusively establishes the fact that the note was not given in consideration of the plaintiff pursuing, or agreeing to pursue, any particular line of conduct. There was no promise on the part of the plaintiff to do, or refrain from doing, anything. Her right to the money promised in the note was not made to depend upon an abandonment of her employment with Mayer Bros., and future abstention from like service. Mr. Ricketts made no condition, requirement, or request. He exacted no *quid pro quo*. He gave the note as a gratuity, and looked for nothing in return. So far as the evidence discloses, it was his purpose to place the plaintiff in a position of independence, where she could work or remain idle, as she might choose. The abandonment by Miss Scothorn of her position as bookkeeper was altogether voluntary. It was not an act done in fulfillment of any contract obligation assumed when she accepted the note.

The instrument in suit, being given without any valuable consideration, was nothing more than a promise to make a gift in the future of the sum of money therein named. Ordinarily, such promises are not enforceable, even when put in the form of a promissory note. Kirkpatrick v. Taylor, 43 Ill. 207; Phelps v. Phelps, 28 Barb. 121; Johnson v. Griest, 85 Ind. 503; Fink v. Cox, 18 Johns. 145. But it has often been held that an action on a note given to a church, college, or other like institution, upon the faith of which money has been expended or obligations incurred, could not be successfully defended on the ground of a want of consideration. Barnes v. Perine, 12 N. Y. 18; Philomath College v. Hartless, 6 Or. 158; Thompson v. Board, 40 Ill. 379; Irwin v. Lombard University, 56 Ohio St. 9, 46 N. E. 63. In this class of cases the note in suit is nearly always spoken of as a gift or donation, but the decision is generally put on the ground that the expenditure of money or assumption of liability by the donee on the faith of the promise constitutes a valuable and sufficient consideration. It seems to us that the true reason is the preclusion of the defendant, under the doctrine of estoppel, to deny the consideration. Such seems to be the view of the matter taken by the Supreme Court of Iowa in the case of Simpson Centenary College v. Tuttle, 71 Iowa, 596, 33 N. W. 74, where Rothrock, J., speaking for the court, said: "Where a note, however, is based on a promise to give for the support of the objects referred to, it may still be

open to this defense [want of consideration], unless it shall appear that the donee has, prior to any revocation, entered into engagements, or made expenditures based on such promise, so that he must suffer loss or injury if the note is not paid. This is based on the equitable principle that, after allowing the donee to incur obligations on the faith that the note would be paid, the donor would be estopped from pleading want of consideration." And in the case of Reimensnyder v. Gans, 110 Pa. St. 17, 2 Atl. 425, which was an action on a note given as a donation to a charitable object, the court said: "The fact is that, as we may see from the case of Ryerss v. Trustees, 33 Pa. St. 114, a contract of the kind here involved is enforceable rather by way of estoppel than on the ground of consideration in the original undertaking."[120] It has been held that a note given in expectation of the payee performing certain services, but without any contract binding him to serve, will not support an action. Hulse v. Hulse, 84 E. C. L. 709. But when the payee changes his position to his disadvantage in reliance on the promise, a right of action does arise. McClure v. Wilson, 43 Ill. 356; Trustees v. Garvey, 53 Ill. 401.

Under the circumstances of this case, is there an equitable estoppel which ought to preclude the defendant from alleging that the note in controversy is lacking in one of the essential elements of a valid contract? We think there is. An estoppel *in pais* is defined to be "a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged." Mr. Pomeroy has formulated the following definition: "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might, perhaps, have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy." 2 Pom. Eq. Jur. 804. According to

[120] In Estate of Mary Beatty, Deceased v. Western College, 177 Ill. 280, 52 N. E. 432 (1898), where a claim was based on a charitable subscription promissory note, Magruder, J., said: "But, while such a note, amounting to a mere gift, is open to the defense of a want of consideration, yet that defense cannot be made to it, if money has been expended, or liabilities have been incurred, in reliance upon the note. If money has been expended, or liabilities have been incurred, which, by legal necessity, must cause loss or injury to the person, so expending money or incurring liability, if the note is not paid, the donor or maker thereof is, in good conscience, bound to pay, and the gift will be upheld upon the ground of estoppel, and not by reason of any valid consideration in the original undertaking."

But "Reliance upon a promise gives it no new validity when such reliance is not the conventional inducement of the promise; that is to say, when it is not contemplated by the terms of the bargain as the equivalent of the promise." Holmes, C. J., in French v. Boston National Bank, 179 Mass. 404, 408 (1901). See note to Morris v. Norton, *ante*, p. 319.

the undisputed proof, as shown by the record before us, the plaintiff was a working girl, holding a position in which she earned a salary of $10 per week. Her grandfather, desiring to put her in a position of independence, gave her the note, accompanying it with the remark that his other grandchildren did not work, and that she would not be obliged to work any longer. In effect, he suggested that she might abandon her employment, and rely in the future upon the bounty which he promised. He doubtless desired that she should give up her occupation, but, whether he did or not, it is entirely certain that he contemplated such action on her part as a reasonable and probable consequence of his gift. Having intentionally influenced the plaintiff to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit the maker, or his executor, to resist payment on the ground that the promise was given without consideration. The petition charges the elements of an equitable estoppel, and the evidence conclusively establishes them. If errors intervened at the trial, they could not have been prejudicial. A verdict for the defendant would be unwarranted. The judgment is right, and is

*Affirmed.*

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AUGUSTUS B. MARTIN and Others *v.* WILLIAM MELES and Others.

(Supreme Judicial Court of Massachusetts, 1901. 179 Mass. 114, 60 N. E. 397.)

HOLMES, C. J. This is an action to recover the contribution promised by the following paper, which was signed by the defendants and others: "January 21, 1896, We, the undersigned, manufacturers of leather, promise to contribute the sum of five hundred (500) dollars each, and such additional sums as a committee appointed by the Massachusetts Morocco Manufacturers Association may require; in no case shall the committee demand from any manufacturer or firm a total of subscriptions to exceed the sum of two thousand (2,000) dollars, such sum to be employed for legal and other expenses under the direction of the committee, in defending and protecting our interests against any demands or suits growing out of Letters Patent for Chrome Tanning, and in case of suit against any of us the committee shall take charge thereof and apply as much of the fund as may be needed to the expense of the same."

The plaintiffs are the committee referred to in the agreement, and subscribers to it. They were appointed and did some work before the date of the agreement, and then prepared the agreement which was signed by nine members of the association mentioned, and by the defendants, who were not members. They went on with their work, undertook the defence of suits, and levied assessments which were paid, the defendants having paid $750. In November, 1896, the defendants' firm was dissolved, and two members of it, Meles and Auerbach, ceased tanning leather. The defendants notified

the plaintiffs of the dissolution, and on June 23, 1897, upon demand for the rest of their subscription, refused to pay the same. The main questions insisted upon, raised by demurrer and by various exceptions, are whether the defendants' promise is to be regarded as entire and as supported by a sufficient consideration.

It will be observed that this is not a subscription to a charity. It is a business agreement for purposes in which the parties had a common interest and in which the defendants still had an interest after going out of business, as they still were liable to be sued. It contemplates the undertaking of active and more or less arduous duties by the committee, and the making of expenditures and incurring of liabilities on the faith of it. The committee by signing the agreement promised by implication not only to accept the subscribers' money but to perform those duties. It is a mistaken construction to say that their promise, or indeed their obligation, arose only as the promise of the subscribers was performed by payments of money.

If then the committee's promise should be regarded as the consideration, as in Ladies' Collegiate Institute v. French, 16 Gray, 196, 201 (see Maine Central Institute v. Haskell, 75 Maine, 140, 144), its sufficiency hardly would be open to the objection which has been urged against the doctrine of that case, that the promise of trustees to apply the funds received for a mere benevolence to the purposes of the trust imposes no new burden upon them. Johnson v. Otterbein University, 41 Ohio St. 527, 531. See Presbyterian Church of Albany v. Cooper, 112 N. Y. 517. Neither would it raise the question whether the promise to receive a gift was a consideration for a promise to make one. The most serious doubt is whether the promise of the committee purports to be the consideration for the subscriptions by a true interpretation of the contract.

In the later Massachusetts cases more weight has been laid on the incurring of other liabilities and making expenditures on the faith of the defendant's promise than on the counter-promise of the plaintiff. Cottage Street Church v. Kendall, 121 Mass. 528; Sherwin v. Fletcher, 168 Mass. 413. Of course the mere fact that a promisee relies upon a promise made without other consideration does not impart validity to what before was void. Bragg v. Danielson, 141 Mass. 195, 196. There must be some ground for saying that the acts done in reliance upon the promise were contemplated by the form of the transaction either impliedly or in terms as the conventional inducement, motive, and equivalent for the promise. But courts have gone very great lengths in discovering the implication of such an equivalence, sometimes perhaps even having found it in matters which would seem to be no more than conditions or natural consequences of the promise. There is the strongest reason for interpreting a business agreement in the sense which will give it a legal support, and such agreements have been so interpreted. Sherwin v. Fletcher, *ubi supra*.[121]

[121] In Sherwin v. Fletcher, 168 Mass. 413 (1897), an action of contract on

What we have said justifies, in our opinion, the finding of a consideration either in the promise or in the subsequent acts of the committee, and it may be questioned whether a nicer interpretation of the contract for the purpose of deciding which of the two was the true one is necessary. It is true that it is urged that the acts of the committee would have been done whether the defendants had promised or not, and therefore lose their competence as consideration because they cannot be said to have done in reliance upon the promise. But that is a speculation upon which courts do not enter. When an act has been done, to the knowledge of another party, which purports expressly to invite certain conduct on his part, and that conduct on his part follows, it is only under exceptional and peculiar circumstances that it will be inquired how far the act in truth was the motive for the conduct, whether in case of consideration (Williams v. Carwardine, 4 B. & Ad. 621; see Maine Central Institute v. Haskell, 75 Maine, 140, 145), or of fraud. Windram v. French, 151 Mass. 547, 553. In Cottage Street Church v. Kendall, 121 Mass. 528, the form of the finding in terms excluded subsequent acts as consideration, and therefore it did not appear whether the facts were such that reliance upon the promise would be presumed. In Bridgewater Academy v. Gilbert, 2 Pick. 579, the point was that merely signing a subscription paper without more did not invite expenditure on the faith of it. See Amherst Academy v. Cowls, 6 Pick. 427, 438; Ives v. Sterling, 6 Met. 310, 316. In this case the paper indisputably invited the committee to proceed.

A more serious difficulty if the acts are the consideration is that it seems

the following agreement, was brought by trustees selected under article 2 thereof, namely:

"We, the undersigned subscribers, do hereby agree to pay the sum set against our respective names, the same to be payable under and in accordance with the following conditions, namely:

"1. The money by us subscribed is to be used for the purpose of erecting a building in the town of Ayer, to be used for the manufacture of boots and shoes.

"2. The details regarding the plan under which the subscribers hereto shall organize themselves, and upon which said building shall be erected and rented, shall be hereafter fixed and determined by a majority in numbers and interest of the subscribers hereto, at a meeting to be duly called for that purpose.

"3. No subscription hereto shall be binding until the sum of twelve thousand ($12,000) dollars shall have been raised.

"Samuel W. Fletcher. $200."

Allen, J., for the court, said: "The written agreement signed by the defendant was virtually a promise to pay to such person or persons as should be fixed at a meeting of the subscribers. This promise was at the outset an offer, but when steps were taken in pursuance of Article 2, and a plan was fixed and determined as therein provided, and the plaintiffs were chosen trustees, they became the promisees; and when they proceeded to erect a building in reliance upon the subscriptions of the defendant and others, and before any withdrawal or retraction by him, that supplied a good consideration, and the promise became valid and binding in law."

to lead to the dilemma that either all acts to be done by the committee must be accomplished before the consideration is furnished, or else that the defendant's promise is to be taken distributively and divided up into distinct promises to pay successive sums as successive steps of the committee may make further payments necessary and may furnish consideration for requiring them. The last view is artificial and may be laid on one side. In the most noticeable cases where a man has been held entitled to stop before he has finished his payments, the ground has not been the divisibility of his undertaking but the absence of consideration, which required the court to leave things where it found them. In re Hudson, 54 L. J. Ch. 811; Presbyterian Church of Albany v. Cooper, 112 N. Y. 517. As against the former view, if necessary, we should assume that the first substantial act done by the committee was all that was required in the way of acts to found the defendants' obligation. See Amherst Academy v. Cowls, 6 Pick. 427, 438. But if that were true, it would follow that as to the future conduct of the committee their promise, not their performance, was the consideration, and when we have got as far as that, it may be doubted whether it is not simpler and more reasonable to set the defendants' promise against the plaintiffs' promise alone. We are inclined to this view, but do not deem a more definitive decision necessary, as we are clearly of opinion that, one way or the other, the defendants must pay.

What has been said pretty nearly disposes of a subordinate point raised by the defendants. It is argued that, by notice pending performance that they would not go on with the contract, the defendants, even if they incurred a liability to damages, put an end to the right of the plaintiffs to go on and to recover further assessments, as in the case where an order for work is countermanded at the moment when performance is about to begin under the contract (Davis v. Bronson, 2 No. Dak. 300), or when at a later moment the plaintiff was directed to stop (Clark v. Marsiglia, 1 Den. 317), followed by many later cases in this country. See Collins v. Delaporte, 115 Mass. 159, 162. We assume that these decisions are right in cases where the continuance of work by the plaintiff would be merely a useless enhancement of damages. But we are of opinion that they do not apply. In the first place it does not appear that such a notice was given. The first definite notice and the first breach was a refusal to pay on demand. At that time the liability was fixed, and the damages were the sum demanded.

In the next place, if a definite notice had been given by the defendants in advance that they would not pay, whatever rights it might have given the plaintiffs at their election (Ballou v. Billings, 136 Mass. 307), it would not have been a breach of the contract (Daniels v. Newton, 114 Mass. 530), and it would not have ended the right of the plaintiffs to go on under the contract in a case like the present, where there was a common interest in the performance, and where what had been done and what remained to do probably were to a large extent interdependent. Davis v. Campbell, 93 Ia. 524; Gibbons v. Bente, 51 Minn. 499; Cravens v. Eagle Cotton Mills

Co., 120 Ind. 6. See Frost v. Knight, L. R. 7 Ex. 111, 112; Johnstone v. Milling, 16 Q. B. D. 460, 470, 473; Dalrymple v. Scott, 19 Ont. App. 477; John A. Roebling's Sons' Co. v. Lock Stitch Fence Co., 130 Ill. 660, 666; Davis v. Bronson, 2 No. Dak. 300, 303.

Before leaving the case it is interesting to remark that the notion rightly exploded in Cottage Street Church v. Kendall, 121 Mass. 528, 530, 531, that the subscription of others than the plaintiff may be a consideration, seems to have remained unquestioned with regard to agreements of creditors to accept a composition. Compare the remarks of Wells, J., in Perkins v. Lockwood, 100 Mass. 249, 250 (Farrington v. Hodgdon, 119 Mass. 453, 457; Trecy v. Jefts, 149 Mass. 211, 212; Emerson v. Gerber, 178 Mass. 130), with what he says in Athol Music Hall Co. v. Carey, 116 Mass. 471, 474.

It is not argued that whatever contract was made was not made with the plaintiffs. Sherwin v. Fletcher, 168 Mass. 413.

*Demurrer overruled; exceptions overruled.*

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LORENA A. STEELE, Guardian and next friend of JAMES H. STEELE, infant, and others *v.* NICHOLAS W. STEELE.

(Court of Appeals of Maryland, 1892. 75 Md. 477, 23 Atl. 959.)

This appeal is taken from an order of the Orphans' Court allowing and passing the claim of the appellee against his father's estate.

ROBINSON, J.[122] * * * This is a claim based upon a verbal promise by the father that, if the appellee would purchase a certain woolen factory, then advertised for sale, he (the father) would contribute $5,000 towards the payment of the purchase money; and, relying upon this promise, the appellee bought the property. The right of the appellee to enforce the payment of such a claim as this depends—First, upon whether the promise was in fact made by the father; and, if so, was the property purchased by the son upon the faith of the promise? and, secondly, was the purchase of the property upon the faith of this promise, and the liability thereby incurred a sufficient consideration to make it a binding contract?

First. We fully agree that a promise of this kind ought to be established by the clearest and most satisfactory proof. At the same time, however, no one, it seems to us, can read the testimony in the record without being satisfied beyond question that the promise was made by the father, and that the property was purchased by the son on the faith of the promise. * * * The father was a person of large means, and Nicholas was his only son. The property was a woolen mill, and he had implicit confidence in his son's ability to manage and conduct the business, and it was but natural that he should be willing and anxious to assist him in its purchase.

[122] Parts of the opinion are omitted.

And this brings us to the question whether the purchase of the property upon the faith of the promise on the part of the father is a sufficient consideration to make it a valid contract. And in regard to this question there cannot be, it seems to us, any difficulty. Without going through the long list of cases in which the question as to the sufficiency of consideration has been considered, it is sufficient to say it is well settled that if one incurs a legal liability, as by entering into a contract with a third person, the liability thereby incurred is a sufficient consideration to support a promise by the person at whose request it was incurred. Thus, for instance, where a person contracts in his own name to purchase property upon the promise by another to provide the money to pay for it, the consideration is sufficient to support the contract. Leake, Cont. 628; 1 Chitty, Cont. p. 64. The case comes, we think, directly within the principle laid down in Skidmore v. Bradford, L. R. 8 Eq. 134, in which the vice-chancellor said: "If Edward Bradford were a mere volunteer, there is no principle on which he would be entitled to come to this court to have the testator's bounty completed, and the balance of the purchase money paid out of the assets. But if, on the failure of the testator's representations, he has involved himself in any liability, or has incurred any obligation, he cannot be regarded as a volunteer, and, if so, the testator's assets are liable to make good the representation on the faith of which the nephew has entered into this contract. * * * The case therefore is one in which the purchaser became liable to be sued, and incurred that liability on the faith of the representations of the testator that he would give him the warehouse which was the subject-matter of the contract, and would provide the purchase money." The purchase of the property in this case by the appellee upon the faith of the promise made by his father to give him $5,000 to assist him in the payment of the purchase money is therefore a sufficient consideration to support the contract, and the order must be

*Affirmed.*[123]

[123] "If A promises to buy a house for his nephew, that is nothing; but if A promises to buy a house for his nephew and request the nephew to enter into a contract of purchase in the nephew's name and the nephew does so, the law implies a promise on the part of A to reimburse the nephew any part of the purchase-money which he may be called upon to pay. Skidmore v. Bradford, L. R. 8 Eq. 134." Evans, P. J., in Y. M. C. A. v. Estill, 140 Ga. 291, 296 (1913).

On the other hand, "If A says, 'I will give you, B, £1000' and B, in reliance on that promise, spends £1000 in buying a house, B cannot recover the £1000 from A." Pearson, J., in Re Hudson, 54 L. J., Ch. 811 (1885).

## KIRKSEY *v.* KIRKSEY.

**(Supreme Court of Alabama, 1845. 8 Ala. 131.)**

Assumpsit by the defendant, against the plaintiff in error.

The plaintiff was the wife of defendant's brother, but had for some time been a widow, and had several children. In 1840, the plaintiff resided on public land, under a contract of lease, she had held over, and was comfortably settled, and would have attempted to secure the land she lived on. The defendant resided in Talladega County, some sixty or seventy miles off. On the 10th October, 1840, he wrote to her the following letter:

"Dear Sister Antillico,—Much to my mortification, I heard that brother Henry was dead, and one of his children. I know that your situation is one of grief and difficulty. You had a bad chance before, but a great deal worse now. I should like to come and see you, but cannot with convenience at present. * * * I do not know whether you have a preference on the place you live on or not. If you had, I would advise you to obtain your preference, and sell the land and quit the country, as I understand it is very unhealthy, and I know society is very bad. If you will come down and see me, I will let you have a place to raise your family, and I have more open land than I can tend; and on account of your situation, and that of your family, I feel like I want you and the children to do well."

Within a month or two after the receipt of this letter, the plaintiff abandoned her possession, without disposing of it, and removed with her family, to the residence of the defendant, who put her in comfortable houses, and gave her land to cultivate for two years, at the end of which time he notified her to remove, and put her in a house, not comfortable, in the woods, which he afterwards required her to leave.

A verdict being found for the plaintiff, for $200, the above facts were agreed, and if they will sustain the action, the judgment is to be affirmed, otherwise it is to be reversed.

ORMOND, J. The inclination of my mind is that the loss and inconvenience which the plaintiff sustained in breaking up and moving to the defendant's, a distance of sixty miles, is a sufficient consideration to support the promise to furnish her with a house, and land to cultivate, until she could raise her family. My brothers, however, think that the promise on the part of the defendant was a mere gratuity, and that an action will not lie for its breach. The judgment of the court below must therefore be reversed, pursuant to the agreement of the parties.[124]

[124] "It is often a matter of great difficulty to discern the line which separates promises creating legal obligations from mere gratuitous agreements. Each case depends so much on its own peculiar facts and circumstances that it affords but little aid in determining other cases of differing facts. The promise or agreement, the relation of the parties, the circumstances surrounding them, and their intent, as it may be deduced from these, must determine the inquiry. If the purpose is to confer on the promisee a benefit from affection and gen-

## JOHN SEMMES DEVECMON *v.* ALEXANDER SHAW and CHRISTIAN DEVRIES, Executors of John S. Combs.

(Court of Appeals of Maryland, 1888. 69 Md. 199, 14 Atl. 464, 9 Am. St. Rep. 422.)

BRYAN, J. John Semmes Devecmon brought suit against the executors of John S. Combs, deceased. He declared in the common counts, and also filed a bill of particulars. After judgment by default, a jury was sworn to assess the damages sustained by the plaintiff. The evidence consisted of certain accounts taken from the books of the deceased, and testimony that the plaintiff was a nephew of the deceased, and lived for several years in his family, and was in his service as clerk for several years. The plaintiff then made an offer of testimony, which is thus stated in the bill of exceptions: "that the plaintiff took a trip to Europe in 1878, and that said trip was taken by said plaintiff, and the money spent on said trip was spent by the said plaintiff at the instance and request of said Combs, and upon a promise from him that he would reimburse and repay to the plaintiff all money expended by him in said trip; and that the trip was so taken and the money so expended by the said plaintiff, but that the said trip had no connection with the business of said Combs; and that said Combs spoke to the witness of his conduct in being thus willing to pay his nephew's expenses as liberal and generous on his part." On objection, the court refused to permit the evidence to be given, and the plaintiff excepted.

It might very well be, and probably was the case, that the plaintiff would not have taken a trip to Europe at his own expense. But whether this be so or not, the testimony would have tended to show that the plaintiff incurred expense at the instance and request of the deceased, and upon an express promise by him that he would repay the money spent. It was a burden incurred at the request of the other party, and was certainly a sufficient consideration for a promise to pay. Great injury might be done by inducing persons to make expenditures beyond their means, on express promises of repayment, if the law were otherwise. It is an entirely different case from a promise to make another a present; or render him a gratuitous service. It is nothing to the purpose that the plaintiff was benefited by the expenditure of his own money. He was induced by this promise to spend it in this way, instead of some other mode. If it is not fulfilled, the expenditure will have been procured by a false pretence.

As the plaintiff, on the theory of this evidence, had fulfilled his part of the contract, and nothing remained to be done but the payment of the money by the defendant, there could be a recovery in indebitatus assumpsit; and it was not necessary to declare on the special contract. The fifth count in the declaration is for "money paid by the plaintiff for the defendants'

erosity, the agreement is gratuitous. If the purpose is to obtain a *quid pro quo* —if there is something to be received, in exchange for which the promise is given, the promise is not gratuitous, but of legal obligation." Brickell, C. J., in Bibb v. Freeman, 59 Ala. 612, 616-617 (1877).

testator in his lifetime, at his request." In the bill of particulars, we find this item: "To cash contributed by me, J. Semmes Devecmon, out of my own money, to defray my expenses to Europe and return, the said John S. Combs, now deceased, having promised me in 1878 'that if I would contribute part of my own money towards the trip, he would give me a part of his, and would make up to me my part,' and the amount below named is my contribution, as follows," etc. It seems to us that this statement is a sufficient description of a cause of action covered by the general terms of the fifth count. The evidence ought to have been admitted.

The defendants offered the following prayer, which the court granted:

"The defendants, by their attorneys, pray the court to instruct the jury that there is no sufficient evidence in this case to entitle the plaintiff to recover the interest claimed in the bill of particulars, marked, 'Exhibit No. 1 Bill of Particulars.'"

The only evidence bearing on this question is the account taken from the books of the deceased, which was offered in evidence by the plaintiff. This account showed on its face a final settlement of all matters embraced in it. In the absence of proof showing errors of some kind, the parties must be concluded by it in all respects. We think the prayer was properly granted.

*Judgment [for defendant] reversed, and new trial ordered.*[125]

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WHITE, Executor of John Bluett, Deceased, *v.* WILLIAM BLUETT.

(Court of Exchequer, 1853. 23 L. J., Ex., (N. S.) 36.)

Action upon a promissory note made payable to J. Bluett, the testator. Plea that the said J. Bluett, the testator, was the father of the defendant, and that in the lifetime of the said J. Bluett, the defendant complained to his said father that he, the defendant, had not received at his hands so much money or so many advantages as the other children of the said J. Bluett, and certain controversies arose between the defendant and his said father, concerning the premises, and the said J. Bluett afterward admitted

[125] So of agreements to pay a young man a sum of money if he will not drink liquor, use tobacco, etc., for a certain period. Talbott v. Stemmons, 89 Ky. 222 (1889); Hamer v. Sidway, 124 N. Y. 538 (1891). Or will attend a university as a student. Hoshor v. Kuntz, 19 Wash. 258 (1898). Even though the young man is benefitted by what he does, he suffers a legal detriment. The only problem is whether a contract should be found or a promise of gift upon condition.

In Earle v. Angell, 157 Mass. 294 (1892) a promise by an aunt to a nephew was in substance: "If you will agree to attend my funeral in Massachusetts, coming from your home near Philadelphia, I will pay all expenses and give you $500." The nephew was found to have promised and the arrangement was sustained as a contract.

and declared to the defendant that his, the defendant's, said complaints were well founded, and, therefore, afterward, etc., it was agreed by and between the said J. Bluett and the defendant that the defendant should forever cease to make such complaints, and that in consideration thereof, and in order to do justice to the defendant, and also out of his, the said J. Bluett's, natural love and affection toward the defendant, he, the said J. Bluett, would discharge the defendant of and from all liability in respect of the causes of action to which this plea is pleaded, and would accept the said agreement on his, the defendant's, part in full satisfaction and discharge of the said last-mentioned causes of action; and the defendant further saith, that afterward, and in the lifetime of the said J. Bluett, and before this suit, he, the said J. Bluett, did accept of and from the defendant the said agreement as aforesaid, in full satisfaction and discharge of such mentioned causes of action.

Demurrer and joinder.

[During the argument Parke, B., asked: Is an agreement by a father, in consideration that his son will not bore him, a binding contract?]

POLLOCK, C. B.† The plea is clearly bad. By the argument a principle is pressed to an absurdity, as a bubble is blown until it bursts. Looking at the words merely, there is some foundation for the argument, and, following the words only, the conclusion may be arrived at. It is said the son had a right to an equal distribution of his father's property, and did complain to his father because he had not an equal share, and said to him, "I will cease to complain if you will not sue upon this note." Whereupon the father said, "If you will promise me not to complain I will give up the note." If such a plea as this could be supported, the following would be a binding promise: A man might complain that another person used the public highway more than he ought to do, and that the other might say, "Do not complain, and I will give you £5." It is ridiculous to suppose that such promises could be binding.[126] So, if the holder of a bill of exchange were

† The statement of facts is abbreviated and the opinions of Parke B and Alderson B are omitted.

126 In Dunton v. Dunton, 18 Vict. L. R. 114 (1892) the court divided in opinion as to whether a promise by a divorced wife that she would conduct herself with sobriety and in a respectable, orderly and virtuous manner was consideration for the husband's promise to make certain payments. The dissenting judge said the promise seemed to him "about as vague a promise as can well be imagined," but the majority judges held that the agreement was binding and Williams, J., explained White v. Bluett, *supra*, as a case which went "upon the express ground that the son had no right to complain of the father's distribution of the property" and therefore "the son's abstaining from doing what he had no right to do could be no consideration." Of the plaintiff in Dunton v. Dunton, Higginbotham, C. J., said: "In the present case the plaintiff was released by the decree for the dissolution of marriage from her conjugal obligation to the defendant to conduct herself with sobriety, and in a respectable, orderly, and virtuous manner; and conduct of an opposite character would not necessarily involve a breach on her part of any human law other than the law

suing the acceptor, and the acceptor were to complain that the holder had treated him hardly, or that the bill ought never to have been circulated, and the holder were to say, "Now if you will not make any more complaints I will not sue you." Such a promise would be like that now set up. In

of marriage, which had ceased to bind her. She was legally at liberty, so far as the defendant was concerned, to conduct herself in these respects as she might think fit, and her promise to surrender her liberty and to conduct herself in the manner desired by the defendant constituted, in my opinion, a good consideration for his promise to pay her the stipulated amount." And Williams, J., said: "She [the plaintiff] was under no legal obligation to the defendant, or to any one, not to get drunk in her own or any friend's house. She was under no legal obligation to the defendant, or to any one, not to consort with persons, male or female, of bad moral character. She was under no legal obligation to the defendant, or to any one, not to allow a paramour to have sexual connection with her. She was entitled in these and other respects to pursue her own course of conduct."

The contract in Dunton v. Dunton, where the parties were divorced, is not open to objections sometimes urged against contracts between husband and wife who are to continue to live together whereby payments to the wife are conditioned on her good conduct.

In Miller v. Miller, 78 Iowa 177 (1889), for instance, the action was by a wife against her husband to recover on a contract between them, whereby it was agreed to drop all matters of dispute, to refrain from scolding, fault finding, and anger, and live together as husband and wife; that the wife should keep her home in comfortable condition; and that the husband should provide all the necessary expenses of the family, and pay the wife in addition a certain sum per month. The court sustained a judgment for the defendant. Granger, J., said:

"It is said in argument that in this case the husband had been guilty of such conduct as to justify the wife in leaving him, and would have been entitled to a separate support, and it was because of this contract that she consented to live with defendant, and that the amount was settled upon the wife in pursuance of the agreement. Stripped of the conditions upon which payment is to be made, such a contract might not be questioned. The enforcement of this contract as to payments involves an inquiry into just the facts which we have been urging as against public policy. The payments are to be made 'so long as Mrs. Miller shall faithfully observe the terms and conditions of their contract.' If, then, she seeks to compel payment, she must do so by averring her compliance in general terms, and the husband may answer, putting in issue the facts, and then follows the inquiry if at some time she did not scold or find fault. Was she not at some time angry? Has she kept the family in a comfortable condition? * * * It needs no argument to show that such inquiries in public would strike at the very foundations of domestic life and happiness. Public policy dictates that the door of such inquiries shall be closed; that parties shall not contract in such a manner as to make such inquiries essential to their enforcement. What element could be introduced into a family that would tend more directly to breed discord than this contract? A failure to pay from any cause not her fault renders the husband liable to judgment, and this from month to month, or from year to year. No misfortune frees him from this obligation save that of the loss or misconduct of his wife. In the very nature of things, a demand for such a payment would engender ill feelings and provoke complaints as to conduct that would otherwise pass

reality, there was no consideration whatever. The son had no right to complain, for the father might make what distribution of his property he liked; and the son's abstaining from doing what he had no right to do can be no consideration.

*Judgment for the plaintiff.*[187]

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## JAMIESON *v.* RENWICK.

(Supreme Court of Victoria, 1891. 17 Vict. L. Rep. 124.)

HIGINBOTHAM, C. J.* This is an appeal from * * * [a judgment on] a verdict for the plaintiff for £25. The action was brought on a document purporting to be an agreement. * * *

The next ground of objection is that this promise is a voluntary one, a promise to make a gift; that, in fact, no consideration for making the promise is shown by the instrument, and that therefore the agreement is not one on which an action can be brought. The agreement is an extremely peculiar one, and not easy of comprehension. It opens with a recital that "John Renwick, of his own free will, as and by way of gift, and subject to the proviso and agreement hereinafter contained, doth agree to pay to the said John Jamieson the annual sum of £25." That promise is subject to this proviso: "Provided, however, and it is hereby agreed, that if the said John Jamieson shall reside, attempt, claim, or threaten to reside in Sandhurst aforesaid, or shall visit, annoy, or interfere in any way with the said John Renwick, either personally, or by letter or messenger, or shall claim, or attempt to claim, any interest or right to the land of the said John Renwick, or to occupy the same, or shall, in the opinion of the said John Renwick, not conduct himself in a proper and becoming manner as a member of society, then the said John Renwick shall be entitled to put an end absolutely to this agreement, and shall be at liberty to refuse any further payment to the said John Jamieson." This proviso constitutes a condition for the payment of money by the defendant; the fulfilment of the conditions of the proviso constitutes the promises made on his part by the plaintiff.

Some of these promises constitute a good consideration for the promise of

unnoticed, or at least without attention. An effort at compulsory payment would almost certainly bring before the courts allegations of misconduct, based upon incidents of little moment, to be magnified or belittled in the interest of success in court."

[187] "In the absence of a command from the father, the son would be privileged to make complaints. A forbearance to exercise this privilege seems to be perfectly definite and to be worth the money." Corbin's Anson on Contracts, p. 129 n. Compare Sharon v. Sharon, 68 Cal. 29 (1885); Crawley v. Blackman, 81 Ga. 775 (1888). But see Howlett v. Howlett, 115 Mich. 75 (1897). On vagueness and uncertainty of promise, see Dunshee v. Dunshee, 255 Ill. 296 (1912).

* The statement of facts and parts of the opinion are omitted.

the defendant. The first condition or promise, that Jamieson shall not reside, nor attempt, claim, or threaten to reside in Sandhurst, relates to an act or acts which the plaintiff is at liberty to do or not to do, and the performance of which would not amount to any wrong done to the defendant.[188] The second condition, that the plaintiff shall not personally, or by letter or messenger, claim or attempt to claim any interest in defendant's land, relates to an act which the plaintiff is at perfect liberty to do without committing any wrong. The plaintiff can advance any legal claim which he is advised is a good one. The promise not to visit the defendant is a valid promise. To annoy or interfere with the defendant is an unlawful act, and therefore the promise to forbear from so doing is not one which constitutes a good consideration. The principles guiding the court in cases like this appear in Bracewell v. Williams, L. R. 2 C. P. 196. There it was held that a promise not to apply for costs under the Bankruptcy Act was a sufficient consideration to support a contract to pay the amount of such costs; but that a promise to conduct proceedings in bankruptcy so as to injure as little as possible the debtor's credit, was not a good consideration to support a contract. Erle, C. J., says, at page 198: "The second count is, I think, also bad; it really amounts to this; in consideration that I do not abuse the process of the court for a purpose other than that for which it was intended—viz., the recovery of my debt, by using it as a means of exposure of you, you will perform your promise. The consideration, therefore, is really the abstaining from an abuse of the process of the court." A promise that a person will not do what he lawfully may is a good consideration. But a promise not to do what is unlawful does not constitute a good consideration. In the present case we think that there are sufficient promises constituting a good consideration to support the promise made by the defendant. A promise not to annoy is nugatory. The second objection therefore fails in our opinion.

In dealing with the third objection, that the judgment was against evidence, * * * we think that all the evidence shows that there is no reason for coming to the finding that the defendant has not honestly and fairly exercised the power given to him by the agreement, [to put an end to it, "Provided that the said John Jamieson shall, in the opinion of the said John Renwick, not conduct himself in a proper and becoming manner as a member of society,"] and he has been therefore justified in putting an end to the agreement and refusing to pay money under it to the plaintiff. A review of the whole of the evidence strengthens the judgment formed by the defendant that the plaintiff did not conduct himself in a proper manner as a member of society in accordance with the terms of the agreement. We think, therefore, that the judgment of the learned judge was against the evidence, and on this ground a new trial will be allowed, unless the plaintiff

[188] That agreements to stay away from a particular locality, if not otherwise objectionable, are valid, see Upton v. Henderson, 106 L. T. (N. S.) 839 (1912); Wallace v. McPherson, 138 Tenn. 458 (1917).

within one week elect to accept a nonsuit with costs. If he do not so elect, then new trial on the usual terms, and appeal allowed with costs.[129]

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## HOGAN *v.* STOPHLET.

**(Supreme Court of Illinois, 1899. 179 Ill. 150, 53 N. E. 604, 44 L. R. A. 809.)**

Action to recover a reward offered for the apprehension and conviction of a criminal. A judgment in the Circuit Court for plaintiff was reversed by the Appellate Court. Plaintiff appealed.

MAGRUDER, J.[130] * * * The appellant was the sheriff of Pulaski county. The arrest of Howard [the criminal] was made in Pulaski county, and for a felony committed by Howard in that county, Howard also being a resident of that county. It was therefore appellant's duty to make the arrest. * * * It being true that it was the official duty of the appellant, as sheriff, to make the arrest of the guilty party, and that the fees, which he is entitled to charge for the performance of his official duties, are fixed by law, it follows, upon well established principles, that the appellant was not entitled to the reward sued for in this case. It is against public policy to allow a man to recover a reward for doing his duty as a public officer. It is also against public policy and illegal for a sheriff to receive for services, for which fixed compensation is prescribed by law, any other or further fees, although extraordinary diligence may have been exercised by him in the discharge of his duty. (Pool v. City of Boston, 5 Cush. (Mass.) 219; Murfree on Sheriffs, § 1070.) A promise to pay an officer a reward for doing what it is his duty to do under the law is a promise without any consideration to support it.

In Matter of Russell's Application, 51 Conn. 577, the facts showed, that an inhabitant of the city of Hartford, whose house was broken into in the night, offered a reward for the detection of the burglar; that certain policemen, during the hours allotted them for rest, discovered the burglar, and obtained information which led to his conviction; that policemen in that

[129] "The general principle is, that if part of a consideration be merely void, the contract may be supported by the residue of the consideration, if good *per se* (Bradburne v. Bradburne, Cro. Eliz. 149; Tisdale's Case, *ibid.*, 758; Crisp v. Gamel, Cro. Jac. 128), but if any part of a consideration be illegal, it vitiates the whole. Featherstone v. Hutchinson, Cro. Eliz. 199; Bridge v. Cage, Cro. Jac. 103; Scott v. Gilmore, 3 Taunt. 226; Woodruff v. Hinman, 11 Vt. 592; 2 Saund. R. (Patteson & Wms. Edit.), 136, note 2. A promise by a party to do what he is bound in law to do is not an illegal consideration, but is the same as no consideration at all, and is merely void, in other words, it is insufficient, but not illegal." Kellogg, J., in Cobb v. Cowdery, 40 Vt. 25, 28 (1867). But if an offer of a unilateral contract calls for several acts, some void, but not illegal, and some valid, there is, on principle, no acceptance unless all are furnished.

[130] The statement of facts and parts of the opinion are omitted.

city were required by law to report all violations of law, and to arrest without warrant persons guilty of criminal offenses where the offenders were taken in the act, or on the speedy information of others; to render all possible assistance to the ministers of the law, and to exert themselves to prevent the commission of crime, etc.; and it was held by the court that to allow them to receive the reward would be both in violation of the city ordinances, and against public policy. In that case the court said: "It has been held from a very early period, that a promise to pay an officer a sum of money for doing a thing, which the law will not suffer him to take anything for, is merely void, however freely and voluntarily it may appear to have been made. * * * And it is now well settled that a public officer, whose compensation is fixed or whose fees are prescribed by law, cannot legally contract for or demand a larger compensation or higher fees in the form of a reward or in any other form, for services rendered in the line or scope of his official duties."

In Pool v. City of Boston, *supra*, it was held, that a watchman of the city of Boston, who, while in the discharge of his duty as such, discovered a person setting fire to a building and prosecuted him to conviction, was not entitled to claim a reward offered by the city government for the detection and conviction of the incendiary.

In Davis v. Burns, 5 Allen (Mass.) 349, it was held, that an officer of the customs of the United States, who found smuggled goods, while assisting the inspectors in charge of a vessel and examining the passengers and their luggage, although he was not in discharge of the specific duty assigned to him, could not maintain an action to recover a reward, offered by the owners of the vessel to any person giving information to their agents or officers of any goods smuggled or concealed or intended to be smuggled therefrom. In the latter case the decision of the court was put upon the broad ground of public policy which forbids an officer to receive extra compensation for doing what his official duty requires him to do. * * *

In Lees v. Colgan, 120 Cal. 262, where a captain of police of the city and county of San Francisco apprehended a murderer in such city and county for a murder committed in another county, it was held that the captain made the arrest of the murderer in the line of his official duty and that it was against sound public policy to receive a reward offered by the government of the state for the arrest and conviction of the murderer; and in that case the court say: "The courts, both in this country and in England, are practically unanimous in declaring that a public officer working for a fixed compensation, or whose fees are prescribed by law, cannot demand or contract for a reward for services rendered in the line or scope of his official duty." (See also Marking v. Needy & Hatch, 8 Bush. (Ky.) 22; Ex parte Gore, 57 Miss. 251; Monroe County v. Bell, 18 So. 121; Thornton v. Railway Co., 42 Mo. App. 58; Kick v. Merry, 23 Mo. 74; Weaver v. Whitney, 1 Hopk. 13; Hatch v. Mann, 15 Wend. [N. Y.] 45.)

The claim that extra services have been rendered, furnishes no warrant in

such cases for the charge of extra compensation. In Hatch v. Mann, *supra*, it was said: "That a public officer, whose fees are prescribed by law, may maintain an action to recover an additional sum promised him by a party for doing his official duty, is a monstrous proposition, fraught with every kind of mischief. The pretense, that it is for extra services, would cover any conceivable corruption or extortion. * * * If a constable for making extraordinary efforts to perform an ordinary official act, may not only receive, but may also collect by law a compensation beyond what the statute allows for the act, any other officer may do the same; and sheriffs, legislators and judges might, and soon would, put their 'extraordinary efforts' in the market, to be had by the highest bidder. This is a sickening and revolting view of the subject."

There are some decisions which hold to the contrary of the views herein expressed, but these decisions will be found upon examination to be cases where the officer arrested the offender beyond his territorial jurisdiction, or cases arising under particular statutes, which did not make it the duty of the officer to make the arrest. Many of these decisions are reviewed in the very able opinion delivered by the Supreme Court of Connecticut In the Matter of Russell's Application, *supra*, and are there distinguished from such cases as that which is presented by the present record.

The principles, announced by the authorities above referred to, have always been recognized as sound by this court. * * *

Judgment [of Appellate Court]

*Affirmed.*[131]

[131] But doing or agreeing to do more than one's official duty will serve as consideration. "I think there may be services which the constable is not bound to render, and which he may therefore make the ground of a contract," said Denman, C. J., in England v. Davidson, 11 A. & E. 856, 8 (1840). For instance, in Hartley v. Inhabitants of Granville, 216 Mass. 38 (1913) detective duties were held not to be within the scope of a constable's official obligation and he was allowed to recover a reward for ferreting out offenders. But compare Somerset Bank v. Edmond, 76 Oh. St. 396 (1907). And in Reif v. Page, 55 Wis. 496 (1882) a fireman was allowed to recover a reward offered by a husband to any one who would rescue his wife from a burning building, dead or alive, because at great peril to his life and health he accomplished the rescue of her dead body and because the court found that as a fireman of the city he was not legally bound to risk his life in that rescue.

"It has been repeatedly held that public policy does not permit an officer to claim a reward for merely doing his duty. Elkins v. Wyandotte Co., 91 Kan. 518, 520, 138 Pac. 578, 51 L. R. A. (N. S.) 638, Ann. Cas. 1915D, 257. The question as applied to a claim for reward is discussed in the opinion in Smith v. Fenner, 102 Kan. 830, 172 Pac. 514, L. R. A. 1918E, 348; and see Marsh v. Express Co., 88 Kan. 538, 129 Pac. 168, 43 L. R. A. (N. S.) 133, and authorities cited there. In the recent case of Thacker v. Smith, 103 Kan. 641, 175 Pac. 983, it was held that a deputy sheriff could not lawfully receive any part of such a reward, and also that others who had acted with him under a division agreement were not entitled to recover because the agreement itself was void and inseparable. In some of the cited cases what are called 'nonpay officers' were

## KEITH & HASTINGS, Admrs., &c. *v.* ALFRED MILES.

**(Supreme Court of Mississippi, 1860. 39 Miss. 442, 77 Am. Dec. 685.)**

HARRIS, J. The defendant in error, when about ten or twelve years old, left the house of his guardian, Alexander Miles, plaintiffs' intestate, and went to the house of his uncle by marriage, "and there in the neighborhood remained until his guardian persuaded him to go and live with him, making him the following promises; that he, the guardian, would not charge him, the said defendant, any board; that he would send him to school and make no charge for the same." The defendant went to live with plaintiffs' intestate, his said guardian, and remained there about twelve months.

On final settlement of the guardianship account, plaintiffs in error claimed allowance of sixty dollars for the board of defendant, and also amounts paid for tuition.

Exceptions were filed to these items in the court below, and sustained by the court. This writ of error is now prosecuted here to revise that judgment.

It appears in this record that the defendant paid no board at his uncle's house during his stay there; and upon this ground, we suppose, it was thought, in the court below, a sufficient consideration arose to sustain the promise of the guardian to board and school the defendant without charge.

Between adults, or where no duty of obedience existed, a promise made under these circumstances would doubtless be obligatory, upon the ground that injury and loss would otherwise be occasioned to defendant by his abandonment of his uncle's house, where he paid no board. But a different

**permitted to recover because it was not their duty to cause the arrest." Porter, J., in Taft v. Hyatt, (Kans.) 180 Pac. 213, 215 (1919).**

**In Hayden v. Songer, 56 Ind. 42, 49 (1877) the court intimates that if to earn a reward by making an arrest a man unnecessarily gets himself appointed special constable the fact that he is such constable will not prevent his recovery of the reward if he complies with the terms of the offer. The court did not have to decide the matter, however, as under the facts of the case a special constable as such had no authority, and was under no duty, to make the arrest.**

**On right of public officer to reward, see 10 Ann. Cas. 729, note.**

**In Ryder v. Stockwell, 14 Cal. 134 (1869), in defense of an action to recover a reward for information that would lead to the arrest and conviction of the person or persons who set fire to defendant's house, the defendant insisted that plaintiff could not recover because he was bound as a good citizen to render the services without reward, but Baldwin, J., for the court said (pp. 135-136): "But this position is not tenable. * * * It can hardly be said that every citizen is bound, however meritorious the task may be, to quit his own business, and devote his time to the discovery of crime and bring criminals to justice. Nor, that if a man who has lost his property agrees to give another a sum of money to go with him to discover or arrest the thief and recover the goods, he is not bound to pay that other if the latter performs the service."**

**More troublesome questions arise in regard to the duties of a finder to return lost goods and whether the finder may earn a reward offered.**

rule is held in cases where it is the legal duty of the promisee to do, without reward, the act induced by the promise sought to be enforced.

No action will lie to enforce a promise for doing that which it was the party's legal duty to do, without such promise or reward, "for this would be extortion and illegal." 2 Tucker's Lect. 137; 2 Burr. R. 924; 2 Black. R. 204; Chitty on Con. 54.

The ward in this case, being under the legal control of his guardian, had no right to rebel against his authority, leave his house, or refuse obedience to his lawful directions. It was his legal duty, as well as his highest interest, to submit himself cheerfully to the directions of his guardian; and he cannot be permitted to exact a reward for the performance of a duty so obviously incumbent on him. The law will not presume that injury or loss could arise to him in the discharge of that duty, and hence no consideration for the promise to board and school him could arise to support it, against his guardian.

The promise relied on to avoid the items of board and tuition claimed in the account of plaintiff's intestate being without consideration is void. The court therefore erred in rejecting these items on that ground.

Let the judgment and decree of the court below be reversed, and cause remanded for further proceedings in accordance with this opinion.[182]

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## LATTIMORE *v.* HARSEN.

**(Supreme Court of New York, 1817. 14 Johns. 330.)**

This was a motion to set aside the report of referees. It appeared from the affidavits which were read that the plaintiffs entered into an agreement under seal dated November 14th, 1815, with Jacob Harsen and the defendant, Cornelius Harsen, by which the former, in consideration of the sum of $900, agreed to open a cartway in Seventieth Street, in the city of New York, the dimensions and manner of which were stated in the agreement, and bound themselves under the penalty of $250 to a performance on their part. Some time after the plaintiffs entered upon the performance they became dissatisfied with their agreement, and determined to leave off the work, when the defendant, by parol, released them from their covenant, and promised them that if they would go on and complete the work and find materials he would pay them for their labor by the day. The plaintiffs had received more than the sum stipulated to be paid to them by the original agreement. The action was brought for the work and labor and materials found by the plaintiffs under the subsequent arrangement, and

**[182] Apart from the question of consideration, may that which has been supplied under a promise to have it a gift be charged for afterwards even if the promise is made by a guardian to a ward?**

the referees reported the sum of $400.05 in favor of the plaintiffs. The case was submitted to the court without argument.

PER CURIAM. The only question that can arise in the case is whether there was evidence of a contract between the plaintiff and the present defendant to perform the services for which this suit is brought. From the evidence it appears that a written contract had been entered into between the plaintiffs and the defendant, together with his father, Jacob Harsen, for the performance of the same work, and that after some part of it was done the plaintiffs became dissatisfied with their contract, and determined to abandon it. The defendant then agreed if they would go on and complete the work he would pay them by the day for such service and the materials found without reference to the written contract.

This is the allegation on the part of the plaintiffs, and which the evidence will very fairly support. If the contract is made out there can be no reason why it should not be considered binding on the defendant. By the former contract the plaintiffs subjected themselves to a certain penalty for the non-fulfilment, and if they chose to incur this penalty they had a right to do so, and notice of such intention was given to the defendant, upon which he entered into the new arrangement.[133] Here was a sufficient con-

[133] The distinction between an alternative contract and liquidated damages must not be overlooked. In Stewart v. Bedell, 79 Pa. St. 336, 339 (1875), "*Per Curiam*", it was said: "The defendant's covenant not to engage in business within prescribed limits, and the covenant, if he should do so, that he would pay $10,000 liquidated damages, are not alternative; the latter being merely the agreed consequence of a breach of the former. If covenants be alternative and either be performed there is no breach. An election is given to the covenantor to perform either. But here a breach of the former covenant is necessary to give effect to the latter. Hence there is no election in such case, except that which arises from a determination to suffer the consequences of a breach." Although in form a penalty the provision in Lattimore v. Harsen was doubtless one for liquidated damages. The contract was not one giving the plaintiffs the legal choice between performing the work and paying the liquidated damages sum in any other sense than exists in the case of any contract which the courts will not enforce specifically. The issue is still sharply drawn between those who agree with Lord Coke and Justice Holmes that one has a legal "right," *i. e.*, legal privilege, to break his contract and pay damages, if the contract will not be enforced specifically, and those who insist that he has no such legal "right," *i. e.*, legal privilege. Physical ability and legal privilege are not synonymous, as any hold-up man may demonstrate. For a vigorous attack on the position of Lord Coke and Justice Holmes, see note by Professor Willard T. Barbour in 16 Mich. L. Rev. 106.

For a somewhat humorous phase of the contention in Lattimore v. Harsen, see Gewirtz v. Gewirtz, 178 N. Y. Supp. 738 (1919), where the court held that after a separation decree providing for alimony to the wife had been rendered, a so-called agreement of separation between the husband and wife entered into after the husband's default in paying the alimony provided in the decree was without consideration as well as void as against public policy. The consideration point arose because the husband, in the words of Page, J., who wrote the opinion, "threatened to suffer confinement rather than pay [the decreed ali-

sideration for this promise; all payments made on the former contract have been allowed, and perfect justice appears to have been done by the referees, and no rules or principles of law have been infringed. The motion to set aside the report, therefore, ought to be denied.

*Motion denied.*[184]

mony]; in fact he expressed a keen desire to go to jail rather than pay." Under the agreement the husband was to pay and did pay only a sum already due under the alimony decree which the wife agreed to accept in full for her support, maintenance and alimony for the past and in the future, and to show consideration relied on his privilege to go to jail. The motion being one to punish the husband for contempt in failing to pay instalments of alimony falling due under the decree after the contract, Page, J., said of the husband: "He complains that he waived his desire to go to jail for contempt of court. He being again in contempt, the opportunity of fulfilling that desire will be restored to him by the granting of this motion" (p. 740).

[184] "It would doubtless be competent for parties to cancel an existing contract and make a new one to complete the same work at a different rate of compensation, but it seems that it would be essential to its validity that there should be a valid cancellation of the original contract. Such was the case of Lattimore v. Harsen (14 Johns. 330)." Ruger, C. J., in Vanderbilt v. Schreyer, 91 N. Y. 392, 402 (1883).

"The parol promise, it is contended, was without consideration. This depends entirely upon the question whether the first contract was waived. The plaintiff having refused to perform that contract, as he might do, subjecting himself to such damages as the other parties might show they were entitled to recover, he afterwards went on upon the faith of the new promise and finished the work. This was a sufficient consideration. If Payne and Perkins [the defendants] were willing to accept his relinquishment of the old contract and proceed on a new agreement, the law, we think, would not prevent it." Per Curiam in Monroe v. Perkins, 9 Pick. (Mass.) 298, 305 (1830). Cf. Rollins v. Marsh, 128 Mass. 116 (1880).

"But calling an agreement an agreement for rescission does not do away with the necessity of consideration, and when the agreement for rescission is coupled with a further agreement that the work provided for in the earlier agreement shall be completed and that the other party shall give more than he originally promised, the total effect of the second agreement is that one party promises to do exactly what he had previously bound himself to do, and the other party promises to give an additional compensation therefor. If, [however], for a single moment the parties were free from the earlier contract so that each of them could refuse to enter into any bargain whatever relating to the same subject-matter, a subsequent agreement on any terms would be good." 1 Williston on Contracts, § 130a, p. 279.

On promises of additional compensation for completing an executory contract other than a contract for the payment of money, see 11 L. R. A. (N. S.) 789, note; 28 L. R. A. (N. S.) 450, note. See also 34 L. R. A. 33, note.

## DAVIS & CO. *v.* MORGAN.

**(Supreme Court of Georgia, 1903. 117 Ga. 504, 43 S. E. 732, 61 L. R. A. 148, 97 Am. St. Rep. 171.)**

LAMAR, J.* Davis & Co. employed Morgan for one year at $40 per month. After the contract had been in force for some time, Morgan received an offer of $65 per month from a company in Florida, and mentioned the fact to Davis, saying that of course he would not go without consent. Davis insists that he then said, if Morgan would stay out the balance of the term, and work satisfactorily, he would give him $120 at the end of the year. Morgan says that Davis stated "I will add $10 a month from the time you began, and owe you $120 when your time is up." Davis & Co. discharged Morgan two or three weeks before the end of the term, because the latter had gone to Florida for several days without their consent. Morgan insists that he told Davis that he was going, and the latter made no objection. He claimed that he was discharged without proper cause, and brought suit for the extra compensation promised. The jury found a verdict in his favor, and, the court having refused to grant a new trial, Davis & Co. excepted.

If the promise contemplated that Davis & Co. were to pay Morgan $10 per month for that part of the year which had already passed, and as to which there had been a settlement, it was manifestly *nudum pactum;* for a past transaction, the obligation of which has been fully satisfied, will not sustain a new promise. Gay v. Mott, 43 Ga. 254. And the result is practically the same whether Morgan or Davis was correct in the statement of the conversation. Both proved a promise to give more than was due, and to pay extra for what one was already legally bound to perform. The employer, therefore, received no consideration for his promise to give the additional money at the end of the year. Morgan had agreed to work for 12 months at the price promised, and if during the term he had agreed to receive less, the employer would still have been liable to pay him the full $40 per month. On the other hand, the employer could not be forced to pay more than the contract price. He got no more services than he had already contracted to receive, and according to an almost unbroken line of decisions the agreement to give more than was due was a *nudum pactum,* and void, as having no consideration to support the promise. The case is something like that of Bush v. Rawlins, 89 Ga. 117, 14 S. E. 886, where the landlord agreed to give the tenant certain property if he would pay his rent promptly; and it was held that such a promise was a gratuity, and void, as without consideration to support it. And see Tatum v. Morgan, 108 Ga. 336, 33 S. E. 940 (2); Civ. Code 1895, § 3735. It is also within the principle of Stilk v. Myrick, 2 Campbell, 317, where Lord Ellenborough held that an agreement to pay seamen extra for what they were bound by their articles to do was void. And so in Bartlett v. Wyman, 14 Johns. 260, a similar ruling was

*** The last sentence of the opinion is omitted.**

made in a case where a master agreed to give more wages if the seamen would not abandon the ship. See, also, Ayres v. C. R. I. Ry. Co., 52 Iowa, 478, 3 N. W. 522. There are cases holding that a new promise is binding where one of the parties to a contract refuses to perform, and, to save a loss, the innocent party agrees to pay more than the original contract price, if the actor will perform as originally agreed. Goebel v. Linn, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723. But even if that line of cases should not be disregarded as tending to encourage a breach of contract, they do not affect the rights of Morgan here, because he does not bring himself within their ruling. Had there been a rescission or formal cancellation (Vanderbilt v. Schreyer, 91 N. Y. 402) of the old contract by mutual consent, and if a new contract with new terms had been made; or if there had been any change in the hours, services, or character of work, or other consideration to support the promise to pay the increased wages it would have been enforceable. But, as it was, Morgan proved that Davis promised to pay more for the performance of the old contract than he had originally agreed. Such a promise was not binding.

It was argued that the moral obligation would support the promise here, and undoubtedly there are cases in which such consideration has been held to be sufficient. For example, that arising from the duty of a father to support his bastard child. Hargrove v. Freeman, 12 Ga. 342. At one time Lord Mansfield was quoted as having said that all promises deliberately made should be held binding, but Lord Denman, in Eastwood v. Kenyon, 11 Adol. & E. 438, attempts to show that this was either a misquotation, or that, if such a doctrine could have been deduced from whatever he said, the court had refused to follow it in Littlefield v. Shee, 2 Barn. & Ad. 811. The cases holding in conformity with Lord Mansfield's supposed statement, while set out in Hargrove v. Freeman, *supra*, are not adopted as law, because the court finally held that the principle to be adduced from the general current of authorities is that, for a moral obligation to constitute a sufficient consideration to support an express promise, it must be founded upon an antecedent valuable consideration, though respectable authority can be adduced on the other side. In an agreement by one partner to pay the other for extra work (Gray v. Hamil, 82 Ga. 375, 10 S. E. 205, 6 L. R. A. 72); in the promise by a landlord to refund to tenant's money paid by them for worthless fertilizer (Parrott v. Johnson, 61 Ga. 475); and in the agreement by a brother to account to a sister for her interest as an heir at law in land which he had improperly induced the father to convey (Brown v. Latham, 92 Ga. 280, 18 S. E. 421)—the court recognized that there was a moral obligation to support the promise, but in each of the cases there was something very close akin to a legal obligation or to a trust. In Pittman v. Elder, 76 Ga. 371, it was shown that an agreement to pay a debt barred by the statute of limitations, or discharged in bankruptcy, was not supported by what was formerly called a "moral obligation," but by the antecedent obligation; the new promise to pay amounting simply to a

waiver of the statute or of the discharge. Civ. Code 1895, § 3658, defines a good consideration to be such as is founded on natural duty and affection or "on a strong moral obligation." In the light of the authorities, however, the strong moral obligation here referred to seems to be one supported either by some antecedent legal obligation, though unenforceable at the time, or by some present equitable duty. The section, however, does not relate to the moral obligation which inheres in every promise. Austell v. Humphries, 99 Ga. 416, 27 S. E. 736. While all courts recognize the obligation arising from any undertaking, they are, from the necessity of the case, forced to hold that naked promises must depend for their performance solely upon the will of the promisor, and not upon the tribunals which are organized to perform the "duty of government to protect person and property," and in pursuance thereof to award money damages for breaches of contracts. Civ. Code 1895, § 5699. But they cannot enforce promises binding on the conscience, except in those cases where some pecuniary damage flows from the breach or where, in addition to the moral obligation, the promise is also supported by a consideration. When one receives a naked promise, and such promise is broken, he is no worse off than he was. He gave nothing for it, he has lost nothing by it, and on its breach he has suffered no damage cognizable by courts. No benefit accrued to him who made the promise, nor did any injury flow to him who received it. Such promises are not made within the scope of transactions intended to confer rights enforceable at law. They are lightly made, dictated by generosity, courtesy, or impulse, often by ruinous prodigality. To enforce them by a judgment in favor of those who gave nothing therefor would often bring such imperfect obligations into competition with the absolute duties to wife and children, or into competition with debts for property actually received, and make the law an instrument by which a man could be forced to be generous before he was just. * * *

*Judgment reversed.*[135]

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## JOHNSON'S ADMR. *v.* SELLERS' ADMR.

**(Supreme Court of Alabama, 1858. 33 Ala. 265.)**

Action on a verbal contract. Judgment for defendant. Plaintiff appeals.

WALKER, J.[136] * * * The 9th and 10th charges assert the proposition, that if Johnson contracted [with the Wilcox Female Institute at Camden, Ala.] to bring and associate his wife with him in teaching the school, and

[135] "A promise by a party to do what he is bound in law to do is not an illegal consideration, but is the same as no consideration at all, and is merely void; in other words, it is insufficient but not illegal." Kellogg, J., in Cobb v. Cowdery, 40 Vt. 25, 28 (1867).

[136] The statement of facts and parts of the opinion are omitted.

then refused to comply with the contract, a promise by Sellers [the defendant's intestate] to give him $2,500 in order to induce him to comply, would be without consideration. In our judgment, these charges are correct. Johnson, by his contract, was legally bound to bring his wife to teach in the school, if the contract was such as the charge supposes. He had no right to violate that contract, and compensate the injured party in damages. It is true, the law would not interpose to compel the performance of the contract; but this is not because he had a right to violate his contract, but because the law supposes the injury done by the violation of it can be sufficiently compensated in damages. A man may commit trespass, for which the law would merely give an action to recover damages; but it does not therefore follow that he had a right to commit the trespass, being responsible for the damages, or that a promise made him to induce him either to commit or not to commit it, would be valid. Renfro v. Heard, 14 Ala. 23.

If two parties make a contract, one of them may waive the performance of the contract by the other, and assume some new and additional obligation as the consideration of the performance by the other. Such obligation would be binding. Within this principle falls the cases of Stoudenmeier v. Williamson, 29 Ala. 558; Munroe v. Perkins, 9 Pick. 298; and Lattimore v. Hanson, 14 Johns. 330; also, Spangler v. Springer, 22 Penn. St. R. 454; Whiteside v. Jennings, 19 Ala. 784; Thomason v. Dill, 30 Ala. 444. These cases rest upon the ground, that it is competent for the parties to a contract to modify or rescind it, or to waive their right growing out of it as originally made, and engraft new terms upon it. Here, while there is a subsisting contract with the trustees, and a subsisting obligation to perform it, the proposition of the appellant is, that a promise by a third party to induce its performance, or rather to prevent its breach, was supported by a valid consideration. We do not think the law so regards such a promise.[187]

* * *

[187] In modern jurisprudential language the problem here dealt with is stated in Professor Arthur L. Corbin's edition of Anson on Contracts, p. 146, n., as follows:

"The weight of American authority is in favor of the view that the performance or promise to perform an existing contract with A. is not a good consideration for a promise by B. Johnson's Admr. v. Sellers Admr. (1858) 33 Ala. 265; Arend v. Smith (1897) 151 N. Y. 502; Robinson v. Jewett (1889), 116 N. Y. 40; Havana, etc. Co. v. Ashurst (1894), 148 Ill. 115; Reynolds v. Nugent (1865), 25 Ind. 328; Schuler v. Myton (1892), 48 Kan. 282; Putnam v. Woodbury (1878), 68 Me. 58; Sherwin v. Brigham (1893), 39 O. St. 137; Gordon v. Gordon (1875), 56 N. H. 170; Wimer v. Overseers (1883), 104 Pa. 317; Davenport v. First Cong. Soc. (1873), 33 Wis. 387; Hanks v. Barron (1895), 95 Tenn. 275.

"It appears to the present editor that both performance and a promise to perform ought to be held to be sufficient consideration. Such performance is an actual detriment, because it might be much more beneficial to break the contract with the third party and to risk payment of damages. But if this is a detriment that should not be recognized by the law on grounds of policy, still

The judgment of the court below is reversed, [however, for other reasons,] and the cause is

*Remanded.*[188]

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## SHERWOOD *v.* WOODWARD.

**(Court of Common Pleas, 1600. Cro. Eliz. 700.)**

Assumpsit. Whereas he sold to the defendant's son certain weights of cheese; the defendant, in consideration the plaintiff would deliver the said cheese to his said son, assumed, that if the son did not pay for them, then he would; and for non-payment the action was brought. Upon non-assumpsit pleaded, and found for the plaintiff, it was moved by Godfrey in arrest of judgment, that this was not any consideration; for it is no more than what the law appoints, to deliver that which he sold, the property

the performer was privileged to go to his other obligee and induce him to rescind the contract by mutual agreement. By performance he forbears to exercise his privilege, and destroys the power of offering a mutual rescission. Thus, the promisor gets the benefit of the performance, which was that for which he gave his promise; and the promisee has incurred some legal detriment in return for the promise and within the contemplation of the parties. It is immaterial that this detriment is not equivalent in amount with the benefit derived by the promisor. The New York Court of Appeals has adopted this view in the case of DeCicco v. Schweizer (1917), 117 N. E. 807, where the facts were almost exactly like those in Shadwell v. Shadwell, *supra*. In McDevitt v. Stokes (1917), 192 S. W. 681, the Kentucky Court of Appeals adhered to the generally prevailing rule.

"Where the contract is bilateral, it should be enforced for the same reasons that any other bilateral contract is enforced. Neither logic nor public policy invalidates those reasons where the consideration is a promise to perform in accordance with a pre-existing contract with a third person. Such a bilateral contract brings the contractor under two separate duties to the several promisees, none the less separate because one performance will discharge them both. A mutual rescission in the case of one would have no effect whatever upon the other.

"If A has contracted with B to do a thing, and then A promises C to do that same thing in return for an executed consideration on C's part, C can maintain an action on A's promise to him. This is a unilateral contract. It makes no difference whether A's promise is consideration for what C did. What C did is none the less consideration for A's promise.

"For a detailed discussion of this problem, see Arthur L. Corbin, 'Does a Pre-existing Duty Defeat Consideration?' (1918) 27 Yale Law Journal, 362."

In considering this specific contract problem, it is well to bear in mind also that teachers of jurisprudence are not agreed on the meaning of "privilege." Professor Corbin has accepted the Hohfeld terminology, but Professor Kocourek insists that Professor Hohfeld used the term "privilege" to include a variety of meanings. Albert Kocourek, The Hohfeld System of Fundamental Legal Concepts, 15 Illinois L. Rev. 24, 35 n. In reply see Arthur L. Corbin, Jural Relations and Their Classification, 30 Yale L. J. 226.

188 "In the case of Johnson, Admr. v. Sellers, 33 Ala. 265, it is said, 'a prom-

whereof is in the son by the sale. But Gawdy and Fenner held it to be a good consideration; for it is an ease to the bargainee to have them without suit, which peradventure otherwise he could not have had. And although the bargainee may take them in this case, the bargainor is not bound to deliver them; and there is a new act done by him upon this agreement, and it is an ease to the vendee; and 12 Hen. 7 is, that to deliver the goods of the party himself at another place, is a good accord. Wherefore, *caeteris justitiariis absentibus,* they adjudged it for the plaintiff.

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## BAGGE *v.* SLADE.

**(Court of King's Bench, 1614. 3 Bulstrode, 162.)**

Writ of error to reverse a judgment.

COKE, C. J. The case was this, two men were bound in a bond for the debt of a third man; the obligation being forfeited, so that they both of them were liable to pay this. The plaintiff here in this writ of error said to the other, "Pay you all the debt, and I will pay you the moiety of this again," the which he paid accordingly, and so made his request to have a repayment made to him of the moiety according to his promise, which to do he refused. Upon this he brought his action upon the case against the plaintiff upon his promise, and upon non assumpsit pleaded, he had a verdict and judgment, and upon this judgment a writ of error was brought. In this case and in the declaration there is a good consideration set forth, the party's own contract here shall bind him, he hath no remedy for the money paid, but when this is paid, here is good assumpsit grounded upon a good consideration for repayment of the moiety by the plaintiff.

HAUGHTON, J. Notwithstanding this contract he is still least in danger of the first bond.

COKE. I have never seen it otherwise, but when one draws money from another that this should be a good consideration to raise a promise.

DODDERIDGE, J. If the consideration puts the other to charge, though it be no ways at all profitable to him who made the promise, yet this shall be a good consideration to raise a promise.

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**ise by defendant to plaintiff made to induce the latter to comply with an existing contract between him and other persons is without consideration.' We are not disposed to depart from the rule as here stated, but we are not willing to extend it so that if the party making the second contract is directly interested in the result, and is to be benefited, he can not employ the same party for the protection of his own interest. If two persons are jointly indicted, and put upon trial, or if only one is upon trial, and either employs counsel to defend him, the fact that an acquittal of the one employing counsel must result in acquittal of the other, will not render a contract of employment [of the same counsel] by the latter null and void." Coleman, J., in Humes v. Decatur Land Improvement & Furnace Co., 98 Ala. 461, 473 (1893).**

Coke agreed with him herein: also if a man be bound to another by a bill in £1000 and he pays unto him £500 in discharge of this bill, the which he accepts of accordingly, and doth upon this assume and promise to deliver up unto him his said bill of £1000, this £500 is no satisfaction of the £1000. but yet this is good and sufficient to make a good promise, and upon a good consideration, because he hath paid money, £500, and he hath no remedy for this again.

Another matter was moved, that the entry of the judgment was not good, the same being in this manner, *Ideo consideratum fuit, adtunc, & ibidem hic ad eandem curiam, quod prædictus querens recuperet.*

The whole court agreed this judgment to be well entered, and that the consideration here is good, and sufficient to raise the promise, & accordingly the rule of the court was *quod judicium affirmetur.*[139]

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## STILK *v.* MYRICK.

**(Court of Common Pleas, 1809. 2 Camp. 317.)**

This was an action for seaman's wages, on a voyage from London to the Baltic and back.

By the ship's articles, executed before the commencement of the voyage, the plaintiff was to be paid at the rate of £5 a month; and the principal question in the cause was, whether he was entitled to a higher rate of wages. In the course of the voyage two of the seamen deserted, and the captain, having in vain attempted to supply their places at Cronstadt, there entered into an agreement with the rest of the crew, that they should have the wages of the two who had deserted equally divided among them if he could not procure two other hands at Gottenburgh. This was found impossible, and the ship was worked back to London by the plaintiff and eight more of the original crew, with whom the agreement had been made at Cronstadt.

LORD ELLENBOROUGH. I think Harris v. Watson was rightly decided; but I doubt whether the ground of public policy, upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported. Here, I say, the agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. If they had been at liberty to quit the vessel at Cronstadt, the case would have

139 "In considering this case [Bagge v. Slade] it should be remembered that in the absence of an express contract there was at this time no right of contribution for a surety either at law or in equity." James Barr Ames, Lectures on Legal History, p. 327.

been quite different; or if the captain had capriciously discharged the two men who were wanting, the others might not have been compelled to take the whole duty upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages. But the desertion of a part of the crew is to be considered an emergency of the voyage as much as their death, and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port. Therefore, without looking to the policy of this agreement, I think it is void for want of consideration, and that the plaintiff can only recover at the rate of £5 a month.

*Verdict accordingly.*

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## SHADWELL *v.* SHADWELL.

**(Court of Common Pleas, 1860. 30 L. J. C. P. 145.)**

The declaration stated that the testator, in his lifetime (in consideration that the plaintiff would marry Ellen Nicholl), agreed with and promised the plaintiff, who was then unmarried, in the terms contained in a writing in the form of a letter, addressed by the said testator to the plaintiff, which writing was and is in the words, letters, and figures following—that is to say:

**"Gray's Inn, August 11, 1838.**

**"My Dear Lancey: I am glad to hear of your intended marriage with Ellen Nicholl; and, as I promised to assist you at starting, I am happy to tell you that I will pay to you £150 yearly during my life, and until your annual income derived from your profession of a Chancery barrister shall amount to 600 guineas, of which your own admission will be the only evidence that I shall receive or require.**

**"Your ever affectionate uncle,**

**"Charles Shadwell."**

Averment that the plaintiff did all things necessary, and all things necessary happened, to entitle him to have the said testator pay to him eighteen of the said yearly sums of £150 each respectively, and that the time for the payment of each of the said eighteen yearly sums elapsed after he married the said Ellen Nicholl, and in the lifetime of the said testator, and that the plaintiff's annual income derived from his profession of a Chancery barrister never amounted to 600 guineas, which he was always ready and willing to admit and state to the said testator, and the said testator paid to the plaintiff twelve of the said eighteen yearly sums which first became payable, and part, to wit, £12 of the thirteenth; yet the said testator made default in paying the residue of the said thirteenth yearly sum, which residue is still in arrear and unpaid, and in paying the five of the said eighteen yearly sums which last became payable, and the said five sums are still in arrear and unpaid.

Fourth plea, that before and at the time of the making of the supposed agreement and promise in the declaration mentioned, the said marriage had been and was without any request by or on the part of the testator touching the said intended marriage, but at the request of the plaintiff, intended and agreed upon between the plaintiff and the said Ellen Nicholl, of which the testator before and at the time of making the supposed agreement and promise also had notice, and the said marriage was after the making of the supposed agreement and promise duly had and solemnized as in the declaration mentioned, at the request of the plaintiff, and without the request of the testator. And the defendants further say, that save and except as expressed and contained in the writing set forth in the declaration, there never was any consideration for the supposed agreement and promise in the declaration mentioned, or for the performance thereof.

Second replication to the fourth plea, that the said agreement declared on was made in writing, signed by the said testator, and was and is in the words, letters, and figures following, and in none other—that is to say [setting out the letter as in the declaration above]. Averment that the plaintiff afterward married the said Ellen Nicholl, relying on the said promise of the said testator, which at the time of the said marriage was in full force, not in any way vacated or revoked, and that he so married while his annual income derived from his profession of a Chancery barrister did not amount, and was not by him admitted to amount, to 600 guineas.

Demurrers to the replications to the fourth and fifth pleas.[140] Joinder in demurrer.

ERLE, C. J. The question raised by the demurrer to the replication to the fourth plea is, whether there was a consideration to support the action on the promise to pay an annuity of £150 per annum. If there be such a consideration it is a marriage; therefore the promise is within the Statute of Frauds, and the consideration must appear in the writing containing the promise—that is, in the letter of August 11th, 1838—and in the surrounding circumstances to be gathered therefrom, together with the averments on the record. The circumstances are that the plaintiff had made an engagement to marry Ellen Nicholl, his uncle promising to assist him at starting, by which, as I understand the words, he meant on commencing his married life. Then the letter containing the promise declared on is said to specify what the assistance would be—namely, £150 per annum during the uncle's life, and until the plaintiff's professional income should be acknowledged by him to exceed 600 guineas; and a further averment, that the plaintiff, relying upon his promise, without any revocation on the part of the uncle, did marry Ellen Nicholl. Then, do these facts show that the promise was in consideration, either of the loss to be sustained by the plaintiff, or the benefit to be derived from the plaintiff to the uncle at his, the

[140] The fifth plea and the replication to it are omitted, as Erle, C. J.'s opinion states the point raised by them sufficiently.

uncle's request? My answer is in the affirmative. First, do these facts show a loss sustained by the plaintiff at the uncle's request? When I answer this in the affirmative, I am aware that a man's marriage with the woman of his choice is in one sense a boon, and in that sense the reverse of a loss; yet, as between the plaintiff and the party promising an income to support the marriage, it may be a loss. The plaintiff may have made the most material changes in his position, and have induced the object of his affections to do the same, and have incurred pecuniary liabilities resulting in embarrassments, which would be in every sense a loss if the income which had been promised should be withheld; and if the promise was made in order to induce the parties to marry, the promise so made would be, in legal effect, a request to marry. Secondly, do these facts show a benefit derived from the plaintiff to the uncle at his request? In answering again in the affirmative, I am at liberty to consider the relation in which the parties stood, and the interest in the status of the nephew which the uncle declares. The marriage primarily affects the parties thereto; but in the second degree it may be an object of interest with a near relative, and in that sense a benefit to him. This benefit is also derived from the plaintiff at the uncle's request, if the promise of the annuity was intended as an inducement to the marriage; and the averment that the plaintiff, relying on the promise, married, is an averment that the promise was one inducement to the marriage. This is a consideration averred in the declaration, and it appears to me to be expressed in the letter, construed with the surrounding circumstances. No case bearing a strong analogy to the present was cited, but the importance of enforcing promises which have been made to induce parties to marry has been often recognized, and the cases of Montefiori v. Montefiori [1 W. Bl. 363] and Bold v. Hutchinson [20 Beav. 250] are examples. I do not feel it necessary to add anything about the numerous authorities referred to in the learned arguments addressed to us, because the decision turns on a question of fact, whether the consideration for the promise is proved as pleaded. I think it is, and therefore my judgment on the first demurrer is for the plaintiff. The second demurrer raises the question, whether the plaintiff's continuing at the bar was made a condition precedent to the right to the annuity. I think not. The uncle promises to continue the annuity until the professional income exceeds the sum mentioned, and I find no stipulation that the annuity shall cease if the professional diligence ceases. My judgment on this demurrer is also for the plaintiff, and I should state that this is the judgment of my Brother Keating and myself, my Brother Byles differing with us.

BYLES, J. I am of opinion that the defendant is entitled to the judgment of the court on the demurrer to the second replication to the fourth plea. It is alleged by the fourth plea that the defendant's testator never requested the plaintiff to enter into the engagement to marry, or to marry, and that there never was any consideration for the testator's promise, except what may be collected from the letter itself set out in the declaration. The

inquiry, therefore, narrows itself to this question, Does the letter itself disclose any consideration for the promise? The consideration relied on by the plaintiff's counsel being the subsequent marriage of the plaintiff, I think the letter discloses no consideration. It is in these words [his Lordship read it]. It is by no means clear that the words "at starting" mean "on marriage with Ellen Nichol," or with any one else. The more natural meaning seems to me to be "at starting in the profession," for it will be observed that these words are used by the testator in reciting a prior promise, made when the testator had not heard of the proposed marriage with Ellen Nicholl, or, so far as appears, heard of any proposed marriage. This construction is fortified by the consideration that the annuity is not, in terms, made to begin from the marriage, but, as it should seem, from the date of the letter. Neither is it in terms made defeasible if Ellen Nicholl should die before marriage. But even on the assumption that the words "at starting" mean "on marriage," I still think that no consideration appears sufficient to sustain the promise. The promise is one which, by law, must be in writing; and the fourth plea shows that no consideration or request, *dehors* the letter, existed, and, therefore, that no such consideration or request can be alluded to by the letter. Marriage of the plaintiff at the testator's express request would be, no doubt, an ample consideration, but marriage of the plaintiff without the testator's request is no consideration to the testator. It is true that marriage is, or may be a detriment to the plaintiff; but detriment to the plaintiff is not enough, unless it either be a benefit to the testator or be treated by the testator as such, by having been suffered at his request. Suppose a defendant to promise a plaintiff, "I will give you £500 if you break your leg," would that detriment to the plaintiff, should it happen, be any consideration? If it be said that such an accident is an involuntary mischief, would it have been a binding promise if the testator had said, "I will give you £100 a year while you continue in your present chambers"? I conceive that the promise would not be binding for want of a previous request by the testator. Now, the testator in the case before the court derived, so far as appears, no personal benefit from the marriage. The question, therefore, is still further narrowed to this point, Was the marriage at the testator's request? Express request there was none. Can any request be implied? The only words from which it can be contended that it is to be implied are the words, "I am glad to hear of your intended marriage with Ellen Nicholl." But it appears from the fourth plea that that marriage had already been agreed on, and that the testator knew it. These words, therefore, seem to me to import no more than the satisfaction of the testator at the engagement as an accomplished fact. No request can, as it seems to me, be inferred from them. And, further, how does it appear that the testator's implied request, if it could be implied, or his promise, if that promise alone would suffice, or both together, were intended to cause the marriage, or did cause it, so that the marriage can be said to have taken place at the testator's request, or, in other words, in

consequence of that request? It seems to me, not only that this does not appear, but that the contrary appears; for the plaintiff before the letter had already bound himself to marry by placing himself not only under a moral, but under a legal obligation to marry, and the testator knew it. The well-known cases which have been cited at the bar in support of the position that a promise based on the consideration of doing that which a man is already bound to do, is invalid, apply to this case; and it is not necessary, in order to invalidate the consideration, that the plaintiff's prior obligation to afford that consideration should have been an obligation to the defendant. It may have been an obligation to a third person. See Herring v. Dorell, 8 Dowl. P. C. 604, and Atkinson v. Settree, Willes, 482. The reason why the doing what a man is already bound to do is no consideration, is not only because such a consideration is in judgment of law of no value, but because a man can hardly be allowed to say that the prior legal obligation was not his determining motive. But whether he can be allowed to say so or not, the plaintiff does not say so here. He does, indeed, make an attempt to meet this difficulty by alleging, in the replication to the fourth plea, that he married relying on the testator's promise; but he shrinks from alleging that though he had promised to marry before the testator's promise to him, nevertheless, he would have broken his engagement, and would not have married without the testator's promise. A man may rely on encouragements to the performance of his duty who yet is prepared to do his duty without those encouragements. At the utmost, the allegation that he relied on the testator's promise seems to me to import no more than that he believed the testator would be as good as his word. It appears to me, for these reasons, that this letter is no more than a letter of kindness, creating no legal obligation. In their judgment on the other portions of the record I agree with the rest of the court.

*Judgment for the plaintiff.*[141]

[141] Using the Hohfeld concepts, Professor Corbin thus analyzes the case: "If there was a valid bilateral engagement between the nephew and Ellen Nichol, the only rights possessed by the former were a right against Ellen that she should marry him as agreed and an indefinite number of rights against third persons that they should not interfere with Ellen's performance as agreed. The nephew abandoned none of these rights. In addition to these rights, he had also the privilege of making an offer of rescission to Ellen and the legal power of creating in Ellen the power of rescission by making such an offer. Prior to his actual marriage to Ellen, he abandoned neither the privilege nor the power, although he forbore from acting in accordance with them. By the actual marriage, however, he utterly destroyed this legal power, for an offer of rescission subsequently made would be void of legal effect. The nephew also had the legal power of breaking his contract with Ellen, thereby substituting a secondary obligation for the primary one. The forbearance to act in accordance with that power is also a detriment and would be a sufficient consideration in itself, except for the fact that he was not, as to Ellen, legally privileged to break the contract." Corbin's Anson on Contracts, p. 145, n. 1.

Query as to a "*legal* power of breaking" a contract? On the question of the

## SCOTSON *v.* PEGG.

**(Court of Exchequer, 1861. 6 Hurlstone & Norman 295.)**

Declaration. For that in consideration that the plaintiffs, at the request of the defendant, would deliver to the defendant a certain cargo of coals, then on board a certain ship of the plaintiffs, the defendant to take the same from and out of the said ship, the defendant promised the plaintiffs to unload and discharge the same at the rate of 49 tons of the said coals during each working day, after the said ship was ready to unload and discharge the same. And although the plaintiffs did afterward deliver the said cargo to the defendant, and were always ready and willing to suffer and permit him to take the same from and out of the said ship as aforesaid, and although all things were done, and conditions precedent to be performed by the plaintiffs were performed by the plaintiffs, to entitle the plaintiffs to a performance of the said promise by the defendant: Yet the defendant did not unload and discharge the said cargo at the rate aforesaid during each working day after the said ship was ready to unload and discharge the same, and the defendant wholly neglected and refused so to do for five days longer and more than he ought to have done according to his said promise; and the plaintiffs were put to expense in and about the maintaining and keeping the master and crew of the said ship, etc.

Plea. That before the making of the said promise the plaintiffs, by another contract made by and between the plaintiffs and certain other persons, agreed with the said certain other persons, for certain freight therefore payable by the said other persons to the plaintiffs, to carry the said coals on a certain voyage in the said ship, and to deliver the said coals to the order of the said other persons, which contract was in full force thence, until, and at the time of the making of the said promise and the delivery of the said coals. And the defendant says that before the making of the said promise, and after the making the said other contract, and while the last-mentioned contract was in force, he bought the coals of the said other persons, who thereupon ordered the plaintiffs to deliver the same to the defendant, under and according to the said contract with the said other persons, of which the plaintiffs before the making of the said promise had notice. And the defendant says that the said order was in full force until and at the time of the making of the said promise, and thence until and at the delivery of the said coals, of which the plaintiffs always had notice. And the defendant says the then future delivery to the defendant of the said coals on the terms in the declaration mentioned, which was the consideration for the said promise, was the delivery of the said coals to the order of the said other persons, which the plaintiffs had by the said contract with such other persons so agreed to make as aforesaid, and which before and at the time of the making of the said promise, until and at the time of the said

**so-called legal "right," i. e., legal privilege to break a contract, see Professor Willard T. Barbour's note in 16 Mich L. Rev. 106.**

delivery, the plaintiffs were, by, under, and according to the said contract with the said other persons bound to make as aforesaid. And the defendant says that there never was any consideration for his said promise other than the doing of that which by the said contract with the said other persons they the plaintiffs, before and at the time of the making of the said promise, and thence until the plaintiffs did it, were bound to do.

Demurrer and joinder therein.

MARTIN, B.[142] I am of opinion that the plea is bad, both on principle and in law. It is bad in law because the ordinary rule is, that any act done whereby the contracting party receives a benefit is a good consideration for a promise by him. Here the benefit is the delivery of the coals to the defendant. * * * The defendant gets a benefit by the delivery of the coals to him, and it is immaterial that the plaintiffs had previously contracted with third parties to deliver to their order.

WILDE, B. I am also of opinion that the plaintiffs are entitled to judgment. The plaintiffs say, that in consideration that they would deliver to the defendant a cargo of coals from their ship, the defendant promised to discharge the cargo in a certain way. The defendant, in answer, says: "You made a previous contract with other persons that they should discharge the cargo in the same way, and therefore there is no consideration for my promise." But why is there no consideration? It is said, because the plaintiffs, in delivering the coals, are only performing that which they were already bound to do. But to say that there is no consideration is to say that it is not possible for one man to have an interest in the performance of a contract made by another. But if a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a promise should not be binding. Here the defendant, who was a stranger to the original contract, induced the plaintiffs to part with the cargo, which they might not otherwise have been willing to do, and the delivery of it to the defendant was a benefit to him. I accede to the proposition that, if a person contracts with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual. But there is no authority for the proposition that where there has been a promise to one person to do a certain thing, it is not possible to make a valid promise to another to do the same thing. Therefore, deciding this matter on principle, it is plain to my mind that the delivery of the coals to the defendant was a good consideration for his promise, although the plaintiffs had made a previous contract to deliver them to the order of other persons.

*Judgment for the plaintiffs.*[143]

[142] Part of the opinion of Martin B. is omitted.

[143] "A somewhat curious and important question here presents itself, which does not appear to have been well settled yet. If these services were in fact the very services which the plaintiffs were already bound to perform by virtue

## DE CICCO *v.* SCHWEIZER, ET AL.

(Court of Appeals of New York, 1917. 221 N. Y. 431, 117 N. E. 807, L. R. A. 1918E, 1004, Ann. Cas. 1918C, 816.)

Action by Attilio De Cicco against Joseph Schweizer and others. From a judgment of the Appellate Division, First Department (166 App. Div. 919, 152 N. Y. Supp. 1106), modifying and affirming a judgment of the trial term in favor of plaintiff, the defendant named appeals. Affirmed.

See, also, 176 App. Div. 679, 163 N. Y. Supp. 823.

of a subsisting contract with the State of Texas, were they capable of serving as the consideration for any promise by the defendant, notwithstanding they might result, and did result, in a benefit to him? We have examined several cases bearing upon this question. * * *

"The rule established by these authorities is, that a promise made in consideration of the doing of an act which the promisee is already under obligation to a third party to do, though made as an inducement to secure the doing of that act, is not binding because it is not supported by a valuable consideration. We conceive this to be clearly true when the act done on the part of the promisee involves nothing more than performance of the original obligation toward the party to whom it was due. On the other hand, if the promise be made in consideration of a promise to do that act, entered into directly with the promisor, as indicated by Mr. Pollock, or in consideration that some dispute is thereby determined, or that some right is waived, as suggested by the remarks of Martin, B., in Scotson v. Pegg, then the promise is binding, because not made in consideration of the performance of a subsisting obligation to another person, but upon a new consideration moving between the promisor and promisee. We do not perceive that Shadwell v. Shadwell or Scotson v. Pegg are opposed to this view; though some observations were thrown out by the learned judges during the argument which we cannot reconcile with it, and which we cannot assent to.

"We think that the consideration on which this defendant's promise to the plaintiffs is alleged to have been founded is governed by the rule which we have stated. It is claimed that the services rendered by the plaintiffs in the proceeding against Chiles, in the Supreme Court of the United States, were rendered at the request of the defendant, and constituted the consideration for his subsequent promise.

"But it appears that, at the time when they are said to have carried on these proceedings at his request, they had already been retained by and were under a legal obligation to the State of Texas to perform these services; and it is not shown that they promised the defendant that they would continue them, or that they were induced by defendant's request to determine any dispute as to their obligations, or to waive any claim. In a word, no other consideration for any promise by the defendant, than the performance of what they were legally bound to perform by a subsisting contract with another party, is shown; and the plaintiffs have shown, on the other hand, in their own behalf, that they actually did perform that act under their prior contract. We hold that these services could not serve as a consideration for any promise by the defendant, even if it had been made at the time of the request for their performance. It may be added that, even if they could serve this purpose, they are not shown by any evidence to have been, as a matter of fact, the consideration on which the promise here insisted on was based. What the consideration for a promise was is a matter of evidence, and this consideration is not shown

CARDOZO, J. On January 16, 1902, "articles of agreement" were executed by the defendant Joseph Schweizer, his wife, Ernestine, and Count Oberto Gulinelli. The agreement is in Italian. We quote from a translation the part essential to the decision of this controversy:

"Whereas, Miss Blanche Josephine Schweizer, daughter of said Mr. Joseph Schweizer and of said Mrs. Ernestine Teresa Schweizer, is now affianced to and

to have been referred to, or to have been in the minds of the parties. We know of no principle which would have authorized a jury to assume, in the absence of affirmative proof, that some past benefit, conferred at a party's request, was intended to serve as a reason or consideration of a subsequent promise, whose terms in no way referred to it, merely because it was an event which had once happened between the same parties. The antecedents of parties are not to be sifted for a consideration.

"Again, it should appear in some way that these services were in fact, rendered in consequence of defendant's request. If the plaintiffs were already bound by their contract with another party to perform them, and were actually performing them at the time of defendant's request; in other words, if they were already moved by a sufficient legal cause, the mere fact of a request by a new party is not evidence that they were caused by that request; and this record discloses no other affirmative evidence tending to show that the plaintiffs did, in fact, act upon that request. Indeed, by showing, in their own behalf, that they obtained judgment against Chiles under their contract with the State of Texas (Rec. 15), they have shown that they did not act upon defendant's request." James, J., in Merrick v. Giddings, 1 Mackey, 394, 406, 410-412 (1882).

"Without dwelling further on the reasons for the doctrine, it seems to us better to hold, as a general rule, that if A, has refused or hesitated to perform an agreement with B., and is requested to do so by C., who will derive a benefit from such performance, and who promises to pay him a certain sum therefor, and A. thereupon undertakes to do it, the performance by A. of his agreement in consequence of such request and promise by C. is a good consideration to support C.'s promise." Allen, J., in Abbott v. Doane, 163 Mass. 433, 436 (1895). If, however, there is no refusal to go on, it seems that in Massachusetts there is no consideration. Parrot v. Mexican Cent. Rwy. Co., 207 Mass. 184 (1911). "As a general proposition, it is settled in this commonwealth that a promise to pay one for doing that which he was under a prior legal duty to do is not binding for want of a valid consideration. * * * A limitation of the general proposition has been established in Massachusetts, in cases where a plaintiff, having entered into a contract with the defendant to do certain work, refuses to proceed with it, and the defendant, in order to secure to himself the actual performance of the work in place of a right to collect damages from the plaintiff, promises to pay him an additional sum. * * * While it [this limitation] is well established in Massachusetts, the doctrine should not be extended beyond the cases to which it is applicable upon the recognized reasons that have been given for it." Knowlton, C. J., in Parrot v. Mexican Central Railway, 207 Mass. 184, 194-195 (1911).

But Massachusetts does not distinguish between doing and promising to do. See Swartzman v. Babcock, 218 Mass. 334 (1914), where the contract was unilateral. Indeed, Professor Williston calls Merrick v. Giddings, quoted, *supra*, the "single exception" to the statement that "no distinction is taken in the cases, English or American, between actual performance and a promise to perform an existing duty in respect of the validity of the consideration." 1 Williston on Contracts, § 131, pp. 283-284 and note 31.

is to be married to the above said Count Oberto Giacomo Giovanni Francesco Maria Gulinelli: Now in consideration of all that is herein set forth the said Mr. Joseph Schweizer promises and expressly agrees by the present contract to pay annually to his said daughter Blanche, during his own life and to send her, during her lifetime, the sum of two thousand five hundred dollars, or the equivalent of said sum in francs, the first payment of said amount to be made on the 20th day of January, 1902."

Later articles provided that "for the same reason heretofore set forth," Mr. Schweizer will not change the provision made in his will for the benefit of his daughter and her issue, if any. The yearly payments in the event of his death are to be continued by his wife.

On January 20, 1902, the marriage occurred. On the same day, the defendant made the first payment to his daughter. He continued the payments annually till 1912. This action is brought to recover the installment of that year. The plaintiff holds an assignment executed by the daughter, in which her husband joined. The question is whether there is any consideration for the promised annuity. That marriage may be a sufficient consideration is not disputed.[144] The argument for the defendant is, however, that Count Gulinelli was already affianced to Miss Schweizer, and that the marriage was merely the fulfillment of an existing legal duty. For this reason, it is insisted, consideration was lacking. The argument leads us to the discussion of a vexed problem of the law which has been debated by courts and writers with much subtlety of reasoning and little harmony of results. There is general acceptance of the proposition that where A. is under a contract with B., a promise made by one to the other to induce performance is void. The trouble comes when the promise to induce performance is made by C., a stranger. Distinctions are then drawn between bilateral and unilateral contracts; between a promise by C. in return for a new promise by A., and a promise by C. in return for performance by A. Some jurists hold that there is consideration in both classes of cases. Ames, Two Theo-

[144] In Prewitt v. Wilson, 103 U. S. 22, 24 (1880), Field, J., said: "Now, marriage is not only a valuable consideration, but, as Coke says, there is no other consideration so much respected in the law. Bishop justly observes that 'marriage is attended and followed by pecuniary consequences; by happiness or misery to the parties; by life to unborn children; by unquiet or repose to the state; by what money ordinarily buys and by what no money can buy, to an extent which cannot be estimated or expressed, except by the word infinite. To say, therefore, that it is to be regarded, where it is the inducement to any contract, as a valuable consideration, is to utter truth, yet only a part of the truth.' And, also, that 'marriage is to be ranked among the valuable considerations, yet it is distinguishable from most of these in not being deducible to a value which can be expressed in dollars and cents, while still it is in general terms of the very highest value.' Law of Married Women, §§ 775, 776. Such is the purport and language running through all the decisions, both in England and in this country, with reference to marriage as a consideration for an antenuptial settlement. Barrow v. Barrow, 2 Dick. 504; Nairn v. Prowse, 6 Ves. 752; Campion v. Cotton, 17 Ves. 264; Sterry v. Arden, 1 Johns. Ch. (N. Y.) 261; Herring v. Wickham, 29 Grat. (Va.) 628." See Gurvin v. Cromartie, 11 Ired. L. (N. C.) 174 (1850). See also 50 Am. Dec. 372, note.

ries of Consideration, 12 Harvard Law Review, 515; 13 Harvard Law Review, 29, 35; Langdell, Mutual Promises as a Consideration, 14 Harvard Law Review, 496; Leake, Contracts, p. 622. Others hold that there is consideration where the promise is made for a new promise, but not where it is made for performance. Beale, Notes on Consideration, 17 Harvard Law Review, 71; 2 Street, Foundations of Legal Liability, pp. 114, 116; Pollock, Contracts (8th Ed.) 199; Pollock, Afterthoughts on Consideration, 17 Law Quarterly Review, 415; 7 Halsbury, Laws of England. Contracts, p. 385; Abbott v. Doane, 163 Mass. 433, 40 N. E. 197, 34 L. R. A. 33, 47 Am. St. Rep. 465. Others hold that there is no consideration in either class of cases. Williston, Successive Promises of the Same Performance, 8 Harvard Law Review, 27, 34; Consideration in Bilateral Contracts, 27 Harvard Law Review, 503, 521; Anson on Contracts (11th Ed.) p. 92.

The storm center about which this controversy has raged is the case of Shadwell v. Shadwell, 9 C. B. (N. S.) 159; 99 E. C. L. 158, which arose out of a situation similar in many features to the one before us. Nearly everything that has been written on the subject has been a commentary on that decision. There an uncle promised to pay his nephew after marriage an annuity of £150. At the time of the promise the nephew was already engaged. The case was heard before Erle, Ch. J., and Keating and Byles, JJ. The first two judges held the promise to be enforceable. Byles, J., dissented. His view was that the nephew, being already affianced, had incurred no detriment upon the faith of the promise, and hence that consideration was lacking. Neither of the two opinions in Shadwell v. Shadwell can rule the case at bar. There are elements of difference in the two cases which raise new problems. But the earlier case, with the literature which it has engendered, gives us a point of departure and a method of approach.

The courts of this state are committed to the view that a promise by A. to B. to induce him not to break his contract with C. is void. Arend v. Smith, 151 N. Y. 502, 45 N. E. 872; Vanderbilt v. Schreyer, 91 N. Y. 392; Seybolt v. N. Y., L. E. & W. R. R. Co., 95 N. Y. 562, 47 Am. Rep. 75; Robinson v. Jewett, 116 N. Y. 40, 22 N. E. 224. If that is the true nature of this promise, there was no consideration. We have never held, however, that a like infirmity attaches to a promise by A., not merely to B., but to B. and C. jointly, to induce them not to rescind or modify a contract which they are free to abandon. To determine whether that is in substance the promise before us, there is need of closer analysis.

The defendant's contract, if it be one, is not bilateral. It is unilateral. Miller v. McKenzie, 95 N. Y. 575, 47 Am. Rep. 85. The consideration exacted is not a promise, but an act. The count did not promise anything. In effect the defendant said to him: If you and my daughter marry, I will pay her an annuity for life. Until marriage occurred, the defendant was not bound. It would not have been enough that the count remained willing to marry. The plain import of the contract is that his bride also should be willing, and that marriage should follow. The promise was intended to

affect the conduct, not of one only, but of both. This becomes the more evident when we recall that though the promise ran to the count, it was intended for the benefit of the daughter. Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49. When it came to her knowledge, she had the right to adopt and enforce it. Gifford v. Corrigan, 117 N. Y. 257, 22 N. E. 756, 6 L. R. A. 610, 15 Am. St. Rep. 508; Buchanan v. Tilden, 158 N. Y. 109, 52 N. E. 724, 44 L. R. A. 170, 70 Am. St. Rep. 454; Lawrence v. Fox, 20 N. Y. 268. In doing so, she made herself a party to the contract. Gifford v. Corrigan, *supra*. If the contract had been bilateral, her position might have been different. Since, however, it was unilateral, the consideration being performance (Miller v. McKenzie, *supra*), action on the faith of it put her in the same position as if she had been in form the promisee. That she learned of the promise before the marriage is a legitimate inference from the relation of the parties and from other attendant circumstances. The writing was signed by her parents; it was delivered to her intended husband; it was made four days before the marriage; it called for a payment on the day of the marriage; and on that day payment was made, and made to her. From all these circumstances, we may infer that at the time of the marriage the promise was known to the bride as well as the husband, and that both acted upon the faith of it.

The situation, therefore, is the same in substance as if the promise had run to husband and wife alike, and had been intended to induce performance by both. They were free by common consent to terminate their engagement or to postpone the marriage. If they forbore from exercising that right and assumed the responsibilities of marriage in reliance on the defendant's promise, he may not now retract it. The distinction between a promise by A. to B. to induce him not to break his contract with C., and a like promise to induce him not to join with C. in a voluntary rescission, is not a new one. It has been suggested in cases where the new promise ran to B. solely, and not to B. and C. jointly. Pollock, Contracts (8th Ed.) p. 199; Williston, 8 Harv. L. Rev. 36. The criticism has been made that in such circumstances there ought to be some evidence that C. was ready to withdraw. Williston, *supra*, pp. 36, 37. Whether that is true of contracts to marry is not certain. Many elements foreign to the ordinary business contract enter into such engagements. It does not seem a far-fetched assumption in such cases that one will release where the other has repented. We shall assume, however, that the criticism is valid where the promise is intended as an inducement to only one of the two parties to the contract. It may then be sheer speculation to say that the other party could have been persuaded to rescind. But where the promise is held out as an inducement to both parties alike, there are new and different implications. One does not commonly apply pressure to coerce the will and action of those who are anxious to proceed. The attempt to sway their conduct by new inducements is an implied admission that both may waiver; that one equally with the other must be strengthened and persuaded; and that rescission or at

least delay is something to be averted, and something, therefore, within the range of not unreasonable expectation. If pressure, applied to both, and holding both to their course, is not the purpose of the promise, it is at least the natural tendency and the probable result.

The defendant knew that a man and a woman were assuming the responsibilities of wedlock in the belief that adequate provision had been made for the woman and for future offspring. He offered this inducement to both while they were free to retract or to delay. That they neither retracted nor delayed is certain. It is not to be expected that they should lay bare all the motives and promptings, some avowed and conscious, others perhaps half-conscious and inarticulate, which swayed their conduct. It is enough that the natural consequence of the defendant's promise was to induce them to put the thought of rescission or delay aside. From that moment, there was no longer a real alternative. There was no longer what philosophers call a "living" option. This in itself permits the inference of detriment. Smith v. Chadwick, 9 App. Cas. 187, 196; Smith v. Land & House Corp., 28 Ch. D. 7, 16; Voorhis v. Olmstead, 66 N. Y. 113, 118; Fottler v. Moseley, 179 Mass. 295, 60 N. E. 788. "If it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into the contract, it is a fair inference of fact that he was induced to do so by the statement." Blackburn, L. J., in Smith v. Chadwick, *supra*. The same inference follows, not so inevitably, but still legitimately, where the statement is made to induce the preservation of a contract. It will not do to divert the minds of others from a given line of conduct, and then to urge that because of the diversion the opportunity has gone by to say how their minds would otherwise have acted. If the tendency of the promise is to induce them to persevere, reliance and detriment may be inferred from the mere fact of performance. The springs of conduct are subtle and varied. One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others.

One other line of argument must be considered. The suggestion is made that the defendant's promise was not made *animo contrahendi*. It was not designed, we are told, to sway the conduct of any one; it was merely the offer of a gift which found its motive in the engagement of the daughter to the count. Undoubtedly, the prospective marriage is not to be deemed a consideration for the promise "unless the parties have dealt with it on that footing." Holmes, Common Law, p. 292; Fire Ins. Ass'n v. Wickham, 141 U. S. 564, 579, 12 Sup. Ct. 84 (35 L. Ed. 860). "Nothing is consideration that is not regarded as such by both parties." Philpot v. Gruninger, 14 Wall. 570, 577 (20 L. Ed. 743); Fire Ins. Ass'n v. Wickham, *supra*. But here the very formality of the agreement suggests a purpose to effect the legal relations of the signers. One does not commonly pledge one's self to generosity in the language of a covenant. That the parties believed there

was a consideration is certain. The document recites the engagement and the coming marriage. It states that these are the "consideration" for the promise. The failure to marry would have made the promise ineffective. In these circumstances we cannot say that the promise was not intended to control the conduct of those whom it was designed to benefit. Certainly we cannot draw that inference as one of law. Both sides moved for the direction of a verdict, and the trial judge became by consent the trier of the facts. If conflicting inferences were possible, he chose those favorable to the plaintiff.

The conclusion to which we are thus led is reinforced by those considerations of public policy which cluster about contracts that touch the marriage relation. The law favors marriage settlements, and seeks to uphold them. It puts them for many purposes in a class by themselves. Phalen v. U. S. Trust Co., 186 N. Y. 178, 181, 78 N. E. 943, 7 L. R. A. (N. S.) 734, 9 Ann. Cas. 595. It has enforced them at times where consideration, if present at all, has been dependent upon doubtful inference. McNutt v. McNutt, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372; Appleby v. Appleby, 100 Minn. 408, 111 N. W. 305, 10 L. R. A. (N. S.) 590, 117 Am. St Rep. 709, 10 Ann. Cas. 563. It strains, if need be, to the uttermost the interpretation of equivocal words and conduct in the effort to hold men to the honorable fulfillment of engagements designed to influence in their deepest relations the lives of others.

The judgment should be affirmed with costs.

CRANE, J.[145] (concurring). I concur for affirmance and agree with what Judge Cardozo has said about the law of consideration, but I prefer other reasons for my conclusions in this case.

Marriage settlements are usually made between husband and wife; but marriage settlements by third parties have been recognized by law. Schouler's Dom. Rel. (5th Ed.) § 178; Phalen v. U. S. Trust Co., 186 N. Y. 178, 78 N. E. 943, 7 L. R. A. (N. S.) 734, 9 Ann. Cas. 595. The policy of the law to uphold and enforce such contracts is applicable to both classes. * * *

The only reasonable inference to be drawn from these facts is that this agreement was a marriage settlement made by the father upon his daughter in view of the impending marriage and to take effect upon the marriage. The marriage having taken place, the settlement became binding. In the Phalen Case, *supra*, it was said by this court:

"The strict legal definition of consideration need not here be discussed, since marriage settlements have always been regarded as exceptions to the general rule upon this question." At page 186 of 186 N. Y. at page 946 of 78 N. E. (7 L. R. A. [N. S.] 734, 9 Ann. Cas. 595).

If, however, consideration were necessary for this marriage settlement, the marriage was that consideration. * * *

[145] Parts of the opinion of Crane, J., are omitted.

Romilly's words in Laver v. Fielder, *supra,* [32 Beav. 1] are pertinent here:

"It is of great importance that all persons should understand, that when a man makes a solemn engagement upon an important occasion, such as the marriage of his daughter, he is bound by the promise he then makes. If he induce a person to act upon a particular promise, with a particular view, which affects the interests in life of his own children and of the persons who become united to them, this court will not permit him afterwards to forego his own words, and say that he was not bound by what he then promised."

The trial court to whom all the facts were submitted was justified in finding that this agreement was a marriage settlement by a father upon his daughter, and that it influenced or induced the parties, at least in part, to marry at the time they did, and was therefore a legal agreement.

*Judgment affirmed.*[146]

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## McDEVITT *v.* STOKES.

**(Court of Appeals of Kentucky, 1917. 174 Ky. 515, 192 S. W. 681.)**

Action by Mike McDevitt against W. E. D. Stokes. Defendant's demurrer to complaint was sustained, and plaintiff appeals. Affirmed.

SETTLE, C. J.[147] In this action instituted by the appellant Mike McDevitt, in the court below he sought to recover of the appellee, W. E. D. Stokes, the sum of $800 alleged to be the balance due him of a $1,000 claim which appellee agreed to pay him in the event he won with a mare called "Grace," to be driven by him, the celebrated Kentucky Futurity race of the Kentucky Trotting Horse Breeders' Association at Lexington in October, 1910. In the opinion of the Circuit Court the facts alleged in the petition did not show a sufficient consideration to support the agreement on the part of appellee to pay the $1,000, for which reason the general demurrer filed by the latter to the petition was sustained. The appellant declining to

[146] See Arthur L. Corbin, Does a Pre-existing Duty Defeat Consideration? 27 Yale L. J. 362. See also, Clarence D. Ashley, The Doctrine of Consideration, 26 Harv. L. Rev. 429; Henry W. Ballantine, Is the Doctrine of Consideration Senseless and Illogical? 11 Mich. L. Rev. 423, and Mutuality and Consideration, 28 Harv. L. Rev. 121; Edmund M. Morgan, Benefit to the Promisor as Consideration for a Second Promise for the Same Act, 1 Minn. L. Rev. 383, in addition to the articles cited in the principal case.

Of De Cicco v. Schweizer, it is said in 31 H. L. R. 652-3:

"An act which the promisee is legally bound to perform is not valid consideration for the promise of a third person. * * * However, in the present case the act called for, marriage, was the joint act of the promisee and beneficiary. Although each was bound to the other, together they were not bound to anyone. In marrying, they performed an act which no one had a legal right to call upon them to do, and which, therefore, was good consideration."

[147] Parts of the opinion are omitted.

plead further, the petition was dismissed, and from the judgment entered in conformity to these rulings he prosecutes this appeal.

The facts constituting appellant's cause of action, fully set forth in the petition, are substantially as follows: At the trotting meeting of the Kentucky Trotting Horse Breeders Association, held at the city of Lexington in October, 1910, the mare Grace, owned by one Shaw, was entered in the Kentucky Futurity race to be driven by the appellant, McDevitt, a driver of great skill and experience, who was then in Shaw's employ. The Kentucky Futurity race is one of the most noted races among trotting horsemen in the United States, and the winning of it greatly increases the value of the winning horse and also the value of the sire, dam, and brothers and sisters of the winner. The purse offered in the race in question was $14,000, to be divided as follows: To the winner $10,000; to the second horse, $2,000; to the third horse $1,000; to the fourth horse $500; to the owner of the dam of the winner $300; to the owner of the dam of the second horse $100; to the owner of the dam of the third horse $75; to the owner of the dam of the fourth horse $25. At the time this race occurred, and for some years prior thereto, the appellee, Stokes, controlled and managed a large stock farm near Lexington, together with a number of valuable race horses, bred and reared thereon, and had formed for operating the business a corporation known as the "Patchen Wilkes Stock Farm," of which he owns practically all the stock and is the president and manager. Among the horses then owned by this corporation was Peter the Great, the sire of the mare Grace, Orianna, her dam, Vladimir, a yearling, and Kilpatrick, a colt, her full-brothers. As appellee named the mare Orianna as the dam of Grace, entered to win the Kentucky Futurity race, he, or the corporation of which he is president, was entitled, in the event of the latter's winning it, to receive $300 out of the purse of $14,000, going to the winner. In addition, the value of each of the four horses, Peter the Great, Orianna, Vladimir and Kilpatrick, owned by the corporation of which he is president, would be greatly increased by Grace winning the race. It is alleged in the petition that, influenced by the foregoing considerations, appellee agreed to pay appellant the sum of $1,000 if he would drive and win the Kentucky Futurity with the mare Grace, to which the latter agreed; drove the mare and won the race; that by reason thereof appellee, or the corporation of which he is president, received, of the $14,000 purse won $300, as owner of Orianna, the dam of Grace, and the value of Peter the Great, the sire of Grace, was increased $10,000, that of Orianna, her dam, $5,000, and that of Vladimir and Kilpatrick, her brothers, $5,000 each.

It is insisted for appellant that the above-enumerated benefits received by appellee from the winning of the trotting race by the mare Grace, which resulted in large measure from his skill in driving her, constitutes a sufficient consideration for the promise and undertaking of appellee to pay him the $1,000. This contention ignores consideration of another element of the alleged contract between the parties which, in our minds, is conclusive of

its invalidity, viz. that appellant, because of his employment by Shaw, the owner of the mare Grace, was already both morally and legally bound to perform the service required of him by the alleged contract he made with appellee; hence its performance, as legally required by his contract with Shaw, would inevitably have resulted in the benefits received by appellee, in the absence of the alleged contract made by the latter to pay therefor. To hold that appellant would not have won the race with Grace but for the agreement of appellee to pay him the $1,000 if he would do so, would be to say that he would have been recreant to the obligation arising out of his employment by Shaw, an inference not justified by anything appearing in the petition.

We find no fault with the argument of appellant's counsel that a consideration which is either of benefit to the promisor or detriment to the promisee will be regarded sufficient to uphold the contract between the parties; nor are we inclined to depart from any principle announced in the cases of Talbott v. Stemmons, 10 Ky. Law Rep. 33, Ryan v. Tribble, 60 S. W. 633, 22 Ky. Law Rep. 1447, Moayon v. Moayon, 114 Ky. 864, 72 S. W. 33, 24 Ky. Law Rep. 1641, 60 L. R. A. 415, 102 Am. St. Rep. 303, Van Winkle v. King, 145 Ky. 693, 141 S. W. 46, First State Bank, etc., v. Morton, 146 Ky. 293, 142 S. W. 694, and Shadwick v. Smith, 147 Ky. 160, 143 S. W. 1027, relied on in the brief of counsel. The contracts discussed and passed on in those cases rest upon no such facts as are presented by the contract in the instant case, nor do they, or any of them, conflict with the conclusions at which we have arrived.

It will be found from an examination of those cases that the benefit resulting to the promisor, constituting the consideration of the contract, was some legal right acquired of the promisee by the promisor to which he would not otherwise have been entitled, or that the detriment resulting to the promisee, constituting the consideration of the contract, was the waiver or loss of some legal right in return for the promise he would otherwise have availed himself of. Our meaning will be better explained by the following excerpt from Page on Contracts, vol. 1, § 274, in which the author, in discussing the meaning of the words "valuable consideration," says:

"The use of 'benefit' and 'detriment' in this connection needs explanation. While correct if properly understood, it is liable to misconstruction. 'Benefit' does not refer to any pecuniary gain arising out of the transaction, nor 'detriment' to any pecuniary loss. It is not possible to wait until the transaction is concluded and the books balanced to see whether the consideration existed originally. 'Benefit' as used in this rule means that the promisor has, in return for a promise, acquired some legal right to which he would not otherwise have been entitled; 'detriment' means that the promisee has, in return for the promise, forborne some legal right which he would otherwise have been entitled to exercise." * * *

The controlling feature which distinguishes the instant case from those *supra*, relied on by appellant's counsel, is that what the appellant claims

he undertook to do in return for the appellee's promise to pay him the $1,000, was a thing or act he was already under a legal obligation to perform regardless of the promise made by the appellee. * * *

In Eblin v. Miller's Executor, *supra,* [78 Ky. 371] the distinction between an actual benefit and a legal benefit is aptly shown. Eblin, a tenant of Miller, having complained to him that a stairway of the leased premises was out of repair and threatened to surrender his lease and abandon the premises before the end of the term, unless Miller would repair the stairway, the latter promised him, if he would continue as his tenant to the end of the term, he (Miller) would have the stairway repaired, which he did. After the making of the repairs, however, Eblin, on account of the giving way of the banisters, fell from the stairway and was injured. After the death of Miller, Eblin brought suit against his executors to recover damages for the injuries caused by his fall from the stairway, alleging in the petition that his injuries resulted from the negligent manner in which the stairway was repaired by Miller. In the absence of a contract to repair the leased premises the law imposes no duty upon the landlord to repair the same. As no such contract was made between Eblin and Miller before or when the former began his tenancy, he was bound, as tenant, to retain possession of the premises during the term, whether the landlord made needed repairs thereon or not, but the only promise on the part of Miller to make repairs was after the beginning of the term, and based alone on the agreement of the tenant to relinquish his expressed purpose to abandon them before the end of his term. Upon the state of case presented, it was held: (1) A mere promise by a landlord to repair the demised premises before the tenant's term expires, upon the agreement that he will not abandon the property, is without consideration, and cannot be enforced. (2) As the tenant was bound to retain possession of the premises for the current month, without an agreement to continue his tenancy for a longer time, the case fell within the rule stated. (3) That the landlord agreed to have repairs made by a person regularly employed by him to repair his houses, and that this person did the work unskillfully, did not aid the petition without an averment that he was unskillful; the agreement being gratuitous.

It is apparent from the facts alleged in the petition and the application to them of the principle announced by the authorities, *supra,* that the petition fails to state a cause of action against appellee. The latter was, it is true, benefited by the winning of the Kentucky Futurity purse by the mare Grace, driven by appellant, but the benefit was purely incidental and one to which he was entitled regardless of appellant's undertaking with him to win the race or of his, appellee's, promise to pay him the $1,000 if he would do so. As appellant under his contract with his employer, Shaw, was in duty bound to do what he claims appellee agreed to pay him to perform, it is evident that he neither assumed any added responsibility nor sustained any loss by reason of his undertaking with appellee that he would

cause the mare Grace to win the race; and no liability was legally imposed upon appellee by his promise to pay him for the service rendered.

This concluson makes it unnecessary for us to decide whether the contract was contrary to public policy; hence that question is not passed on. It follows from what has been said that the action of the Circuit Court in sustaining the demurrer was not error. Wherefore the judgment is

*Affirmed.*[148]

[148] In Lingenfelder v. Wainwright Brewing Co., 103 Mo. 578 (1890), a superintending architect refused to perform his contract to superintend the construction of certain brewery buildings because the defendant ordered a refrigerator plant from a competitor of a refrigerating company of which the architect was president. The employer then offered him five per cent of the cost of the ice machine ordered if he would resume work. The architect accepted the offer and fulfilled the duties of superintending architect through the completion of the buildings, and then his executor sued for the promised five per cent. In denying him a recovery, Gantt, P. J., for the court, said:

"It is urged upon us by respondents that this was a new contract. New in what? Jungenfeld [the architect] was bound by his contract to design and supervise this building. Under the new promise he was not to do anything more or anything different. What benefit was to accrue to Wainwright? He was to receive the same service from Jungenfeld under the new that Jungenfeld was bound to tender under the original contract. What loss, trouble, or inconvenience could result to Jungenfeld that he had not already assumed? No amount of metaphysical reasoning can change the plain fact that Jungenfeld took advantage of Wainwright's necessities, and extorted the promise of five per cent on the refrigerator plant, as the condition of his complying with his contract already entered into. Nor had he even the flimsy pretext that Wainwright had violated any of the conditions of the contract on his part. Jungenfeld himself put it upon the simple proposition that, 'if he, as an architect, put up the brewery, and another company put up the refrigerating machinery, it would be a detriment to the Empire Refrigerating Company' of which Jungenfeld was president. To permit plaintiff to recover under such circumstances would be to offer a premium upon bad faith, and invite men to violate their most sacred contracts that they may profit by their own wrong.

" 'That a promise to pay a man for doing that which he is already under contract to do is without consideration,' is conceded by respondents. * * * The learned counsel for respondents do not controvert the general proposition. Their contention is, and the circuit court agreed with them, that, when Jungenfeld declined to go further on his contract, the defendant then had the right to sue for damages, and not having elected to sue Jungenfeld, but having acceded to his demand for the additional compensation, defendant cannot now be heard to say his promise is without consideration. While it is true Jungenfeld became liable in damages for the obvious breach of his contract, we do not think it follows that defendant is estopped from showing its promise was made without consideration.

"It is true that as eminent a jurist as Judge Cooley, in Goebel v. Linn, 47 Michigan 489, held that an ice company which had agreed to furnish a brewery with all the ice they might need for their business from November 8, 1879, until January 1, 1881, at $1.75 per ton, and afterwards in May, 1880, declined to deliver any more ice unless the brewery would give it $3 per ton, could recover on a promissory note given for the increased price. Profound as is our respect for the distinguished judge who delivered that opinion, we are

## W. K. MORRISON CO. *v.* SLONZYNSKI, ET AL.

(Supreme Court of Minnesota, 1920. 145 Minn. 485, 175 N. W. 992.)

Action to foreclose a mechanic's lien by W. K. Morrison Company against Minnie Slonzynski and others. Judgment for plaintiff, and defendant Minnie Slonzynski appeals. Affirmed.

PER CURIAM. The undisputed evidence, in this action to foreclose a

still of the opinion that his decision is not in accord with the almost universally accepted doctrine and is not convincing, and certainly so much of the opinion as holds that the payment by a debtor of a part of his debt then due would constitute a defense to a suit for the remainder is not the law of this state, nor do we think of any other where the common law prevails.

"The case of Bishop v. Busse, 69 Ill. 403, is really distinguishable from the case at bar. The price of brick increased very considerably, and the owner changed the plan of the building, so as to require nearly double the number; owing to the increased price and change in the plans, the contractor notified the party for whom he was building, that he could not complete the house at the original prices, and, thereupon, a new arrangement was made, and it is expressly upheld by the court on the ground that the change in the buildings was such a modification as necessitated a new contract. Nothing we have said is intended as denying parties the right to modify their contracts, or make new contracts, upon new or different considerations and binding themselves thereby.

"What we hold is that, when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor, and, although by taking advantage of the necessities of his adversary, he obtains a promise for more, the law will regard it as *nudum pactum*, and will not lend its process to aid in the wrong." See also Alaska Packers Assn. v. Domenico, 117 Fed. 99 (1902).

For an analogous hold-up case, see Tolhurst v. Powers, 133 N. Y. 460, (1892), where Finch, J., said: "We agree with the prevailing opinion of the General Term that there was no consideration to support the promise of Powers to pay Ball's debt to the plaintiffs. * * * Ball and Powers requiring a delivery of the dynamo, the plaintiffs undertook or threatened to retain the possession till the original debt should be paid. That they had no right to do. Their primary lien was lost by the delivery, and they acquired no new one by reason of the repairs which were paid for. Such refusal to surrender the possession was an absolute wrong without any color of right about it. After demand their refusal was a trespass, and according to their own evidence the sole consideration for the promise which they claim that Powers made to pay the old debt of Ball was their surrender of possession. To that they were already bound, and parted with nothing by the surrender. They gave up no right which they had against any one, but extorted the promise by a threat of what would have been, if executed, a wrongful conversion. Doing what they were already bound to do furnished no consideration for the promise."

In Erny v. Sauer, 234 Pa. 330 (1912), where a mortgagor in default surrendered possession and agreed to make a deed to the premises on condition of being released from further liability on the mortgage, it was held that the agreement was without consideration. Mestrezat, J., said (pp. 333-4): "At the time the writ [of *scire facias* on the mortgage] was issued in this case, the defendant had made default in payment of the semi-annual installment of interest due on July 1, 1910 and January 1, 1911. The plaintiff therefore, on March 1,

mechanic's lien, is that one Ahl had a contract to erect a building for appellant in the fall of 1916; that Ahl sublet the painting to respondent for $100; that, although no specific date was set for finishing the painting, it was contemplated that the building would be finished by the new year; that by the middle of December, 1916, respondent had painted the outside, which was reasonably worth $40; that thereafter the work on the building stopped, with nothing of the inside finishing done, so that respondent was unable to do the painting on the inside as agreed; that some time previous to April, 1917, respondent filed a mechanic's lien for the work done; that in April Ahl notified respondent that work on the building would be resumed, and requested respondent to do the inside painting as soon as the carpenters were through; that respondent then told Ahl that he had taken the contract, understanding that the painting could be done during the winter, when work was slack, and that he could not now in the spring, the busy season, afford to do it for the original price; that thereupon Ahl agreed to give him $25 more, or in all $125 for the same work he in the fall had promised to do for $100; and that respondent accepted Ahl's terms and finished the work, which was of the reasonable value of $125. The court granted a judgment and lien for $125.

The only proposition urged on the appeal is that there was no consideration for the modified contract; hence the recovery should have been limited to $100. But it seems to us that under the authority of King v. Duluth, Missabe & Northern Ry. Co., 61 Minn. 482, 63 N. W. 1105, the only case to which we are cited by appellant, a legal consideration was shown. Through no fault of respondent there was a cessation of the work on the building, so that he could not finish his part within the time contemplated when he took the job. Because of this default—it is immaterial whether it was appellant's or Ahl's—respondent was forced to file a lien to protect his rights in case construction was not resumed, and he had to do the work during the busy season, instead of during the slack, as was in the minds of the parties when the original agreement was made. We think these matters furnish a sufficient consideration for a modification

**1911, the date of the alleged oral agreement, could have proceeded by *scire facias*, obtained judgment, sold the premises and collected the indebtedness due him, secured by the bond and mortgage; or he could have entered at pleasure, taken actual possession, used the land and reaped its profits: Tryon v. Munson, 77 Pa. 250. If the defendant refused to give possession, he could have been ousted by an action of ejectment. Assuming that he gave possession in pursuance of the alleged parol agreement, he did nothing more than it was his duty to do or what he could have been compelled by legal process to do. No consideration therefore passed to the plaintiff when the defendant voluntarily surrendered possession of the premises to him in pursuance of the agreement." (pp. 333-334). But why was not the agreement to give a deed consideration? On validity of agreement by mortgagor to convey premises to mortgagee in consideration of release from liability under mortgage, see Ann. Cas. 1913C, 1243, showing majority view *contra* to Erny v. Sauer, *supra*.**

of the original contract. Appellant was not a party to the contract; Ahl does not offer any objection to the validity of the modification; and it is difficult to see wherein appellant is injured or damaged, for respondent's work was reasonably worth $125.

*Judgment affirmed.*[149]

[149] "It is entirely competent for the parties to a contract to modify or to waive their rights under it, and ingraft new terms upon it, and in such a case the promise of one party is the consideration for that of the other; but where the promise to the one is simply a repetition of a subsisting legal promise there can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract.

"But where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated by the parties, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration. In such a case the natural inference arising from the transaction, if unmodified by any equitable considerations, is rebutted, and the presumption arises that by the voluntary and mutual promises of the parties their respective rights and obligations under the original contract are waived, and those of the new or modified contract substituted for them. Cases of this character form an exception to the general rule that a promise to do that which a party is already legally bound to do is not a sufficient consideration to support a promise by the other party to the contract to give the former an additional compensation or benefit. 1 Whart. Cont. § 500.

"On the other hand, where no unforeseen additional burdens have been cast upon a party refusing to perform his contract, which make his refusal to perform, unless promised further pay, equitable, and such refusal and promise of extra pay are all one transaction, the promise of further compensation is without consideration, and the case falls within the general rule, and the promise cannot be legally enforced, although the other party has completed his contract in reliance upon it." Start, C. J. in King v. Duluth, Missabe & Northern Rwy. Co., 61 Minn. 482, 487-488 (1895). Linz v. Schuck, 106 Md. 220 (1907) was decided in accord with the foregoing language.

"It is further said by those who adhere to this view that what unforeseen difficulties and burdens will make a party's refusal to go forward with his contract equitable, so as to take the case out of the general rule and bring it within the exception, must depend upon the facts of each particular case. They must be substantial, unforeseen, and not within the contemplation of the parties when the contract was made. They need not be such as would legally justify the party in his refusal to perform his contract, unless promised extra pay, or to justify a court of equity in relieving him from the contract; for they are sufficient if they are of such a character as to render the party's demand for extra pay manifestly fair, so as to rebut all inference that he is seeking to be relieved from an unsatisfactory contract, or to take advantage of the necessities of the opposite party to coerce from him a promise for further compensation. Inadequacy of the contract price which is the result of an error of judgment, and not of some excusable mistake of fact, is not sufficient. King v. Duluth, etc., Ry. Co., *supra*." Walker, J., in Brown v. Owens (N. C.) 105 S. E. 817,

## WARD *v.* GOODRICH.

**(Supreme Court of Colorado, 1905. 34 Colo. 369, 82 Pac. 701, 2 L. R. A. (N. S.) 201, 114 Am. St. Rep. 167.)**

Action by Ella D. Goodrich against Calvin T. Ward, her former husband, on a contract between them made pending a suit for divorce, which stipulates that, in consideration of a release and discharge by her of all claims and demands against him, including court orders for alimony and support of the child, the husband shall pay a certain sum per week for the support of his child in the custody of the wife. From a judgment for plaintiff, defendant appeals. Affirmed.

GODDARD, J.[150] * * * It was urged * * * that the contract sued on is void for want of proper consideration. The argument is that since the only consideration on the part of the appellant is his promise to support his infant child—in other words, to do that which he was legally bound to do—it was not a sufficient consideration to support a promise; and therefore appellant's promise cannot be enforced. Counsel labor under a misapprehension as to the application of the rule he invokes. While it is settled that the promising to do, or the doing of, that which the promisor is already legally bound to do, does not, as a rule, constitute consideration for a reciprocal promise, or support a reciprocal undertaking given by the promisee, it by no means follows that such promise may not be enforced against such promisor by the promisee, although its enforcement compels the performance of that which was already a legal obligation. * * *

This action does not involve the right to the custody of the child, as counsel for appellant seem to argue, but only the question as to whether, having placed the child in appellee's care, his promise to pay the stipu-

817-818 (1921). See also Western Lithograph Co. v. Vanomar Producers (Cal.) 197 Pac. 103 (1921).

"However, where a contract must be performed under burdensome conditions not anticipated, and not within the contemplation of the parties at the time the contract was made, and the promisee measures up to the right standard of honesty and fair dealing, and agrees, in view of the changed conditions, to pay what is then reasonable, just, and fair, such new contract is not without consideration within the meaning of that term, either in law or in equity." Donahue, J., in United Steel Co. v. Casey, 262 Fed. 889, 893-894 (1920).

Clearly where conditions have arisen under which a party is entitled to refuse to go ahead with his contract, a promise to pay him extra if he will do so is valid. In Hartley v. Ponsonby, 7 E. & B. 872 (1857), where the crew to work a ship had become so reduced in number that the jury made a finding which Lord Campbell, C. J., said, "imports to my mind that for the ship to go to sea with so few hands was dangerous to life. If so, it was not incumbent on the plaintiff to perform the work; and he was in the condition of a free man" it was held that there was consideration for the contract to pay him a sum extra to the regular wages to assist in working the ship with the diminished crew. See also Turner v. Owen, 3 F. & F. 176 (1862).

[150] Parts of the opinion are omitted.

lated price for its support can be enforced. We think the court below was correct in holding that he is so liable, and the judgment is therefore affirmed.

*Affirmed.*[151]

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## BENDER *v.* BEEN.

(Supreme Court of Iowa, 1889. 78 Ia. 283, 43 N. W. 216, 5 L. R. A. 596.)

Action upon a promissory note.

BECK, J.[152] 1. The promissory note in suit was jointly executed by defendant and four others. It called for $220, and, after certain payments were deducted, it is claimed in the petition that $150 remained due thereon, for which judgment is asked. The defendant alleged in his answer that a prior indorsee of the note, while holding it, did execute a writing, discharging defendant from all liability thereon, which is in the following words: "Mt. Ayr, Ia. 5-3, 1887. Received of Chas. A. Been $40.00, and same credited on note dated Mch. 2, 1882, given for $220.00, and signed by Calvin Stiles, Wm. A. Been, J. S. Been, C. A. Been, and Wm. White, given to G. Bender. The consideration of payment of above $40.00 is that said Chas. A. Been is to be released entirely from the above-named note. This is done by consent of G. Bender. [Signed] Day Dunning, Cashier." It is further alleged in the answer that the note came into the possession of plaintiff long after maturity, who had full knowl-

[151] "If any party makes a contract for a good consideration to do something which he was already bound to do, though no one was at the time sure that the duty already existed, the other party can sue upon the contract." Lord Loreburn, L. C., in Williams v. O'Keefe [1910] A. C. 186, 191.

Sir Frederick Pollock has said: "Let us now take the case of a promise by John to Peter to do something which he has already promised William to do. * * * Will any one deny that John's promise to Peter will be binding if given in exchange for a performance—say immediate payment of money—by Peter? * * * If then the promise is binding when given for a performance, why should it be less binding when it is given in exchange for Peter's promise? There is no reason in the nature of the case for making any difference"; and Professor Williston has answered: "The difference is this: John's promise to Peter, when given in exchange for a payment of money by Peter is binding because the payment of money is a good consideration. Whether the promise of John in this case could be good consideration is immaterial, for the payment of money needs no consideration. The promise is not illegal and the parties acted under no mistake. If, however, Peter gives a promise instead of money, there must be good consideration on both sides. Not only must Peter's promise be of the sort which the law regards as sufficient, but John's also must be, or neither is enforceable, and the disputed question is whether John's promise is sufficient consideration to support Peter's promise." Wald's Pollock on Contracts, Williston's Ed., 208 and n.

[152] Part of the opinion is omitted.

edge of the release pleaded. A demurrer to the answer was overruled, and from that decision plaintiff appeals.

2. It is a familiar rule of the law that a payment of a part of a promissory note, or of a debt existing in any different form, in discharge of the whole, will not bar recovery of the balance unpaid. The rule is based upon the principle that there is no consideration for the promise of discharge; the sum paid being in fact due from the payer on the debt, he renders no consideration to the payee for his promise to release the balance of the debt. This doctrine has been recognized in more than one decision of this court. Myers v. Byington, 34 Iowa 205; Works v. Hershey, 35 Iowa 340; Rea v. Owens, 37 Iowa 262; Bryan v. Brazil, 52 Iowa 350, 3 N. W. Rep. 117; Early v. Burt, 68 Iowa 716, 28 N. W. Rep. 35. Under this rule the discharge pleaded by defendant is without consideration, and is therefore void. * * *

It is our opinion that the District Court erred in overruling plaintiff's demurrer to defendant's answer. Its judgment is therefore

*Reversed.*[153]

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## BIDDER *v.* BRIDGES.

**(High Court of Justice, Chancery Division, 1887. 37 Ch. Div. 406.)**

In this action costs were taxable against plaintiffs. Certificates of the taxing master showed costs of the judgment £465, 17s. 10d. and costs of the appeal in the case £144 7s. 4d. To save the cost of filing the certificates, Mr. Norris, the managing clerk of Mr. Russ, the solicitor for the defendant, called on Messrs. Rooke & Sons, solicitors for the plaintiffs, on the 28th of May, 1887, when Mr. F. H. Rooke handed him a check for £609 5s. 2d., being the amount of the taxed costs of the judgment and appeal, less £1, which was deducted on account of the certificates not being filed. Mr. Norris then signed receipts for the costs, which were indorsed upon the certificates, and he then handed over the certificates to Mr. F. H. Rooke. The form of the receipt on the certificate of the costs of the judgment was as follows: "Received by check the within-mentioned costs of £465 17s. 10d., less 10s., remitted.—Charles A. Russ.—H. G. N." And a similar receipt was given for the costs of the appeal. The check was drawn by Rooke & Sons in favor of C. A. Russ, Esq., or order, and was duly paid.

**153 On payment and acceptance of less than the amount admittedly due as in full satisfaction, see 20 L. R. A. 785, note; 11 L. R. A. (N. S.) 1018, note; 21 L. R. A. (N. S.) 1005, note; L. R. A. 1917A, 719, note; 4 A. L. R. 474, note; 1 Ann. Cas. 801, note; 16 Ann. Cas. 194, note; Ann. Cas. 1915A, 951, note. On such payment with receipt in full, see 5 Ann. Cas. 525, note; Ann. Cas. 1917A, 130, note. On accord and satisfaction, see also 100 Am. St. Rep. 390, note.**

Mr. Rooke in his affidavit stated that he objected to pay for the filing of the certificates on the ground that they had been taken out without giving notice to his firm of the final appointment to dispose of certain outstanding queries and in their absence, and also on the ground that filing the certificates was an unnecessary expense; and that he gave the check in full satisfaction of all Davis's claims against the plaintiff's under the certificates. Mr. Norris, however, made a counter affidavit stating that all the queries were finally disposed of in the presence of a representative of Messrs. Rooke & Sons. Nothing was said at the time about interest on the costs; but on the 11th of July, 1887, Mr. Russ wrote a letter to Messrs. Rooke & Sons, in which he said: "When you handed me check for the amount of taxed costs you omitted to include interest on the respective certificates. This interest, calculated at 4 per cent from the respective dates of the judgment and appeal, must be paid in the usual way, and I should be obliged by your procuring and handing me a check for £33 16s. 7d., the amount of interest as aforesaid." Messrs. Rooke & Sons having declined to pay the interest claimed, Mr. Russ wrote to them to return the certificates in order that they might take further proceedings on them; and inclosed in their place a separate receipt for the money which had been paid. Messrs. Rooke & Sons refused to give up the certificates, and the defendant Davis then moved before Mr. Justice Stirling that the plaintiffs be ordered to file, or to attend before the proper officer of the court, and produce to such officer the certificates of the taxing master of the 27th of May, 1887, for the purpose of enabling the defendant Davis to issue a writ of *fi. fa.*, for the interest on the costs thereby certified and due from the plaintiffs to Davis.

The motion came on for hearing before Mr. Justice Stirling on the 18th of November, 1887.

STIRLING, J.† This is an application of a very unusual character. * * * Upon the affidavits there is to a certain extent a conflict of evidence. Possibly, in one view, that conflict may be immaterial, but if there should be further litigation it may be material. It is plain, however, that there was a discussion about the amount to be paid. The solicitor for the plaintiffs insisted upon a reduction of £1 being made in reference to the filing of the certificates—it having been agreed that they should not be filed—and he also insisted that the clerk of the defendant's solicitor should take his check for the reduced amount; and to my mind, as the matter then stood, the meaning of both parties was that if the check should be honored it was to be taken in payment for the bills of cost. That is not in dispute, whatever may be the legal effect of the transaction. The check was honored. It has the indorsement of the defendant's solicitor upon it. Then according to the evidence of that solicitor's clerk he discovered a week or two afterwards that the interest had been omitted to be charged.

† The statement of facts is abbreviated and parts of the opinion are omitted.

That is an incorrect statement, because when he went to the plaintiffs' solicitors' office he knew that the interest was not included in the amount to be paid. What he did discover was a decision of the Court of Appeal showing that the defendant might claim interest; and hence this motion. * * *

This was a perfectly plain, honest, and honorable transaction upon both sides. In regard to it the plaintiffs have obtained an advantage honorably got, and why should I take it away from them? It is plain that the certificates were not to be filed, and as plain that it was competent to the parties to enter into such an arrangement; if any mistake was made, it was a mistake of law, and therefore, I do not see why the advantage gained should be taken from the plaintiffs. The agreement being clear that the certificates should not be filed, I do not think that I ought to interfere. If there be any other remedy open to the defendant he can pursue it. Possibly that is enough to dispose of the motion. * * *

After the arguments I may be justified in seeing whether the authorities are in favor of the applicant. What was done by the applicant? He accepted, as it appears to me, in full satisfaction of the plaintiffs' liability for costs, the check of their solicitors payable to order, and that check was duly honored. What in law is the effect of that? The state of the law is very peculiar in regard to the acceptance of a smaller sum in satisfaction of a larger debt. * * *

Then comes the question here—is a negotiable instrument such a matter as may be "paid and accepted in satisfaction of a debt certain?" The applicant accepted not a negotiable instrument of his debtors, but that of their solicitors. He took the check of different persons. Was that an accord and satisfaction according to the authorities? No doubt the case of Cumber v. Wane, 1 Str. 426; 1 Sm. L. C. 8th ed. p. 357, was one in reference to a promissory note. In Foakes v. Beer, 9 App. Cas. 605,[154] the record of Cumber v. Wane is fully stated at page 619. The decision was that giving a promissory note for £5 cannot be pleaded as a satisfaction for £15, but this has been denied by a series of authorities to be law. Thus in Sibree v. Tripp, 15 M. & W. 23, it was held that a promissory note taken for a less sum than the demand was a good satisfaction—that a negotiable instrument for a smaller sum may be given in satisfaction of a larger debt. Then there is the case of Curlewis v. Clark, 3 Ex. 375, and also that of Goddard v. O'Brien, 9 Q. B. D. 37, which goes even further than I am required to go in this case. It was contended that these three authorities went upon the view that Cumber v. Wane was bad law, and that this was inconsistent with the decision in Foakes v. Beer. I do not, however, understand the House of Lords to approve of the application made in Cumber v. Wane of the doctrine laid down in Pinnel's

[154] In Foakes v. Beer, *supra*, a judgment creditor who had received the principal in instalments as payment in full was allowed to enforce payment of interest upon the judgment.

case, 5 Rep. 117a; Co. Litt. 212b. In that case there was a qualification added that if a thing of a different kind be given that is a good satisfaction. That qualification was disregarded in Cumber v. Wayne; and in Foakes v. Beer this circumstances is commented upon by both Earl Selborne and Lord Blackburn. If further authority is required I may refer to the notes of the late Mr. Justice Willes and Mr. Justice Keating to the case of Cumber v. Wane in Smith's Leading Cases, where they state the law to be that a demand may be discharged by payment of a thing different from that contracted to be paid though of less pecuniary value, and they give as an instance a negotiable instrument binding the debtor or a third person to pay a smaller sum. Under these circumstances, having regard to the current of authorities, which appear to me to be unaffected by the decision of the House of Lords [in Foakes v. Beer] I hold that the check of a third party given as this check was, was a satisfaction of the debt and was a good payment.[155]

[155] In Goddard v. O'Brien, 9 Q. B. D. 37 (1882), it was held that the debtor's own check for less than the amount of the debt, with a receipt which read that it was to be in settlement of the full amount of the debt on the check being honored, constituted a good accord and satisfaction when the check was duly honored.

In Hirachand Punamchand v. Temple, [1911] 2 K. B. 330, where the father of a debtor sent a draft for less than the amount in full settlement, which was held to discharge the debt, Fletcher Moulton, L. J., said:

"I have grave doubts whether Goddard v. O'Brien, 9 Q. B. D. 37, was rightly decided, because, when the facts are looked at, it appears that the cheque was there given, not in substitution for the debt, but only as conditional payment of the amount, so that the case really stood on the same footing as payment of a less amount in discharge of a greater. But in the present case we are dealing with the question of the effect of money paid by a third person. In such a case there is no difference between payment of the total amount and payment of a portion of it only, so long as it is paid in settlement of the debt. If a third person steps in and gives a consideration for the discharge of the debtor, it does not matter whether he does it in meal or in malt, or what proportion the amount given bears to the amount of the debt. Here the money was paid by a third person, and I have no doubt that, upon the acceptance of that money by the plaintiffs with the full knowledge of the terms on which it was offered, the debt was absolutely extinguished."

In the United States there is unwillingness to treat a check or unsecured note of the debtor, or the check of a third person who is acting for the debtor in paying, as anything but the money to be collected on it. Hagen v. Townsend, 27 So. Dak. 457 (1911); Jordy v. Maxwell, 62 Fla. 236 (1911); Thayer v. Harbican, 70 Wash. 278 (1912); Weidner v. Standard Life, etc., Co., 130 Wis. 1 (1906).

In Bunge v. Koop, 48 N. Y. 225 (1872) defendants, sued for a balance of $2,900, set up that when the original $6,400 due was demanded they were wholly unable to pay, and thereupon said plaintiffs duly agreed, to and with said defendants, that, provided these defendants should and did induce their friends to raise and loan to said defendants the sum of $3,500 and would pay the same to said plaintiffs, that said plaintiffs would settle and compromise their alleged demand against said defendants for and upon receiving said sum of $3,500 to be raised as aforesaid, and would leave it entirely to the defendants' honor whether they should, at any time thereafter pay said plaintiffs any further sum or amount: and, thereupon, under and in pursuance of said

## FRYE *v.* HUBBELL, ET AL.

**(Supreme Court of New Hampshire, 1907. 74 N. H. 358, 68 Atl. 325, 17 L. R. A. [N. S.] 1197.)**

Mortgage foreclosure proceedings by Napoleon B. Frye, executor, against Abbie A. Hubbell and W. W. Hubbell. Nonsuit was granted as to defendant W. W. Hubbell, and, from a directed verdict for plaintiff, defendant Abbie A. Hubbell excepted. Exceptions sustained, and new trial granted.

The evidence tended to prove the following facts: December 16, 1879, the defendants, Abbie A. and William W. Hubbell, executed a mortgage of the demanded premises to John M. Wakefield, the plaintiff's testator, to secure their promissory note for $600, signed by Abbie A. as principal and William W. as surety. The premises were then incumbered by a mort-

agreement, these defendants at a great sacrifice and trouble did borrow from their said friends the said sum of $3,500, and paid the same to the said plaintiffs on that understanding and agreement. It was held that there was no consideration for the alleged agreement, because in paying the $3,500, the defendants did no more than they were bound to do. Earl, C., said:

"This agreement to thus get the money from their friends was chiefly relied upon by the defendants in their answer and upon the trial as furnishing the new consideration for the compromise. I cannot assent to their claim. The money, when paid, was to belong, and in fact did belong, to the defendants. It was to be paid and was paid as their money. Suppose a debtor agreed to go to work and earn the money, or to dig for it in the earth, would this furnish a new consideration to uphold an agreement of the creditor to take less than his conceded due? In all cases, an embarrassed debtor must make some effort to procure the money to make a compromise, but no case can be found holding that the fact that he had agreed to make such effort, furnishes any consideration to uphold the compromise. The debtor is legally bound to pay, and it is utterly indifferent to the creditor where he gets the means to do it; that is the matter of the debtor, and all his efforts, are expended in simply endeavoring to discharge a legal obligation. Hence the fact that the defendants agreed to induce their friends to loan them the money, and that they did induce them to loan it, furnishes no new consideration to uphold the compromise.

"It matters not that the $3,000 which the defendants received from their friends was in checks, which they handed over to the plaintiffs. If the plaintiffs had agreed to receive the notes of a third party, or any specific personal property, in payment and satisfaction of their claim, it would have been fully paid and satisfied, no matter how small the value of the note or property was. But here the agreement as alleged in the answer, and proved, was that the defendants should pay the $3,500 in money, and this they undertook to do in the checks; they were paid and received as money.

"I have, therefore, reached the conclusion, upon the whole case, that the facts as claimed by the defendants, do not constitute a defense to the balance claimed by the plaintiffs, either as constituting payment or an accord and satisfaction."

So agreeing after the maturity of a note to pay it at a different place than that specified in the note is not consideration for the holder's promise to take

gage to the Newport Savings Bank, to which the Wakefield mortgage was made subject. The Wakefield note was further secured by a mortgage of real estate in Enfield, which was discharged on November 23, 1893, upon payment to Wakefield of $293.03, that sum being realized from a sale of the premises. The note bore the following indorsement: "29203. Nov. 28, 1893. Received of Abbie A. Hubbell $293.03 from sale of Enfield property as part of the within note." There was evidence that William W. Hubbell made two payments on the note, one of $20, and one of $25; that Abbie A. paid $300 about November 28, 1893; and that Wakefield agreed, at the time of the latter payment, to accept said payments, together with that indorsed on the note, in full satisfaction and payment of the debt.

The court instructed the jury that an agreement on the part of Wakefield to accept the payments in full satisfaction and discharge of the note would be no defense to a suit for the balance, and directed them to return a verdict for the plaintiff for the amount due on the note after applying the payments claimed by the defendants. To this instruction and direction of verdict the defendant Abbie A. excepted.

PARSONS, C. J.[156] * * * The material question raised by the case is the legal soundness of the ruling that the payment and acceptance of a sum less than the amount due in full satisfaction and discharge of the debt is no defense to the collection of the balance.

The rule given the jury has been followed by this court. Page v. Brewster, 54 N. H. 184, 189; Mathewson v. Bank, 45 N. H. 104, 106, 107; Blanchard v. Noyes, 3 N. H. 518. * * * In other jurisdictions the rule is almost universally regarded with disfavor, although followed, and the extension of the exceptions has been carried so far by the discovery of sufficient consideration in trivial and apparently immaterial circumstances that the rule itself might more logically be abandoned, while in two states it has been directly attacked and overruled. Clayton v. Clark, 74 Miss. 499, 21 South. 565, 22 South. 189, 37 L. R. A. 771, 60

a lesser sum in satisfaction. Foster County State Bank v. Lammers, 117 Minn. 94 (1912), where Bunn, J., for the court, said: "Defendants contend that a consideration for plaintiff's agreement is found in the fact that defendants agreed to make the payments in Stillwater, Minn., instead of Carrington, N. D., and that therefore the case falls within a well-established exception to the rule. It is true that an agreement by the debtor, made before the maturity of the note, to pay at a place other than the place specified in the note, or at another time, is deemed a sufficient consideration for an agrement by the creditor to accept a sum less than the whole in full payment. But clearly this consideration is lacking when the note is past due. Before maturity the creditor cannot compel payment at any other time or place than those named in the note, but after maturity he is legally entitled to collect his debt wherever and whenever the debtor is found. The agreement to make the payment at Stillwater was, therefore, no more than defendants were legally bound to do, and was in fact a convenience to defendants, rather than a burden, and a loss to plaintiff, rather than an advantage."

[156] The statement of facts is abbreviated and parts of the opinion are omitted.

Am. St. Rep. 521; Dreyfus v. Roberts, 75 Ark. 354, 87 S. W. 641, 69 L. R. A. 823, 112 Am. St. Rep. 67. In others it has been abrogated, in whole or in part, by legislative action. Wald's Poll. Cont. (3d Ed.) 211, note; 1 Cyc. 322; 1 Am. & Eng. Enc. Law, 414, 415. In this state of the law it has been thought to be the duty of the court to re-examine the foundations of the rule, rather than to permit the case to be carried by the mere weight of authority here and elsewhere.

Discussion of the question generally starts with Lord Coke, A. D. 1602. In Pinnel's Case, 5 Co. 117, 1 E. R. C. 368, the plaintiff brought an action of debt on a bond for payment of £8 10s. November 11, 1600. The defendant pleaded that before that day, on October 1st, at the request of the plaintiff he paid £5 2s. 2d., which sum the plaintiff accepted in full satisfaction of the debt. "The plaintiff had judgment for the insufficient pleading; for he did not plead that he had paid the £5 2s. 2d., in full satisfaction, as by law he ought, but pleaded the payment of part generally, and that the plaintiff accepted it in full satisfaction." The only point decided in Pinnel's Case was a point of pleading, now obsolete; for it is certain that no court, English or American, would now dispose of Pinnel's Case as it was determined in 1602. If the point of pleading was considered of any moment, the defendant would have leave to amend, and judgment would go according to the right, not the form. But in deciding the case "it was resolved by the whole court that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum, but that the gift of a horse, hawk, or robe, etc., in satisfaction, is good; for it shall be intended that a horse, hawk, or robe, etc., might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the plaintiff; but in the case at bar it was resolved that the payment and acceptance of parcel before the day in satisfaction of the whole would be good satisfaction in regard of circumstance of time, for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material. So if I am bound in £20 to pay you £10 at Westminster, and you request me to pay you £5 at the day at York, and you will accept it in full satisfaction of the whole £10, it is a good satisfaction for the whole, for the expenses to pay it at York is sufficient satisfaction." While no case has been discovered resting on the point decided in Pinnel's Case, the matters "resolved" by the court have had great influence upon the law, as determined by decided cases which are generally and until recently, in the absence of statutory correction, universally in conformity with the *dictum* of the resolutions and the further point "adjudged"—that a release by deed without consideration was a good bar. Two things were

resolved: (1) That if the creditor accepted in discharge of the debt anything which might be by any possibility of benefit to him, this was a good satisfaction; and (2) "that payment of a lesser sum on the day in satisfaction could not by any possibility be beneficial to the creditor." The latter resolution was in no way involved in the case, and the conclusion was simply *dictum*. Lord Blackburn, in Foakes v. Beer, 9 App. Cas. 605, 616, 617.

In the *dicta* of Lord Coke, nothing is said of a want of consideration for the creditor's agreement to accept the less sum in satisfaction of the debt; but in 1804 Lord Ellenborough, in Fitch v. Sutton, 5 East 230, relying upon the authority of Lord Coke in Pinnel's Case, introduced the idea of a want of consideration. "There must be," he says, "some consideration for the relinquishment of the residue, something collateral, to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*." This statement of Lord Ellenborough has been followed by the courts, and is the foundation of the extended discussions that are to be found in the books. 12 Harv. Law Rev. 524. Much argument is found on the question whether in the particular case some consideration could be found for the agreement, or, as Lord Ellenborough puts it, some "possibility of benefit" to the creditor. The cases are very numerous. 1 Cyc. 319-322; 1 Ency. L. 415, 428; Notes 100 Am. St. Rep. 428-447; 64 Am. Dec. 138; 20 L. R. A. 785; 1 E. R. C. 368-405; 1 Sm. L. C. *146; Jaffray v Davis. 124 N. Y. 164, 167, 26 N. E. 351, 11 L. R. A. 710. But the courts, while following the *dicta*, "have rarely failed, upon any recurrence of the question, to criticise and condemn its reasonableness, justice, fairness, or honesty." Jaffray v. Davis, *supra*. Alderson, B., in Sibree v. Tripp, 15 M. & W. 23, 38, says, after stating the rule: "The courts might very well have held the contrary, and have left the matter to the agreement of the parties"; while Lord Selborne, in Foakes v. Beer, 9 App. Cas. 605, 613, says: "It might be, and indeed I think it would be, an improvement in our law, if a release or acquittance of the whole debt, on payment of any sum which the creditor might be content to receive by way of accord and satisfaction, though less than the whole, were held to be generally binding, though not under seal." In the same case the history of the rule is given by Lord Blackburn, who, while yielding to the opinion of his associates as to the weight of authority, says (pages 618, 622): "And, notwithstanding the very high authority of Lord Coke, I think it is not the fact that to accept prompt payment of part only of a liquidated demand can never be more beneficial than to insist on payment of the whole. And if it be not the fact, it cannot be apparent to the judges. * * * What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be

tc insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so." "To say that you may receive something which is not money—a chattel, for instance, of inferior value—but that you cannot receive money, is to my mind a very singular state of the law." Grove, J., in Goddard v. O'Brien, 9 Q. B. Div. 37, 39. In Johnson v. Brannan, 5 Johns. (N. Y.) 268, 271, the principle under discussion is termed "the rather unreasonable rule of the old law"; while in Kellogg v. Richards, 14 Wend. (N. Y.) 116, 119, it is said to be "technical and not very well supported by reason." Under the rule "the creditor may violate with legal impunity his promise to his debtor however freely and understandingly made. This rule * * * obviously may be urged in violation of good faith." Brooks v. White, 2 Metc. (Mass.) 283, 285, 37 Am. Dec. 95. "The principle of law * * * has been long established and is well settled. Still very little reason can be given for it." Mitchell v. Wheaton, 46 Conn. 315, 33 Am. Rep. 24. The rule is "somewhat harsh, contrary to the apparent intentions of the parties in making a compromise settlement, and not in harmony with the dictates of natural justice." Shaw, C. J., in Langdon v. Langdon, 4 Gray (Mass.) 186, 189.

But despite this criticism the rule has survived, in form at least. It is of course impossible to have examined all the cases; but, so far as such examination has been carried, the number of cases in which the rule has been applied and judgment rendered for the plaintiff, despite the agreement to discharge, is small in comparison with those in which the courts have been able to discover some circumstance, however trifling, which could be construed a technical legal consideration. The rule is not a statute, or even a rule of property. Its validity depends upon its consonance with reason. While the almost universal acceptance of it may commend it to the court with almost irresistible force, still it is open for examination as to whether it was originally sound and whether the weight of the authority upholding it is not diminished or totally overthrown by the exceptions with which the rule cannot logically stand. Before reaching these questions it is to be considered whether, if originally sound, the reason does not fail after the changes of three hundred years—a proposition for the affirmative of which there is authority. "There was a time in the history of the law, when, like everything else of that day, it was a system of metaphysics and logic, and when the case was decided without the slightest regard to its justice, solely on the technical accuracy of the pleaders on the several sides. Defect of form in the plea was defect of right in him who used it. * * * Payment of debt and interest on a bond, the next day after it fell due, was no defense in a court of law; nay, it was no defense to prove payment without an acquittance before the day; nay, if you pleaded and proved a payment, which was accepted in full of the debt, yet you failed unless your plea stated that you paid it in full, as well as that it was accepted in full, or perhaps because you pleaded it as

a payment when you ought to have pleaded it as an accord and satisfaction. * * * It is not a century since it was solemnly decided that if a creditor, finding his debtor in failing circumstances, and being afraid of losing his debt, proposed to give him a discharge in full if he paid half the money, and the debtor borrowed the money and paid the one-half on the day the bond fell due, and got an acquittance in terms as explicit as the English language could afford, yet, if sued, he must pay the rest of the debt, for it was impossible, say the court, payment of part could be a satisfaction of the whole; but, if part was paid before the day, it was a good satisfaction of the whole. * * * It avails little, then, to go back to the last century, or further, to cite cases in which a matter was of validity or effect according as it was couched in this or that form. Universally the law is, or ought to be, that the meaning or intention of the parties is, if it can be distinctly known, to have effect, unless the intention contravenes some well-established principle of law." (Milliken v. Brown, 1 Rawle (Pa.) 391, 397, 398. "The rule that payment of a smaller sum is not a good accord and satisfaction for a larger one * * * was a deduction of strict scholastic logic in the days when money was regarded as having a fixed and unchangeable value. Hence, a part payment of money could never logically be treated, even by agreement, as equivalent to a payment of the whole. In the business methods of the present, it has come to be recognized that money, like other commodities, has fluctuations of value, not only in the general market, but also and more especially to the individual. To a merchant with a note coming due, $5,000 before 3 o'clock to-day, which will save his commercial credit, may well be worth more than $20,000 to-morrow, after his note has gone to protest. * * * The rule was always regarded as more logical than just, and as coming very close to a contradiction of the general rule that the law will not measure the amount or value of the consideration if the parties have agreed upon it." Ebert v. Johns, 206 Pa. 395, 398, 55 Atl. 1064. See Lord Blackburn in Foakes v. Beer, *supra*. "The absurdity and unreasonableness of the rule seem to be generally conceded, but there also seems to remain a wavering, shadowy belief in the fact, falsely so called, that the agreement to accept, and the actual acceptance of, a lesser sum in the full satisfaction of a larger sum, is without any consideration to support it; that is, that the new agreement confers no benefit upon the creditor. However it may have seemed 300 years ago in England, when trade and commerce had not yet burst their swaddling bands, at this day and in this country, where almost every man is in some way or other engaged in trade or commerce, it is as ridiculous as it is untrue to say that the payment of a lesser part of an originally greater debt, cash in hand, without vexation, cost, or delay, or the hazards of litigation in an effort to collect all, is not often—nay, generally—greatly to the benefit of the creditor." Clayton v. Clark, 74 Miss. 499, 509, 21 South. 565, 22 South. 189, 37 L. R. A. 771, 60 Am. St. Rep. 521. An abandonment of the rule may well be placed on

the broadened spirit of the law and upon the fact that the premise upon which it was founded, if true in the seventeenth, is not true in the twentieth century.

In the application of the conclusion of Lord Ellenborough that some possibility of benefit to the creditor would furnish a consideration for the agreement to discharge the balance, the courts have practically in many cases overruled the rule itself, while adhering to it in form. They proceed upon the assumption that the observation of Lord Coke that the acceptance of any chattel in discharge of the debt was a satisfaction because the court could not know the value of the chattel implied that anything except money, though notoriously of less value than the debt, would furnish a consideration for the agreement. Some of the grounds upon which a parol agreement for discharge has been held valid are, as said in a recent case, "interesting and amusing." Dreyfus v. Roberts, *supra*. Reference to them would only tend to display in a stronger light the disfavor with which the rule has been regarded, which sufficiently appears from the quotations already given. Many cases are discussed in Jaffray v. Davis, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710. Others are to be found in the general works cited *supra*. But the cases which hold that the furnishing of security by mortgage, pledge, or notes of a third person for a part of the debt is a sufficient consideration for a discharge of the residue are without foundation, unless the payment of money is such a consideration. These cases are numerous. Jaffray v. Davis, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710; Guild v. Butler, 127 Mass. 390; Kellogg v. Richards, 14 Wend. (N. Y.) 116, 119; Boyd v. Hitchcock, 20 Johns. (N. Y.) 76, 11 Am. Dec. 247; Brooks v. White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95; Keeler v. Salisbury, 33 N. Y. 648; Sibree v. Tripp, 5 M. & W. 22; Bidder v. Bridges, 37 Ch. Div. 406. The only purpose of security of this sort is to produce money for payment on the debt, and the only benefit to the creditor is that such may be the result. If it is not beneficial to a creditor to receive one-half his debt in cash, it is not beneficial to have such payment secured. A promise cannot be beneficial unless the thing promised is. In Jaffray v. Davis, *supra*, notes for one-half the debt, secured by a chattel mortgage, were given in discharge of the claim. The discharge was held good, although it appears to be conceded that the payment of one-half in money at the time the notes were given, upon the same agreement, would not constitute a valid discharge. Under the doctrine of this case a one-day note for one-half the debt, secured by the pledge of an equal amount in gold coin, would constitute a valid discharge, while the direct payment of the same amount in gold coin could not. It is undoubtedly true that the creditor may be better off with security for one-half the debt than with the whole claim unsecured. It may be true, as held in Goddard v. O'Brien, 9 Q. B. Div. 37, that a check from its negotiable character, may be more beneficial to the creditor than a book account for a larger sum; but no security can be more valuable or more

negotiable than cash in hand. Scholastic or any other variety of logic which establishes the sign to be more valuable than the thing signified, the shadow superior to the substance, the possession of an order for money more beneficial than the cash that can be obtained upon it, is the logic of unreason. When it is held that something whose only purpose and value lies in its capacity to secure the payment of money is a sufficient consideration for an oral discharge, the rule of Pinnel's Case that the money itself is not such a discharge is logically overturned. The two cannot stand together. To attempt to reconcile them by the suggestion of value in the paper on which the mortgage is written would be as reasonable as to say that the signature of a third party to a note "may be worth something as an autograph." Curlewis v. Clark, 3 Exch. 375, 380. It is generally beneficial to a creditor to transform his claim into money. Whether under the circumstances it is more beneficial for him to take part in money, or to retain the claim for the whole, is for him to decide; and no sufficient reason exists in logic or morals why he should be relieved from an agreement understandingly made.

Difficulty has been found in technicalities of the plea of accord and satisfaction. Watson v. Elliott, 57 N. H. 511, 513. But difficulties of pleading are not now insuperable. If the parties have settled and agreed upon a discharge, or the application of something received—money, or anything else—in discharge, it is not material whether the transaction "came under the technical appellation of payment, accord and satisfaction, or release, or under no particular head usually found in the books. * * * And there seems to be no reason why such a discharge or application should not be shown under the general issue, as well as payment, or accord and satisfaction, if it would not come under either of these heads." Curtis v. Egan, 53 N. H. 511. The difficulty, aside from the technicalities of an ancient plea, arises from the familiar common-law principle that a promise without consideration cannot be enforced. The entire foundation of the application of this principle to the question under consideration is the assumption that Lord Coke thought, 300 years ago, that the payment of part of a debt was no consideration for a promise. But Professor Ames has not only demonstrated (12 Harv. Law Rev. 521-523) that this assumption is not warranted by anything said in Pinnel's Case, or the statement in the Commentary on Littleton (212b), often cited to the same point, but cites the explicit language of Coke himself in Bagge v. Slade, 3 Bulst. 162, to the contrary. The foundation of the remarks in Pinnel's Case he suggests to be the statement of Brian, C. J., that "payment of 10 pounds cannot be payment of 20 pounds." Y. B. 10 Hen. VII, f. 4, p. 4. After stating the language of Pinnel's Case quoted above, the article continues: "There is no allusion in any of these remarks of the judges to the consideration for an assumpsit. The word 'consideration,' in its modern sense, was unknown to Brian, and the action of assumpsit was in his day in the embryonic stage. To his mind, whether 10 pounds could

be a satisfaction of 20 pounds was a question of simple arithmetic which admitted of only one answer. Ten cannot be 20. The part cannot be the whole. Coke was presumably familiar with Brian's statement. At all events, he reasoned in precisely the same axiomatic way: 'It appears to the judges that by no possibility a lesser sum can be a satisfaction for a greater.' It is sufficiently obvious from the similarity of the language of Coke and Brian that it never occurred to the former that the resolution in Pinnel's Case was based upon any doctrine of consideration. But fortunately Coke's opinion is not a mere matter of inference. We have his own explicit statement, discriminating in the sharpest way between the operation of part payment as a satisfaction and as a consideration. In Bagge v. Slade [3 Bulst. 162], he said: 'If a man be bound to another by a bill in 1,000 pounds, and he pays unto him 500 pounds in discharge of this bill, the which he accepts of accordingly, and doth upon this assume and promise to deliver up unto him his said bill of 1,000 pounds, this 500 pounds is no satisfaction of the 1,000 pounds, but yet this is good and sufficient to make a good promise and upon a good consideration, because he has paid money 500 pounds, and he hath no remedy for this again.' In 1639 the obligor recovered judgment upon a promise like that in the case put by Coke, the court saying: 'For though legally, after the obligation is forfeited, 30 pounds can be no satisfaction for 60 pounds, yet to have the money in his hands without suit is a good consideration to maintain this action upon the promise.' [Rawlins v. Lockey, 1 Vin. Abr. 308, pl. 24]." Other cases are cited to the same effect. 12 Harv. Law Rev. 523.

As has been seen, the absurdity of the results of the rule relied upon in this case has been commented upon in case after case; but persistence in error under the shadow of a great name still calls that right which is recognized to be wrong. Can the faulty structure stand, now that the foundation stone has been removed? The contention is that there is no consideration for the promised release or discharge, if less than the full amount of money is paid. In Kidder v. Blake, 45 N. H. 530, 532, Judge Bartlett quotes wth approval this definition: "Consideration means something which is of some value in the eye of the law, moving from the plaintiff. It may be some benefit to the defendant [promisor], or some detriment to the plaintiff [promisee]." Stated with greater elaboration, "a valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Currie v. Misa, L. R. 10 Exch. 153, 162; Rector, etc., v. Teed, 120 N. Y. 583, 586, 24 N. E. 1014; Wald's Poll. Cont. 167. Professor Langdell says "detriment to the promisee is a universal test of the sufficiency of consideration," and regards benefit to the promisor as "irrelevant to the question whether a given thing can be made the consideration of a promise." Lang. Cont. § 64. Professor Ames, in the

article to which reference has been made, approves this simplified definition, but raises the question, what will be understood by detriment? He reaches the conclusion that the term should include every act or forbearance; while the opposite conclusion is that certain acts or forbearances, as matter of law, cannot constitute a detriment—that a person does not in legal contemplation incur any detriment by doing a thing which he was previously bound to do. Lang. Cont. § 84. In the attempt to scientifically apply the rules of abstract logic to all the cases involving the question of consideration since the inception of the action of assumpsit, it is inevitable that numerous cases will be found unexplainable upon any theory deducible from such rules.

Upon the theory that the detriment to the promisee which will furnish a consideration for a promise is any act or forbearance, Foakes v. Beer and the line of cases following its doctrine are exceptions contrary to principle; while whatever rule is adopted as to acts or forbearances that as matter of law cannot constitute a detriment, numerous cases are found which must be recognized as exceptions. It is not necessary to consider further these abstract discussions of the subject. It must be and is conceded that the common definition of consideration, found in the Reports, is, as above stated, in substance, "a detriment incurred by the promisee, or a benefit received by the promisor in exchange for the promise." If any act or forbearance by the promisee is a detriment which will sustain a promise, the sole question is of sustaining an exception in principle and following authority which "originated in misconception, is repugnant alike to judges and men of business, is not applied consistently to all the cases fairly within its scope, has been a source of highly artificial and technical distinctions, has been changed by statute in India and 10 of our states, and is likely to be generally superseded by similar legislation." 12 Harv. Law Rev. 531. Under the other definition of consideration, the doctrine can be upheld only upon the ground that as matter of law payment of a part of a debt before it is due cannot be beneficial to the creditor or a detriment to the debtor. Upon either view we are met merely by an assumption of the judges, which is unfounded in fact. Upon the question whether such payment is or may be beneficial to a creditor, sufficient has already been said. There is nothing new or modern in the proposition that it may be. In Reynolds v. Pinhowe (1595), Cro. Eliz. 429, the court said of a payment to the creditor: "It is a benefit to him to have it without suit or charge." "Payment without suit or trouble of that which is due is a good consideration." Johnson v. Astell (1667), 1 Lev. 198. These and other like expressions, cited 12 Harv. Law Rev. 523, show that the opinions of the modern judges before quoted that payment before it can be compelled may be beneficial to the creditor are not new discoveries. Nor if detriment to the promisee is to be taken as the sole definition of consideration, is the conclusion that the present parting with money is no detriment defensible, judged by the fact and the practice of business

men. When the parties have made a contract and agreed on the consideration—the immediate payment of a sum of money—it is the refinement of logic to say that such payment is no detriment, or to say, as does Alderson, B., in Sibree v. Tripp, 15 M. & W. 23, 37, "it is not one bargain but two; namely, payment of part, and an agreement without consideration to give up the residue." Such a statement is generally untrue. If A. pays B. $50 on a $100 debt, and then requests B. to release him from the residue, there are two contracts if B. agrees, and no consideration for the second; but such is not the transaction in fact when A. pays to-day $50 in consideration of B.'s agreement to discharge the whole debt. But, it is said, A. is legally bound to pay B. the $50, and as A. only does what he is legally bound to do, there is no consideration. But the confusion arises from a failure to distinguish between legal and moral obligations. One may be morally bound to do precisely in terms as he agrees; but he is legally bound to do as a practical proposition, whatever the theory may be, only what he can be compelled by law to do. The common law does not compel men to do as they agree. It gives damages for the failure to perform legal or contractual duties, but except in a few instances only can the specific performance of the contract be enforced. If A. owes B. a promissory note, no form of action is known by which B. can compel A. to pay it when due. If A. does not pay as promised, in an action of assumpsit B. can recover damages because of the breach of A.'s promise. Since the abolition of imprisonment for debt, the law does not take any steps to compel A. to pay the damages. A.'s property, if he has any subject to execution, the law will seize and apply on B.'s damages. So that the most that A., who owes B. a note, can be legally compelled to do, is to suffer his property to be applied to pay B.'s damages. As to permit this is all A. can be compelled to do, it is all he is legally bound to do. The law does not prohibit his breach of his contract, but leaves him free to break it if he chooses, giving the other party the remedy of damages. Chellis v. Grimes, 72 N. H. 104, 106, 54 Atl. 943; Wiggin v. Manchester, 72 N. H. 576, 581, 58 Atl. 522; Cox v. Jones, 73 N. H. 504, 505, 63 Atl. 178.

The damages the law awards for the nonpayment of money is interest, and for the expense of obtaining judgment and execution, costs. If costs always equal the expense of litigation, if interest is always full recompense for delayed payment, and if an execution is always equivalent to money in hand, then a present part payment of a debt in cash is in fact never beneficial to the creditor or detrimental to the debtor, and can never be a consideration for a discharge of the balance. Whatever the conclusions of scholastic logic, as men having some acquaintance with affairs, judges are bound to know that none of these propositions are always, if ever, true; and, as they are not always true, it cannot be matter of law that in a particular case a part payment was not such a benefit to the creditor or detriment to the debtor as to furnish a consideration for

the creditor's agreement of discharge. Harriman v. Harriman, 12 Gray (Mass.) 341, decided in 1859, was a suit on a judgment for $140.03 recovered in 1839. The defendant was then poor and unable to pay, and the plaintiff told him if he would raise and pay $20 he would receive the same in full satisfaction of the judgment. The defendant borrowed and collected $20 and paid it to the plaintiff, who accepted it in full settlement and satisfaction of the judgment, and gave the defendant a receipt in full of all demands. If the defendant was poor and unable to pay, it is to be inferred nothing could be collected on the judgment. As a business proposition, the question for the plaintiff would seem to have been whether it was more beneficial for him to accept what the defendant could then raise and pay in discharge of the judgment, or to wait for an increase in the defendant's financial resources. There seems no reason why the plaintiff should not have been permitted to decide this question, or why the receipt of money which the defendant could not then be compelled to pay, and which the plaintiff could not obtain without the defendant's consent, should not constitute a sufficient consideration for the agreement under which the defendant was induced to part with his money. But it was held to be well settled that the discharge was invalid for want of consideration. But it is now held elsewhere that acceptance of part payment from an insolvent or embarrassed debtor in full satisfaction of the claim is founded on a sufficient consideration (Engbretson v. Seiberling, 122 Iowa 522, 98 N. W. 319, 64 L. R. A. 75, 101 Am. St. Rep. 279;[157] Melroy v. Kremmerer, 218 Pa. 381, 67 Atl. 699), and that the abandonment of the right to go into insolvency or to take advantage of the bankrupt law furnishes a sufficient consideration for such a contract. Notes in 100 Am. St. Rep. 441, 442. The reason is clear. In such cases the creditor obtains money that he would not otherwise receive, and the debtor pays money for the dis-

[157] In Engebretson v. Seiberling, the acceptance from an insolvent debtor of part payment in full satisfaction of a claim is held to discharge the debt even though the debtor was not contemplating bankruptcy proceedings. The court gave as a reason that "the rule that an agreement to accept part payment in full satisfaction is without consideration is purely technical and subject to many exceptions which the courts have ingrafted upon it from time to time in order to avoid to some extent the injustice which is recognized as frequently resulting from its strict application." But in the opposing case of Pearson v. Thomason, 15 Ala. 700 (1849), the court insists that "the fact of the defendant's insolvency can have no influence in determining whether the agreement of the plaintiffs to accept a less sum than the entire debt, in full satisfaction, was without consideration; for whether he was insolvent or not, the obligation to pay was not impaired, and the moral duty remained in full force."

And Hackney, J., in Beaver v. Fulp, 136 Ind. 595, 597 (1893) said: "The insolvency of the appellant, of itself, does not establish any loss or inconvenience to the appellant or any benefit to the appellee. The rights of a third person are not involved; there is no agreement on the part of the appellant to waive his right of exemption nor to surrender anything that the law gave him or authorized him to retain."

charge which he could not be compelled to pay. It is difficult to see why money so paid and received is not a benefit, despite the observations of Lord Selborne to the contrary in Foakes v. Beer, 9 App. Cas. 605, 613, 614. It is to be noted that the extension of the exemption from execution in modern times, as well as the abolition of imprisonment for debt, creates a situation in which the debtor, by sacrificing a right which the law gives him, may pay more or less upon a debt when he can legally be compelled to pay nothing.

The law does not measure the adequacy of the consideration upon which the parties have agreed. Wald's Poll. Cont. 193; Lang. Cont. § 55. If a payment which the debtor cannot be compelled to make because of lack of property furnishes a consideration, present payment which he cannot be compelled to make because of lack of judicial machinery to effect such result must be equally efficacious. In the notes to Cumber v. Wane, 1 Stra. 426, 1 Sm. L. C. (7th Am. Ed.) 595, 610, it is doubted "whether the maxim that a smaller sum cannot be a satisfaction of a larger debt could apply to anything but a bond. * * * Technically, it would be very difficult to make it apply to simple contracts. But as a principle of evidence, this rule, which requires for the substantiation of such agreements either a surrender of the instrument or a legal release, is a just, wise, and, convenient rule, so great is the danger of fraud and mistake." This might have been a sound reason for a rule of evidence applying in all cases of discharge claimed by anything but full performance. But a payment of less before the day, or in another place at the day, or by a chattel, is not a discharge unless so agreed, and the necessity of the rule of evidence is as strong in the one case as in the other. No such rule has been applied, nor does it appear to have been attempted to support the maxim on this ground in the adjudged cases. The whole matter resolves itself into one of statement. If A. holds B.'s note for $100, there is no reason in law or morals why he may not sell it to C. for $50, or to B. An agreement by A. to sell to B. B.'s note for any sum less than there is due upon it is open to no objection arising from the intricacies of the plea of accord and satisfaction, or of any theory of consideration. Lang. Cont. § 88.

The facts in the present case are not fully reported, but enough appears to justify the suspicion that the case may be within some of the exceptions. It is at least fairly inferable that the defendant was insolvent and had no other property except that covered by the plaintiff's mortgage, upon which another mortgage had precedence. Wakefield could recover nothing out of the property without paying the first mortgage. The defendant was under no obligation to sell or assent to a sale of the Enfield property, and if her consent to such sale was part of the agreement, there was a sufficient consideration under all the cases. Wakefield could have sold his second mortgage to the defendant for such sum as he saw fit, and the fact that the sum paid would not have equaled the amount due on the mortgage

would not have invalidated the contract. Wakefield lived some six years after these transactions. There is no suggestion that he had any purpose except to be bound by the contract. His executor brings the suit, and the contention is that because the parties regarded the transaction as payment or discharge instead of a sale, or because Wakefield neglected to deliver the note to the defendant, as it has been suggested in argument he agreed to do (Draper v. Hitt, 43 Vt. 439, 5 Am. Rep. 292), the law requires the plain purpose of the parties to be defeated, not because of any immorality in the transaction or lack of power in the parties to make the agreement, but because the words they used to describe what they did imply that it was impossible for them to do what they in fact did. No better guide for the determination of the rights of the parties in a contract can be discovered than their purpose and intention in making it. That having been ascertained, a sufficient reason for defeating such purpose is not found in the misinterpretation and misunderstanding of the language of a great jurist of the seventeenth century, however long continued. The rule that the payment of a less sum can never sustain an agreement to discharge a greater, because without consideration, however well supported by the authorities, is contrary to the fact at the present time, whatever the fact was when the rule originated, is based upon misconception, is not founded in reason, and cannot be followed without abandoning the greater principle that reason is the life of the law. In the words of the court in Clayton v. Clark, 74 Miss. 499, 510, 21 South, 565, 569, 22 South. 189, 37 L. R. A. 771, 60 Am. St. Rep. 521: "A rule of law which declares that under no circumstances, however, favorable and beneficial to the creditor, or however hard and full of sacrifice to the debtor, can the payment of a less sum of money at the time and place stipulated in the original obligation, or afterward, for a greater sum, though accepted by the creditor in full satisfaction of the whole debt, ever amount in law to satisfaction of the original debt, is absurd, irrational, unsupported by reason, and not founded in authority, as has been declared by courts of the highest respectability and of last resort, even when yielding reluctant assent to it. We decline to adopt or to follow it."

While there was authority for the instruction finally given the jury, the discussion establishes that the instruction given and the direction of a verdict were erroneous. The verdict is set aside, and a new trial granted.

*Exceptions sustained.*[158]

CHASE, J., dissented

[158] In Jaffray v. Davis, 124 N. Y. 164, (1891) Potter, J., collected the cases to show "the extreme ingenuity and assiduity which the courts have exercised to avoid the operation of the 'rigid and rather unreasonable rule of the old law' as it is characterized in Johnston v. Brannan (5 Johns. 268-272), or as it is called in Kellogg v. Richards (14 Wend. 116), 'technical and not very well supported by reason,' or, as may be more practically stated, a rule that 'a bar of gold worth $100 will discharge a debt of $500, while 400 gold dollars in current coin will not.'"

## TANNER *v.* MERRILL.

**(Supreme Court of Michigan, 1895. 108 Mich. 58, 65 N. W. 664, 31 L. R. A. 171, 62 Am. St. Rep. 687.)**

Assumpsit for work and labor performed.

HOOKER, J.[159] The defendants appeal from a judgment recovered against them at circuit. They are lumbermen, and the plaintiff worked for them at Georgian Bay, his transportation from Saginaw to that place having been paid by them. When he quit work, a question arose as to who should pay this, under the contract of employment, and defendants' superintendent declined to pay any transportation. The plaintiff needed the money due him to get home, and showed a telegram announcing the illness or death of his mother, and said that he must go home, to which the superintendent replied that "he did not pay any man's fare;" whereupon a receipt in full was signed, and the money due, after deducting transportation, was paid. The plaintiff testified that they had no dispute, only he claimed the fare and the superintendent refused to allow it. * * *

The question resolves itself into this: Whether a receipt in full is conclusive of the question of defendant's liability, when it is given upon payment of a portion of a claim admittedly due, accompanied by a refusal to pay more, in the absence of mistake, fraud, duress, or undue influence.

It is urged upon behalf of the plaintiff that receipts are always open to explanation, and that there is no consideration to support the acceptance of a portion of a valid claim as full payment. The cases which counsel cite do not support the broad contention of plaintiff's counsel, which would seriously derange business affairs if it should be sustained. The doctrine that the receipt of part payment must rest upon a valid consideration to be effective in discharge of the entire debt is carefully limited to cases where the debt is liquidated, by agreement of the parties or otherwise, which was not the case here. It was in dispute. * * * In Hayes v. Insurance Co., 125 Ill. 639, the court apply the doctrine relied upon, but expressly state that "this rule has no application where property other than money is taken in satisfaction, or where there is an honest compromise of unliquidated or disputed demands." * * * In Marion v. Heimbach, 62 Minn. 215, the court say: "But where the claim is unliquidated, it would seem to be true that if the creditor is tendered a sum less than his claim, upon the condition that, if it is accepted, it must be in full satisfaction of his whole claim, his acceptance is an accord and satisfaction." See also Fuller v. Kemp, 138 N. Y. 231, where the same doctrine is held; Fire Ins. Ass'n v. Wickham, 141 U. S. 577.

The important fact to ascertain is whether the plaintiff's claim was a liquidated claim or not. If it was, there was no consideration for the

[159] Parts of the opinion are omitted.

discharge. If not, the authorities are in substantial accord that part payment of the claim may discharge the debt, if it is so received. Upon the undisputed facts, the claim of the plaintiff, as made, was not liquidated. It was not even admitted, but, on the contrary, was denied, because the defendants claimed that it had been partially paid by a valid offset. While the controversy was over the offset, it is plain that the amount due the plaintiff was in dispute. If so, it is difficult to understand how it could be treated as a liquidated claim, unless it is to be said that a claim may be liquidated piecemeal, and that, so far as the items are agreed upon, it is liquidated, and to that extent is not subject to adjustment on a basis of part payment. Cases are not numerous in which just this phase of the question appears. This would seem remarkable, unless we are to assume that, in calling a claim unliquidated, the courts have alluded to the whole claim, and have considered that, where the amount is not agreed upon, the claim as a whole is unliquidated, and therefore subject to adjustment. If this is not true, no man can pay an amount that he admits to be due without being subject to action whenever and so often as his creditor may choose to claim that he was not fully paid, no matter how solemn may have been his acknowledgment of satisfaction, so long as it is not a release under seal. * * *

It is believed that we may safely treat this claim as one claim, not as two, and as unliquidated, inasmuch as it was not admitted. * * * In Potter v. Douglass, 44 Conn. 541, plaintiff refused $45, which was tendered in full payment of a claim. He took it, however, on account, as he said, and wrote a receipt to that effect, which defendant refused, for the reason that it stated that the money was received on account. The plaintiff, however, kept the money. It does not appear that this amount of $45 was disputed. Apparently, it was not. Yet the court called the claim an unliquidated demand, and held it to have been discharged. In Perkins v. Headley, 49 Mo. App. 562, it is said: "But if there is a controversy between him [the creditor] and his debtor as to the amount which is due, and if the debtor tenders the amount which he claims to be due, but tenders it on the condition that the creditor accept it in discharge of his whole demand, and the creditor does accept it, that will be an accord and satisfaction as a conclusion of law." * * *

It therefore appears that such settlements should have weight, and it seems reasonable to hold that the rule contended for does not apply, for the reason that this was an unliquidated demand, although a certain portion of it was not questioned. * * *

Upon the plaintiff's own testimony, he accepted the money with the knowledge that the defendants claimed that the amount paid was all that was his due, and gave a receipt in full. There is nothing in the case to negative the inference naturally to be drawn from this testimony that there was an accord and satisfaction of an unliquidated demand.

The judgment must be reversed.[160]

MONTGOMERY, J. (dissenting). I think that the payment of an admitted indebtedness is no consideration for a discharge of a further claim by the creditor.

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## DEMEULES *v.* JEWEL TEA CO.

(Supreme Court of Minnesota, 1908. 103 Minn. 150, 114 N. W. 733, 14 L. R. A. (N. S.) 954, 123 Am. St. Rep. 315.)

Action by Joe Demeules against the Jewel Tea Company to recover a balance of $83.66 of a deposit of $150 made by plaintiff to secure the

[160] "Nor do the adjudicated cases support the *dictum* in the former opinion [Price v. Treat, 29 Neb. 536] to the effect that where only the amount admitted to be due is paid, so far the claim is within the rule as one liquidated or not disputed, notwithstanding the plaintiff claims a greater amount. In many of the cases cited the amount tendered was precisely the sum admitted to be due. If a consideration is in such case necessary, it may be found in the fact that the payee receives immediate payment of so much as is paid, without the expense, delay or labor of an accounting, in or out of court, and avoids thereby threatened litigation, which, we think, is always considered a valuable consideration." Irvine, C., in Treat v. Price, 47 Neb. 875, 883-84 (1896).

For a disputed sum to be unliquidated so as to make payment of a lesser sum than is due consideration for acceptance in full, the dispute must be *bona fide*.

"True it is, as pointed out in Fire Ins. Assn. v. Wickham, 141 U. S. 564, it must appear that the alleged dispute really existed and did not arise merely from an arbitrary denial by one party of an obligation which was obviously due." White, J., in City of San Juan v. St. John's Gas Co., 195 U. S. 510, 522 (1904).

There is no discharge where the debtor who marked the check "in full to date" was mistaken in thinking no more was due. Canadian Fish Co. v. McShane, 80 Neb. 551 (1908).

"An accord and satisfaction requires a new agreement and the performance thereof. Jaffray v. Davis, 124 N. Y. 164. It must be an executed contract founded upon a new consideration, although an agreement to accept an independent executory contract has been held sufficient. Kromer v. Heim, 75 N. Y. 574; Morehouse v. Second National Bank, 98 N. Y. 503; 2 Parsons on Contracts (7th ed.), 817, 820. If the claim is liquidated, the mere acceptance of a part, with the promise to discharge the whole, is not enough, for there is no new consideration. Ryan v. Ward, 48 N. Y. 204. If the claim is unliquidated, the acceptance of a part and an agreement to cancel the entire debt, furnishes a new consideration which is found in the compromise. A demand is not liquidated even if it appears that something is due, unless it appears how much is due, and when it is admitted that one of two specific sums is due, but there is a genuine dispute as to which is the proper amount, the demand is regarded as unliquidated, within the meaning of that term as applied to the subject of accord and satisfaction." Vann, J., in Nassoiy v. Tomlinson, 148 N. Y. 326, 330 (1896). And see Ostrander v. Scott, 161 Ill. 339 (1896).

On part payment as satisfaction of a disputed claim, see Ann. Cas. 1915A, 951, note.

faithful performance of his duties as salesman and collector for the defendant. The defendant had sent a check for $66.34, claiming to retain the rest as owing it. Findings for plaintiff. From an order denying motion for new trial, defendant appeals. Affirmed.

ELLIOTT, J.[161] * * * 1. The check for $66.34, which was accepted and retained by Demeules, contained the following recital: "Return in full of $150.00 cash bond deposited, and falsified balance $83.66; amount of this check, $66.34; total, $150.00." The appellant claims that the acceptance of this check with the indorsement thereon constituted an accord and satisfaction. But the evidence shows that there was no consideration for such an agreement, such as is necessary under all the authorities. Duluth Chamber of Commerce v. Knowlton, 42 Minn. 229, 44 N. W. 2; Marion v. Heimbach, 62 Minn. 214, 64 N. W. 386; Ness v. Minn. & Col. Co., 87 Minn. 413, 92 N. W. 333; Byrnes v. Byrnes, 92 Minn. 73, 75, 99 N. W. 426; Hoidale v. Wood, 93 Minn. 190, 100 N. W. 1100, and cases cited in 1 Cyc. 311. Demeules, at the time the check was sent, claimed that the company owed him $150. The company claimed that it owed but $66.34. The claim was not unliquidated in the ordinary acceptation of the term. The company paid, and Demeules accepted and applied, only what the company conceded that it owed. It therefore suffered no detriment by paying that amount. It yielded nothing, and Demeules received nothing, more than the company conceded was his due. If it while conceding that it owed $66.34 only, had paid any greater sum whatever, it would have suffered a detriment by to that extent yielding its claim. There would then have been a consideration for the respondent's agreement to accept less than he claimed was due him. As said in Ness v. Minn. & Col. Co., *supra:* "There can be no accord and satisfaction of a disputed claim, unless something of legal value has been received in full payment thereof to which the creditor had no prior right." The company admitted that Demeules had the prior right to the $66.34 which it paid him. He therefore merely received and obtained money to which he was entitled, and this does not amount to an accord and satisfaction. Marion v. Heimbach, 62 Minn. 214, 64 N. W. 386. There are cases in other states which sustain the appellant's position; but after giving them careful consideration, we have come to the conclusion that the principle upon which they rest is inconsistent with the prior decisions of this court. * * *

The orders of the trial court are therefore affirmed.[162]

[161] Parts of the opinion are omitted.

[162] See Whittaker Chain Tread Co. v. Standard Auto Supply Co., reported, *post*, p. 1407.

## McKENZIE, ET AL. *v.* HARRISON, ET AL.

**(Court of Appeals of New York, Second Division, 1890. 120 N. Y. 260, 24 N. E. 458, 8 L. R. A. 257, 17 Am. St. Rep. 638.)**

Appeal from a judgment of the general term of the Supreme Court, first department, overruling exceptions ordered to be heard in that court in the first instance, and directing judgment to be entered upon the verdict directed by the court.

HAIGHT, J.* This action was brought to recover the amount of rent alleged to be due and unpaid upon a lease of real estate in the city of New York. It appears that the parties had made and executed a lease under seal whereby the plaintiffs leased to the defendants the store and premises known as "No. 16 Fourth Street," for the term of 10 years from May 1, 1877, for the annual rental of $4,500, payable quarterly. Upon the trial the defendants offered to prove, in substance, that after they had occupied the premises for one year under the lease, and paid the rent in full for that year, they reported to the plaintiffs that their business was very dull, and that they could not afford to pay so much rent; that thereupon the plaintiffs agreed to reduce the rent $1,000 per year, making $3,500 a year, or $875 for each quarter; that thereafter the defendants, at the end of each quarter, paid the plaintiffs $875, and the plaintiffs executed and delivered to them a receipt for that amount, in full for balance of rent due at that date as per agreement, "until times are better;" that this continued for three years, after which the plaintiffs notified the defendants that thereafter they wished them to pay the amount of rent originally provided for by the lease, and that thereafter the full amount of rent was paid until the commencement of this action, in December, 1886. This evidence was excluded by the trial court, and a verdict ordered for the plaintiffs for the full amount claimed. * * *

We shall not question the rule that a contract or covenant under seal cannot be modified by a parol unexecuted contract. Coe v. Hobby, *supra;* Smith v. Kerr, 33 Hun 567-571, 108 N. Y. 31, 15 N. E. Rep. 70. Neither shall we question the views of the court below to the effect that the alleged oral agreement in this case to reduce the rent $1,000 per year was void and inoperative in so far as it remained unexecuted. The lessors had the right to repudiate it at any time, and demand the full amount of rent provided for by the lease; but, in so far as the oral agreement had become executed, as to the payments which had fallen due and had been paid and accepted in full as per the oral agreement, we think the rule invoked has no application. The reason of the rule was founded upon public policy. It was not regarded as safe or prudent to permit the contract of parties which had been carefully reduced to writing, and executed under seal, to be modified or changed by the testimony of witnesses

* Parts of the opinion are omitted.

as to the parol statements or agreements of parties. Hence the rule that testimony of parol agreements shall not be competent as evidence to impeach, vary, or modify written agreements or covenants under seal. But the parties may waive this rule, and carry out and perform the agreements under seal, as changed or modified by the parol agrement, thus executing both agreements; and where this has been done, and the parties have settled with a full knowledge of the facts and in the absence of fraud, there is no power to revoke or remedy reserved to either party. Munroe v. Perkins, 9 Pick. 298; Lattimore v. Harsen, 14 Johns. 330; McCreery v. Day, 23 N. E. Rep. 198. So, in this case, if, as is claimed, the parol agreement was made to reduce the rent $1,000 per year, and that agreement has been carried out and fully executed by the parties, and at the end of each quarter, when the rent by the terms of the lease became due and payable, the reduced sum, as agreed upon by the parol agreement, was paid, and the parties settled upon that basis, and, as evidence of such settlement, the plaintiffs gave a receipt in full for the amount of rent due to that date, it became executed, and the plaintiffs cannot revoke the same, or maintain this action to recover any greater sum than that settled for. * * *

It may be claimed that the payment of a less sum than the admitted debt is not a good accord and satisfaction. There are numerous authorities sustaining this doctrine. Lord Coke stated the rule to be that, where the condition is for the payment of a definite, fixed, liquidated sum, the obligor cannot at the time appointed pay a less sum in satisfaction of the whole, because it is apparent that the lesser sum of money cannot be a satisfaction of a greater. This rule has been criticised as unsound and unjust in cases where the lesser sum is accepted in full satisfaction of the greater, (see Co. Litt. 212b; Foakes v. Beer, 9 L. R. App. Cas. 605-617; Jaffray v. Davis, 1 N. Y. Supp. 814;) while, in other cases, the courts have gone still further, and held that the rule applied even in cases where the payment was accepted in full satisfaction, and a receipt given therefor (Harriman v. Harriman, 12 Gray 341; Smith v. Phillips, 77 Va. 548; Bunge v. Koop, 48 N. Y. 225; Wilkinson v. Byers, Langd. Cas. Cont. 197-201.) Under the view taken by us of this case, it does not become necessary to approve or disapprove of the doctrine promulgated in these cases, for this rule has no application when the payment is made under an agreement which is recognized as valid by the parties, and has been fully executed.[163]

[163] In Agel & Levin v. Patch Manufacturing Co., 77 Vt. 13, 58 Atl. 792 (1904), Rowell, C. J., said: "The plaintiffs, by correspondence, sold to the defendant a car of scrap iron at $18 per net ton, delivered at Rutland. After shipment, but before delivery, the defendant refused to take the iron at $18 per net ton, whereupon the parties verbally altered the contract by fixing the price at $18 per gross ton, and thereupon the defendant took the iron, and paid for it at the latter price. The plaintiffs now claim that the alteration was without consideration and void, and seek to recover in general assumpsit the difference between

Again, a debt could be discharged at common law by executing a formal release under seal. The seal imported a consideration, and this has not been questioned by any of the cases. There undoubtedly is a distinction between releases under seal and an ordinary receipt given on the payment of a sum of money which is not under seal, the latter being subject to explanation and proof showing that it was given without consideration. But, even though there may not be an accord and satisfaction, there may be a gift, and the receipt may be evidence of such gift. A gift is a voluntary transfer of any property or thing by one to another without consideration. To be valid, it must be executed. There must be a delivery by the donor such as will place the property or thing given under the control of the donee, and there must be an intent to vest the title in him. Actual and personal delivery by the donor is not always necessary, for, when another person is the custodian, an order of the donor to deliver to the donee may constitute a gift. It may be oral or in writing. No formal words or expressions are required. It is a question of intent, and the inquiry is as to what was intended by that which was said and done. A promissory note or other evidence of debt may be the subject of a gift, and the delivery of the note or of the evidence of debt is evidence tending to show an intent to give. A debt may be forgiven, and a receipt in full may be evidence of such forgiveness. 2 Schouler, Pers. Prop. §§ 68-90. See, also, Bish. Cont. § 50.

In the case of Gray v. Barton, 55 N. Y. 68, the defendant was owing the plaintiff the sum of $820. The plaintiff told him that if he would give him one dollar to make it lawful he would give him the entire debt. Whereupon the defendant delivered one dollar to the plaintiff, who there-

the prices. Some courts hold that a party is not bound to perform his contract, but may break it at will, and pay damages; and that, having broken it, if he consents to perform on terms more favorable to himself, he is doing that which he is not legally bound to do, and so there is a sufficient consideration for the other party's assent to those terms. Other courts hold that a party is bound to perform his contract, and consequently that there is no consideration for the other party's assent to those terms unless there is a valid discharge of the original contract. Harriman, Cont. 70. But however this may be while the modified contract remains executory, when it is performed by the party in whose favor it was modified, it becomes binding on both parties, and the original contract is thereby discharged, unless it appears that such was not the intention of the parties. Rogers v. Rogers, 139 Mass. 440, 1 N. E. 122; Lawrence v. Davey, 28 Vt. 264. It is said in Thurston v. Ludwig, 6 Ohio St. 1, 67 Am. Dec. 328, that there is a class of cases that a written contract may be altered by mere verbal agreement of the parties, which, at its inception, would have no binding force, but when acted upon by the parties till it would work a fraud or an injury to refuse to carry it out would become binding and effective as a contract. Even a contract under seal may be discharged by the performance of a subsequent parol agreement. * * * In the case at bar the new agreement has been acted upon by the parties and fully performed by the defendant, and the original agreement cannot now be enforced without injustice to the defendant."

upon executed and delivered a receipt therefor in full to balance all accounts to date, of whatever name and nature. It was held that the executing and delivery of the receipt in full, with the purpose of giving the debt, was such an act that the law would construe the instrument, if necessary, as an assignment to the defendant. This case is in point, and is controlling upon the question under consideration. See Ferry v. Stephens, 66 N. Y. 321; Carpenter v. Soule, 88 N. Y. 251-256.

We are therefore of the opinion that the proof offered should have been received, that from it the jury might have found that the plaintiffs gave to the defendant the balance of the rent for which this action was brought. The judgment should be reversed, and a new trial ordered, with costs to abide the event.[164]

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## RAGGOW *v.* SCOUGALL AND CO.

**(High Court of Justice, King's Bench Division, 1915. 31 T. L. R. 564.)**

In August, 1913, the plaintiff by an agreement in writing agreed to become the defendants' designer for two years at a certain salary. It was provided that if the business should be discontinued during the period the agreement should cease to be of any effect.[165] When the war broke out many customers cancelled orders which they had given to the firm, and the defendants had to consider whether they should close the business altogether. They called their employees together, and most of them agreed to a reduction of wages during the war if the defendants would continue the business. The plaintiff entered into a new agreement in writing, in which he, like other employees of the firm, agreed to accept a smaller salary for the duration of the war, provided that when the war was over the terms of the old agreement should be revived. He went

[164] On part payment with receipt in full as satisfaction, see 5 Ann. Cas. 525, note; Ann. Cas. 1917A, 130, note.

[165] "It is elementary that a promise to do or not to do something which would work a detriment to the promisor, or a benefit to the promisee, is a sufficient consideration to support a contract. That a promise is dependent upon a condition does not affect its validity, if it was a condition contemplated by the parties and which might reasonably occur. 9 Cyc. 327, and authorities there cited, among which is Rose v. Ry. Co., 31 Tex. 49. Nor does it matter that the occasion for the fulfilment of the promise has not yet arisen. It is the promise, binding in law, and not in its fulfillment which constitutes the consideration." Jenkins, J., in Burt v. Dearson, (Tex. Civ. App.) 227 S. W. 354, 356-7 (1921).

"When a man acts in consideration of a conditional promise, if he gets the promise he gets all that he is entitled to by his act, and if, as events turn out, the condition is not satisfied, and the promise calls for no performance, there is no failure of consideration." Holmes, J., in Gutlon v. Marcus, 165 Mass. 335, 336 (1896).

on with his work, and accepted the new salary until February last, when the defendants received a solicitors' letter claiming payment in full at the rate fixed in the old agreement; and as they refused to pay the excess this action was brought.

In the court below judgment was given for the plaintiff on the ground that no consideration had been shown for the new agreement to accept a reduced payment.

MR. JUSTICE DARLING said the appeal must be allowed. It was clear from the provision in the new agreement that the terms of the old one should be revived when the war came to an end, and that until the war ended the old agreement was dead. The parties had in fact torn up the old agreement and made a new one by mutual consent. They could have done it by recitals setting out the existence and rescission of the old agreement, but they had adopted a shorter course. The new agreement was an agreement contemplating employment on certain terms while the war lasted, and on certain other terms, which could be ascertained by reference to the older document, after the war had ended. The point, therefore, as to want of consideration failed and the appeal succeeded. He was the more glad to be able to arrive at this conclusion on the law, for it was evident that the plaintiff was trying to do a very dishonest thing.

MR. JUSTICE COLERIDGE agreed.

*Appeal allowed.*[166]

166 "Parties to an unperformed contract may alter and modify its terms; to determine whether it is modified by a subsequent arrangement the intention of the parties must be ascertained. 13 C. J. 590; Henning v. U. S. Insurance Co., 47 Mo. loc. cit. 431, 4 Am. Rep. 332; Lanitz v. King, 93 Mo. 513, loc. cit. 519, 6 S. W. 263; Brigham City Fruit Growers' Ass'n v. Zollmann Produce Co., 220 S. W. 911, loc. cit. 915. The party suing on such contract must declare upon it as modified.

"It has been repeatedly held by each one of the courts of appeals in this state that an agreement made in substitution of an executory contract of prior date annuls the former contract and is itself a sufficient consideration for a release of its obligations. Carman v. Harrah, 182 Mo. App. loc. cit. 376, 377, 170 S. W. 388; Smith v. Crane, 169 Mo. App. loc. cit. 708, 154 S. W. 857; Welch v. Mischke, 154 Mo. App. loc. cit. 735, 136 S. W. 36; Cannon-Weiner Co v. Boswell, 117 Mo. App. loc. cit. 476, 477, 93 S. W. 355; Mulliken v. Haseltine et al., 160 Mo. App. loc. cit. 13, 141 S. W. 712; Pressed Brick Co. v. Barr, 76 Mo. App. loc. cit. 386; Pottery Co. v. Folckemer, 131 Mo. App. 105, 110 S. W. 598. While the rule is thus stated broadly, the substituted arrangement must contain a change of the obligation of each party in order to constitute a consideration. If the obligation of one party only is affected by the new arrangement, and the other party receives nothing additional and is relieved of no duty, then there is a want of consideration. Koslosky v. Bloch, 191 Mo. App. 257, loc. cit. 260, 177 S. W. 1060; Zerr v. Klug, 121 Mo. App. 286, loc. cit. 292, 98 S. W. 822; Wilt v. Hammond, 179 Mo. App. 406, loc. cit. 414, 416, 165 S. W. 362.

"In the present case both parties were relieved of the stipulations to deliver the commodities in the times provided for in the first contract." White, C., in Mt. Vernon Car Mfg. Co. v. Hirsch Rolling Mill Co. (Mo.) 227 S. W. 67, 74 (1920).

## H. L. BENSON *v.* L. PHIPPS.

(Supreme Court of Texas, 1895. 87 Tex. 578, 29 S. W. 1061, 47 Am. St. Rep. 128.)

GAINES, Chief Justice. The plaintiff was a surety for one Hosack, the principal maker upon a promissory note payable to the defendant in error. Some days after the note fell due, Hosack wrote defendant in error requesting an extension, to which request defendant replied by letter as follows: "I will extend the time of payment one year, and look with confidence for the accrued interest within sixty days, hoping it will not inconvenience you. After that, if it is your pleasure to make the interest on the extension payable semi-annually, it will help me."

The defendant in error testified to having received the letter from Hosack requesting an extension, and that the foregoing was his reply, but the contents of Hosack's communication were not otherwise shown. He also testified, that he was paid nothing for the extension, and that Hosack never paid the accrued interest.

Suit having been brought on the note by the payee against all the makers, the plaintiff in error pleaded his suretyship; and the facts as stated above having been proved, the trial court gave judgment for the plaintiff in that court. That judgment upon appeal was affirmed by the Court of Civil Appeals.

It is the right of the surety at any time after the maturity of the debt to pay it and to proceed against the principal for indemnity. This right is impaired if the creditor enter into a valid contract with the principal for an extension of the time of payment. The obligation of the surety is strictly limited to the terms of his contract, and any valid agreement between the creditor and the principal by which his position is changed for the worse, discharges his liability. For this reason it is universally held, that a contract between the two, which is binding in law, by which the principal secures an extension of time, releases the surety, provided the surety has not become privy to the transaction by consenting thereto. If the creditor is not bound by his promise to extend, it is clear there is no release. In order to hold him bound by his promise, there must be a consideration. Whether a mere agreement for an extension by the debtor is sufficient to support a promise to extend by the creditor, is a question upon which the authorities are not in accord. We are of opinion, however, that the question should be resolved in the affirmative, at least in cases in which it is contemplated by the contract that the debt should bear interest during the time for which it is extended. If the new agreement was that the debtor should pay at the end of the period agreed upon for the extension precisely the same sum which was due at the time the agreement was entered into, the case might be different. But a promise to do what one is not bound to do, or to forbear what one is not bound to forbear is a good consideration for a contract. In case of a debt which bears interest either by convention or

by operation of law, when an extension for a definite period is agreed upon by the parties thereto, the contract is, that the creditor will forbear suit during the time of the extension, and the debtor foregoes his right to pay the debt before the end of that time. The latter secures the benefit of the forbearance; the former secures an interest-bearing investment for a definite period of time. One gives up his right to sue for a period in consideration of a promise to pay interest during the whole of the time; the other relinquishes his right to pay during the same period, in consideration of the promise of forbearance. To the question, why this is not a contract, we think no satisfactory answer can be given. It seems to us it would be a binding contract, even if the agreement was that the debt should be extended at a reduced rate of interest. That an agreement by the debtor and creditor for an extension for a definite time, the debt to bear interest at the same rate or at an increased but not usurious rate, is binding upon both, is held in many cases, some of which we here cite: Wood v. Newkirk, 15 Ohio St. 295; Fowler v. Brooks, 13 N. H. 240; Davis v. Lane, 10 N. H. 156; Stallings v. Johnson, 27 Ga. 564; Robinson v. Miller, 2 Bush (Ky.) 179; Reynolds v. Barnard, 36 Ill. App. 218; Chute v. Pattee, 37 Me. 102; Rees v. Barrington, 2 Ves. 540; see also Crossman v. Wohlleben, 90 Ill. 537; McComb v. Kittredge, 14 Ohio 348.

In many cases which seemingly support the contrary doctrine, there was a mere promise by the creditor to forbear, without any corresponding promise on part of the debtor not to pay during the time of the promised forbearance. In such cases, it is clear that there is no consideration for the promise. In others, where there was a mutual agreement for the extension, it may be that interest during the period of extension was not allowed by law, and the agreement did not provide for the payment of interest. The case of McLemore v. Powell, 12 Wheaton 554, may have been of that character.

In this case, as we construe the correspondence between Hosack and the defendant in error, there was a request for an extension of the debt for twelve months on part of the former, and an unconditional acceptance on the part of the latter. We infer, that Hosack must have written something about the payment of accrued interest—probably that he hoped to be able to pay it in sixty days. The presumption is, that the letter was in the possession of the defendant in error at the time of the trial. He did not produce it. In any event, he should have known its contents, and if Hosack made his request for an extension conditional upon his payment of the accrued interest, he should have testified to the fact. We conclude, therefore, that there was a binding promise for an extension, and that the plaintiff in error was therefore released.

There is error in the judgment, for which it must be reversed; and since it may be shown upon another trial that Hosack's offer contained

a condition that he would pay the interest in sixty days, the cause is remanded.

*Reversed and remanded.*[167]

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## THE AUSTIN REAL ESTATE AND ABSTRACT COMPANY *v.* G. A. BAHN.

**(Supreme Court of Texas, 1895. 87 Tex. 582, 29 S. W. 646, 30 S. W. 430.)**

On motion for rehearing.

GAINES, Chief Justice. This is a motion for rehearing of an application, based upon the ground that our ruling in this case is in conflict with that made in the case of Benson v. Phipps, recently decided in this court.

When the application now before us was filed, it was considered that it probably involved the same question which was raised in Benson v. Phipps, and upon which a writ of error had been granted. Action upon the application was accordingly suspended until that case was decided; and then it was discovered, that although the question of the validity of a promise for an extension of a contract of indebtedness was involved in each case, the two were clearly distinguishable. In this case, with reference to this question, the trial court found the facts as follows: "That a few days after the note sued on became due, and just before it was assigned to the plaintiff, N. E. Fain presented same to the defendant for payment, when said Stacy, as president of defendant company, requested that an extension of one week from that date be given on said note, and that the same be not placed in the hands of attorney for collection until one week; and agreed, if this was done, that he would pay the note within that time, etc. Here the creditor agrees to extend for one week, and the debtor agrees to pay within the week. He does not agree that he will not pay until the end of the week, or that in case he does pay, he will pay interest for the entire period of the extension. Hence there was no consideration for the promise of the creditor. In Benson v. Phipps, the principal maker of the note and the payee agree upon an extension for twelve months; from which the promise was implied on part of the former not to sue, and upon the latter not to pay within the

[167] See Crossman v. Wohlleben, 90 Ill. 537 (1878); Alley v. Hopkins, 98 Ky. 668 (1896). But see Olmstead v. Latimer, 158 N. Y. 313 (1899); Davis v. Stout, 126 Ind. 12 (1890).

"As a general rule the time for the performance of a written agreement may be extended by parol, and an extension of such written agreement may be shown when supported by some new and sufficient consideration." Cardwell, J., in Cummins v. Beavers, 103 Va. 230, 238 (1904).

See 52 L. R. A. (N. S.) 331, note; L. R. A. 1915B, 1, 26, note.

stipulated time. The promise of the debtor to forego his right to pay at any time after the note was originally due, secured to the creditor the absolute right to receive the interest for the entire time of the extension, and constituted the consideration for the creditor's promise.

In the case before us, it was the right of the company to pay at any time, notwithstanding Fain's promise, and hence there was no consideration to support that promise.

The motion for a rehearing is overruled.

*Motion overruled.*

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## ALLEN *v.* HARRIS.

**(Court of Common Pleas, 1696. 1 Ld. Raym. 122.)**

Trover for a waistcoat. The defendant pleads, that the plaintiff, in consideration that the defendant at the special instance of the plaintiff assumed to pay to the plaintiff 20s. agreed to discharge the defendant of this trover, etc., and lays mutual promises to perform, etc. The plaintiff demurs.

*Girdler,* for the defendant.

The old rule was, that an accord and satisfaction ought to be pleaded executed, that the plaintiff might be sure of something for his damages; but an arbitrement may be pleaded without performance, because the parties may have reciprocal remedies. Then it being now settled, that the parties may have actions upon mutual promises, this accord may be pleaded, though not executed, because each party may have his remedy. 2 Jones, 158; Raym. 450; Case v. Barber, 2 Jones 168; Wickham v. Taylor. *Sed non allocatur.* For, *per curiam,* if arbitrement be pleaded with mutual promises to perform it, though the party has not performed his part, who brings the action, yet he shall maintain his action; because an arbitrement is like a judgment, and the party may have his remedy upon it. But upon accord no remedy lies. And the books are so numerous, that an accord ought to be executed, that it is now impossible to overthrow all the books. But if it had been a new point, it might be worthy of consideration. Judgment for the plaintiff. See 15 Hen. 6; Accord 1; 3 Cro. 304; Balston v. Baxter, Hil. 7 Edw. 4, p. 6; Stile, 245, 252.

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## CROWTHER, ET AL., *v.* FARRER.

**(Court of Queen's Bench, 1850. 15 Q. B. 677.)**

ASSUMPSIT. The declaration stated that at the time of the making of the promise two actions, one in trover and the other in trespass, both at

the suit of the present plaintiffs against the present defendant, were pending in the Queen's Bench; and thereupon it was agreed by and between the plaintiffs and the defendant in manner following, that is to say: that the said actions should be settled, and all proceedings therein stayed, and that the defendant should pay to the plaintiffs £40 in respect of the costs of the said two actions, and also £236 9s. in part of damages; and that the plaintiffs should receive from certain other persons, to wit, J. B. and J. P., £263 11s.; but in the event of J. B. and J. P. neglecting or refusing to pay to the plaintiffs that amount, or in the event of J. B. and J. P. giving up their contract with the defendant, then, and in either of such cases, the defendant should pay to the plaintiffs what might remain unpaid to them of such sum of £263 11s., in which case the defendant should be entitled to get the 1,506 square yards of stone[168] in the said agreement mentioned, or to sell it as he might think proper, in the same manner as though a certain agreement of 1835 had never been made: averment of mutual promises: "and, although the plaintiffs have always performed the said agreement on their part, and although they, confiding in the said promise of the defendant, did then, to wit, upon the making of the said promise, wholly cease to prosecute the said actions and each of them, and have thence continually hitherto stayed all proceedings therein, and although a reasonable time for the defendant to pay the said sums of £40 and £236 9s. had elapsed long before the commencement of this suit:" breach, non-payment of these sums, or either of them, or any part thereof.

Plea: Non assumpsit. Issue thereon.

Verdict for plaintiffs. Rule *nisi* to arrest the judgment.

[In the course of the argument, Lord Campbell, C. J., asked: If the plaintiffs, at the request of the defendant, made a contract which they would break if they proceeded with the actions, is not that alone a consideration to support the defendant's promise?]

LORD CAMPBELL, C. J. The motion in arrest of judgment is made on two grounds: first, that the declaration discloses no consideration for the defendant's promise; secondly, that there are not proper averments of performance of conditions precedent. Now, as to the first objection, the count states that it was agreed between the plaintiffs and defendant that the two actions should be settled, and all proceedings therein stayed. The question is not what would form a good plea in bar to the further maintenance of these actions, but whether this is a good consideration for the defendant's agreement. Is it not an advantage to the promisor, and a disadvantage to the promisee, that two actions against the one at the suit of the other should be settled, and no proceedings taken therein? Then there is a general averment of performance, which after verdict is abundantly sufficient, though it might be bad on special demurrer; but the count goes farther, and

[168] The declaration did not state anything further on this subject.—Reporter's note.

alleges performance more particularly. I think, however, that the agreement does not contemplate that any further act should be done to settle these actions. It appears that, by those who framed the agreement, they were considered as settled by the agreement itself; and, I think, rightly; for they were so settled. I cannot entertain any doubt that, if, after such an agreement, an attempt were made to proceed in the actions, the court would interfere summarily if the defendant was not in default.

PATTESON, J. The question is raised, whether on the face of this declaration there is any thing more than an accord. Now I own I think the meaning of what is stated in the declaration is that the actions are actually gone by the agreement, and that the plaintiff could not have gone on with them; but, even if it was no more than an agreement on the part of the plaintiffs to refrain from going on, I think that was a sufficient consideration to support the promise of the defendant.

COLERIDGE, J. It seems to me that the declaration discloses a mutual agreement, binding each party to the other, supposing that other to have performed his own part. I had more doubt as to the sufficiency of the averment of performance. Perhaps on a special demurrer it might not be sufficient; but this is after verdict; and then it is enough that there is an averment of the plaintiffs having always performed the agreement on their part.

ERLE, J. I shall only add one word as to the averment of performance. I take it that, when the plaintiffs and the defendant agree that the actions are settled, the very agreement puts an end to the actions; that the court would interfere if they were afterwards proceeded with; and that consequently no further performance of the agreement is required.

*Rule discharged.*[169]

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## KROMER *v.* HEIM.

**(Court of Appeals of New York, 1879. 75 N. Y. 574, 31 Am. Rep. 491.)**

Appeal from order of the General Term of the Superior Court of the city of New York, affirming an order of Special Term denying a motion on the part of defendant to set aside an execution issued upon judgment herein, and to have the judgment satisfied of record.

On June 24th, 1876, plaintiff obtained a judgment herein for $4,334.08. On July 26th, 1876, and pending a stay of execution, plaintiff's attorney executed and delivered to defendant a written stipulation, in and by which plaintiff agreed to accept in settlement of the judgment, if paid within a

[169] Where an accord is taken as satisfaction and the accord is not performed, in England the promisee may sue upon it even though he has unsuccessfully tried to sue on the original cause of action discharged by the accord. Elton Cop Dying Co., Ltd. v. Robert Broadbent & Son, 122 L. T. 142 (1919).

year, $3000 in cash and an assignment of defendant's interest in a certain patent right and of the assets of such patent business, or to accept $1000 in cash, $250 down and the balance in instalments, and merchandise to be delivered in amounts stated, sufficient, with the cash payments, to reduce the judgment to $1000, and an assignment of said patent interests. Defendant paid the $250 down, and made the other cash payments and deliveries of merchandise, as specified in the second alternative of the stipulation, until the judgment was reduced to less than $1000, all of which payments were received by plaintiff without objection. Defendant then executed and tendered to plaintiff an assignment of the patent interests as required, which plaintiff declined to accept, but issued an execution to collect the balance of the judgment.

ANDREWS, J. "Accord," says Sir Wm. Blackstone, "is a satisfaction agreed upon between the party injuring and the party injured; which, when performed, is a bar to all actions upon this account." 3 Bl. Com. 15. An accord executory without performance accepted is no bar; and tender of performance is insufficient. Bac. Abr. Tit. Accord and Satisfaction, C. So also accord with part execution cannot be pleaded in satisfaction. The accord must be completely executed, to sustain a plea of accord and satisfaction. Bac. Abr. Accord and Satisfaction, A; Cock v. Honeychurch, T. Ray. 203; Allen v. Harris, 1 Ld. Ray. 122; Lynn v. Bruce, 2 H. Bl. 317. In Peytoe's Case, 9 Co. 79, it is said, "and every accord ought to be full, perfect and complete; for if divers things are to be done and performed by the accord, the performance of part is not sufficient, but all ought to be performed." The rule that a promise to do another thing is not a satisfaction, is subject to the qualification that where the parties agree that the new promise shall itself be a satisfaction of the prior debt or duty, and the new agreement is based upon a good consideration, and is accepted in satisfaction, then it operates as such, and bars the action. Evans v. Powis, 1 Exch. 601; Kinsler v. Pope, 5 Strobhart, 126; Pars. on Cont. 683, note.

An exception to the general rule on this subject has been allowed in cases of composition deeds, or agreements between a debtor and his creditors; and they have been held, upon grounds peculiar to that class of instruments, to bar an action by a separate creditor, who had signed the composition to recover his debt, although the composition agreement was still executory. Good v. Cheeseman, 2 Barn. & Ad. 335; Bayley v. Homan, 3 Bing. (N. C.) 915. The doctrine which has sometimes been asserted that mutual promises which give a right of action may operate and are good, as an accord and satisfaction of a prior obligation, must, in this state, be taken with the qualification that the intent was to accept the new promise, as a satisfaction of the prior obligation. Where the performance of the new promise was the thing to be received in satisfaction, then, until performance, there is not complete accord; and the original obligation remains in force. Russell v. Lytle, 6 Wend. 390; Daniels v. Hallenbeck, 19 Wend.

408; Hawley v. Foote, 19 Wend. 516; The Brooklyn Bank v. DeGrauw, 23 Wend. 342; Tilton v. Alcott, 16 Barb. 598.

Applying the well-settled principles governing the subject of accords to this case, the claim that the plaintiff's judgment is satisfied cannot be maintained. There is no ground to infer that the agreement of July 26th, 1876, was intended by the parties to be or was accepted as a substitute for or satisfaction of the plaintiff's judgment. It was, in effect, a proposition on the part of the plaintiff, in the alternative, to accept $3000 in cash, if paid within one year, and the assignment of the patent and avails of the patent business, in full of the judgment of $4334.08, or to accept $1000 in cash, in installments, and the balance in merchandise, until the judgment should be reduced to $1000; and for that balance to accept the assignment of the patent interests.

The defendant had the election between the alternatives presented by the plaintiff. He elected the latter, and paid the $1000, and supplied the merchandise, until the debt was reduced to $1000, and then tendered the assignment of the patent interests, which the plaintiff refused to accept.

The judgment clearly was to remain in force until the satisfaction under the new agreement was complete. It is the case of an accord partly executed. So far as the plaintiff accepted performance, his claim was extinguished. So far as it was unexecuted, the judgment remained in full force; and however indefensible in morals it may be for the plaintiff to refuse to abide by the agreement in respect to the patent interests, he was under no legal obligation to accept the assignment tendered; and he had the legal right to enforce the judgment for the balance remaining unpaid.

It is clear that the right to supply the merchandise was for the benefit of the defendant. The plaintiff gave him the option to pay $3,000 in cash, and assign the patent interests, or to pay $3334.08 in merchandise and assign the patent interests. The merchandise was to be furnished on "as favorable terms as would be allowed by Hoyt & Co., or New York rates for cash sales." It gave the plaintiff no benefit beyond what he would derive by any purchase in the open market of the same kind of goods. It is quite clear that the defendant preferred to pay $3334.08 in merchandise to paying $3000 in cash.

We think that no distinction arises upon the circumstances to take the case out of the general rule, that an unexecuted accord cannot be treated as a satisfaction.

*The order should be affirmed.*[170]

[170] "It is not, however, universally true that a cause of action on contract, or for tort, may not be extinguished by an agreement between the parties, although the agreement which is the consideration for the satisfaction is executory. If the subsequent agreement is accepted in satisfaction, and this appears expressly or by implication, the original cause of action is merged and extinguished. Kromer v. Heim, 75 N. Y. 574, and cases cited. It is plain also,

## JOHN SCHWEIDER *v.* GEORGE LANG.

(Supreme Court of Minnesota, 1882. 29 Minn. 254, 13 N. W. 33, 43 Am. Rep. 202.)

BERRY, J. On September 27, 1881, defendant, as payee, holding plaintiff's promissory note, upon which there was an unpaid balance of $1,850, falling due November 10, 1882, with interest to accrue, they agreed as follows: Defendant agreed to accept $1,750 in full satisfaction of the balance of principal and interest called for by the note; $150 to be paid by plaintiff within one week and $1,600 within two weeks from said

that if one having a debt or claim against another satisfies or releases it in consideration of an executory promise by the party owing the debt or duty, he cannot afterward enforce his original cause of action upon a mere failure by the other party to perform his promise, 'for he has a remedy to compel performance.'" Andrews, J., in Morehouse as Receiver v. Second National Bank of Oswego, 98 N. Y. 503, 509 (1885). See also 6 Ann. Cas. 564, note.

In Manley v. Vermont Mutual Fire Ins. Co., 78 Vt. 331 (1906), the insured put in a claim for fire loss of $500.37, appending to his proof of loss a statement that if the same should be allowed, it was agreed that it should be accepted as a full final adjustment. The claim was allowed and the insured signed a receipt preliminary to the sending of a check for the amount, but later the insured filed additional proof of loss for items omitted from the original proof by mistake. This action was then brought for the increased amount, whereupon the company made a tender of the $500.37 and kept it good, relying on the defense of accord and satisfaction. The trial court held for defendant, but in reversing this judgment, Powers, J., for the court, said: (p. 335.)

"It is a familiar rule that an unexecuted accord is no bar to an action on the original undertaking. Bryant v. Gale, 5 Vt. 416; Rising v. Cummings, 47 Vt. 345; Welch v. Miller, 70 Vt. 108; Gowing v. Thomas, 67 N. H. 399. The agreement here relied on is an accord executory; unless the plaintiff accepted the defendant's *promise* to pay (treating the notice of August 4th [that the claim was allowed] as such) in satisfaction of his claim. For, while the general rule is just as stated, that the accord must be executed in order to discharge the obligation, it is equally well settled that when the creditor accepts the mere promise of his debtor to perform some act in the future in satisfaction of the debt, the mere promise itself, without performance, is sufficient to extinguish the debt. Hard v. Burton, 62 Vt. at p. 322; Gowing v. Thomas, *supra;* note to Harrison v. Henderson, (Kan.) 100 Am. St. Rep. at p. 438. To have this effect, however, the new promise must be one legally binding, operating to extinguish the existing claim, which can be enforced in substitution therefor. An essential element of such an agreement—like any other contract—is a legally sufficient consideration. But if one promises to do what he is already legally bound to do, the promise is nude; it creates no new duty and cannot support an action; nor does it afford a consideration for a promise by the other party. Wheeler v. Wheeler, 11 Vt. 60; Cobb v. Cowdery, 40 Vt. 25; see, also, Chase v. Soule, 76 Vt. at bottom of p. 357. Of this character is the agreement in question. As the matter stood at the time it was entered into, the defendant owed the plaintiff $500.37, the sum specified therein, pay-

September 27; the note to be thereupon delivered up, and a mortgage securing the same to be cancelled. Plaintiff agreed to raise the $1,750 and pay the same to defendant as above specified. It was subsequently mutually agreed that defendant should call upon plaintiff at his residence, within a week from September 27, to receive the $150 payment, plaintiff to have the same there in readiness. Plaintiff had and kept the $150 in readiness during the week; but defendant failed to call for it at any time, and plaintiff was unable to find him during the week mentioned. Within two weeks from September 27, plaintiff, after much expense and trouble, procured the sum of $1,600, and on October 10, 1881, duly tendered the sum of $1,750 to the defendant in fulfillment of his (plaintiff's) agreement, and requested defendant to fulfil on his part. Defendant refused to receive the money or to perform his part of the agreement, having on October 1, without plaintiff's knowledge, sold and transferred the note and mortgage to a third party, to whom plaintiff became thereby bound to pay the full unpaid amount called for by the note. Plaintiff brings this action for damages for defendant's breach of contract.

The agreement between the parties was not for the sale of the note and mortgage, but one by which the maker of these instruments was to be discharged from liability thereon by the payee. The agreement is, therefore, not within the statute of frauds, so as to be required to be in writing. The agreement is what is known as an accord executory; that is to say, it is an agreement upon the sum to be paid and received at a future day in satisfaction of the note. If the accord had been executed, there would have been a satisfaction extinguishing the note, the case being taken out of the rule by which payment of a part is held insufficient to satisfy the whole of a liquidated indebtedness by the fact that the payment was to be made before the indebtedness fell due. Sonnenberg v. Riedel, 16 Minn. 83; Brooks v. White, 2 Met. 283.

The case is, then, one of a promise on the part of the plaintiff to do something of advantage in law to the defendant, and on the part of the defendant to do something of advantage in law to the plaintiff—a case of mutual promises, one of which is the consideration of the other. The agreement was valid and binding upon both parties. The plaintiff has duly offered to perform on his part. The defendant has refused to accept

able in ninety days thereafter. So the plaintiff agreed to accept just what he was bound to accept, and the company agreed to pay just what it was bound to pay,—both at the time and in the manner specified in the original contract. Neither yielded anything; neither gained anything. The new agreement resulted in no advantage to the one or detriment to the other. It was not a compromise as was the case in Insurance Co. v. Chestnut, 50 Ill. 111, for there was no disagreement and hence there was nothing to compromise. Insurance Company v. Sweetser, 116 Ind. 370.

"The adjustment agreement was without consideration and revocable by either party to it at any time before full performance. It was a mere accord without satisfaction, and does not bar an action on the policy. Vining v. Insurance Co., 89 Mo. App. 311; Giboney v. Insurance Co., 48 Mo. App. 185."

the proffered performance, as also to perform on his part at plaintiff's request, and has moreover disabled himself from performing by disposing of the note. The plaintiff, is, therefore, in accordance with the general rule which gives damages for breach of contract, entitled to recover the damages which have resulted to him from this breach by defendant. Billings v. Vanderbeck, 23 Barb. 546; Scott v. Frink, 53 Barb. 533; Very v. Levy, 13 How. 345.

*Order affirmed.*

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## HENRY HUNT *v.* WILLIAM BROWN.

**(Supreme Judicial Court of Massachusetts, 1888. 146 Mass. 253, 15 N. E. 587.)**

HOLMES, J. The plaintiff made three notes to Russell, the defendant's intestate. Afterwards, according to the plaintiff's evidence in the present case, Russell promised that, if the plaintiff would assent to a compromise, by the executors of the plaintiff's father's will, of a claim in their hands against third persons, by which compromise the plaintiff's share of his father's estate would be diminished, Russell would accept in full settlement of the balance due upon the notes whatever percentage the executors should take in settlement of their claim. The executors then settled the claim for sixty-two per cent of the amount, with the plaintiff's assent. Then Russell died, and suit was brought by his administrator, the present defendant, upon the notes, against the present plaintiff. The latter pleaded a general denial and payment, and afterwards made an offer of judgment for the full amount of the notes, interest, and costs, which was accepted, and the sum was paid. The present suit is upon Russell's alleged agreement. The defendant asked a ruling that the agreement was without consideration, and also that the judgment in the former case was a bar. Both rulings were refused, and he excepts.

1. It is very plain that the jury were warranted in finding that the plaintiff's assent to the compromise was dealt with by the parties as a consideration, that is, as the conventional inducement of Russell's promise, and not merely as a condition precedent, and that if it was so dealt with it was sufficient. Evidence or even an admission that the compromise was for the plaintiff's advantage would not alter the case. In determining whether or not an act was dealt with by the parties to an oral agreement as a consideration, the fact that its consequences were seen to be advantageous to the actor may be important; but on the question of sufficiency alone, it is enough that the immediate effect of the act is an abandonment of an actual or supposed right, whatever the balance of advantages may be in the long run. It is hard to imagine any change of position, not made in pursuance of a previous duty, which may not be sufficient as a consideration, or which is not a detriment in a legal sense.

2. If Russell had received the sixty-two per cent as agreed, and the suit had been brought for the residue, the question would arise whether the acceptance of less than the sum due, upon a collateral consideration, could be distinguished from an acceptance of less, before the notes fell due, or, like that, constituted an accord and satisfaction; Bowker v. Childs, 3 Allen 434, 436; and if it was technically a satisfaction, whether, like a payment (Fuller v. Shattuck, 13 Gray 70), it must not have been pleaded in the suit upon the notes if it was to be relied on at all, or whether there remained any contract unexecuted by the party satisfied which he would break if he afterwards brought suit. But Russell did not accept the sixty-two per cent; so that the only question is whether his agreement in any other way extinguished the notes in whole or in part, since in that case the judgment might be a bar.

The agreement was not itself a satisfaction. It was not a new contract substituted for the notes, and entitling the plaintiff to demand their surrender. Neither could it operate as a release of thirty-eight per cent of the notes, when the percentage was fixed by the compromise referred to. Language sometimes has been used which suggests that an agreement for a sufficient consideration might take effect by way of release, although not under seal. Goodnow v. Smith, 18 Pick. 414, 416; Petty v. Allen, 134 Mass. 265, 267; Taylor v. Manners, L. R. 1 Ch. 48. But the common law knows no such release. Shaw v. Pratt, 22 Pick. 305, 308. The consideration of the notes being executed, the agreement could operate only by way of accord and satisfaction. See Cumber v. Wane, 1 Smith's Lead. Cas. (8th Am. ed.) 633 and notes; Bragg v. Danielson, 141 Mass. 195, 196; May v. King, 12 Mod. 537, 538. The suggestion which we are considering, if stated in technical form, would have to be that Russell accepted the plaintiff's assent to the compromise which he desired, in satisfaction of thirty-eight per cent of the notes. But this is plainly a distortion of the evidence, according to which the assent was accepted, not as partial satisfaction of a debt, but as the consideration for a promise.

If, however, the jury might have been warranted in finding that the agreement, and what was done under it, had released or satisfied thirty-eight per cent, they were warranted at least equally in finding that it was purely executory in purport as well as in form, viz. to accept a percentage in satisfaction when it was paid. The court could not rule, as matter of law, that the opposite construction was the true one, or assume the opposite construction as a foundation for its rulings.

But it may be said, that the contract must have been found to embrace the element that Russell would not sue for more than sixty-two per cent. And it may be argued, that, if not technically a release it ought to have been available in defense *pro tanto*, by way of estoppel or otherwise, in order to avoid circuity of action, upon the same principle that a covenant not to sue is allowed to enure as a release. The

answer is, that whether available in this way or not, whether or not such a defense would escape the objection that in substance it was accord without satisfaction, the plaintiff was not bound to use the agreement in defense. For if, as we have tried to show, and as the suggestion under consideration assumes, Russell's agreement did not extinguish the whole or any part of the notes, but left them in full force, it also necessarily retained its independent character as a collateral contract. See further Costello v. Cady, 102 Mass. 140; Blake v. Blake, 110 Mass. 202. A breach of it was a substantive cause of action, upon which the present plaintiff might bring his own suit in his own way, and he was no more bound to plead it than he would have been bound to plead a set-off, fraud, or a breach of warranty. Smith v. Palmer, 6 Cush. 513, 521; Cobb v. Curtiss, 8 Johns. 470. See Burnett v. Smith, 4 Gray 50, 52; Davis v. Hedges, L. R. 6 Q. B. 687.

When a defendant has the choice of setting up a matter in defense, or of suing upon it in another action, if he chooses not to set it up in defense, of course the judgment in the action against him is no bar to a subsequent suit by him. Smith v. Palmer, *ubi supra;* Star Glass Co. v. Morey, 108 Mass. 570, 573; Davis v. Hedges, *ubi supra.* Russell's agreement was not pleaded in the former action. Even if it had been executed, it would not have been admissible under a plea of payment. Ulsch v. Muller, 143 Mass. 379; Grinnell v. Spink, 128 Mass. 25. The present plaintiff, not having set up the agreement, and having no other defense, very properly saved himself costs and his antagonist delay by submitting at once to the inevitable and offering judgment. See Rigge v. Burbidge, 15 M. & W. 598.

*Exceptions overruled.*[171]

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## HART *v.* GEORGIA R. CO.

**(Supreme Court of Georgia, 1897. 101 Ga. 188, 28 S. E. 637.)**

Action by Eva F. Hart against the Georgia Railroad Company. A general demurrer to the complaint was sustained, and plaintiff brings error. Affirmed.

COBB, J.[172] * * * The contract as declared on contained an obligation on the part of the plaintiff to erect "a permanent and first-class hotel for the accommodation of the traveling public, and maintain the same in a first-class manner," and the obligation on the part of the road that it, "by the patronage of its road, would maintain and support the same." The whole of the alleged parol contract is contained in the words quoted. What is a first-class hotel? How is a hotel maintained in a first-class

[171] See Marsh v. Fricke, 1 Ala. App. 649, 56 So. 110 (1911).

[172] Part of the opinion is omitted.

manner? What is the patronage of a road running trains day and night at a given point? Is the stopping of every train necessary to maintain and support an eating house at such point? If not, how many trains, and what trains? Suppose the plaintiff had failed to erect an hotel, what character of building could she have been compelled to erect under this contract? That she did erect an hotel which, in her opinion, was a first-class hotel, and that she did maintain the same in what she understood to be a first-class manner, cannot make certain and definite stipulations in the contract declared on, which are otherwise vague and indefinite. Construing the declaration as a whole, it is impossible to determine with certainty what was the contract between the parties, and therefore it is impossible to determine what would be the damages arising from a failure to carry out the alleged contract. As the language alleged does not make a contract between the parties which is capable of enforcement, there was no error in dismissing the declaration on demurrer.

*Judgment affirmed.*

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## WICKHAM & BURTON COAL CO *v.* FARMERS' LUMBER CO.

**(Supreme Court of Iowa, 1920. 179 N. W. 417.)**

Counterclaim asserting that damages were due from plaintiff because of a contract made between plaintiff and defendant. A demurrer to the counterclaim was overruled; hence this appeal. Reversed.

SALINGER, J.[173] I. The counterclaim alleges that about August 18, 1916, defendant, through an agent, entered into an oral agreement * * * "that plaintiff would furnish unto defendant [which bought in such amounts with the purpose of selling the same at retail to its patrons] coal in carload lots, that defendant would want to purchase from plaintiff" on stated terms, with character of the coal described * * *

The basis of the counterclaim, so far as damages are concerned, is the allegation that a stated amount of coal had to be purchased by defendant in the open market at a greater than the contract price, and that therefore there is due the defendant from the plaintiff the sum of $3,090. * * *

II. The demurrer makes, in effect, three assertions: (a) That the arrangement between the parties is void for uncertainty; (b) that it lacks consideration; (c) that it lacks mutuality of obligation. We have given the argument and the citations on the first two propositions full consideration. But we conclude these first two are of no importance if mutuality is wanting.

The authorities that deal with uncertainty and indefiniteness hold,

[173] Parts of the opinion are omitted.

in effect, that whatsoever is ascertainable with reasonable effort is sufficiently certain to be enforced, if there be no objection to enforcement other than uncertainty. Now, grant that it was not difficult to ascertain how much coal defendant would sell in the time stated in the negotiations, how does that help if there was no obligation on one side to sell, or on part of the other to buy? If the defendant was under no binding obligation to buy of plaintiff, it does not matter how much defendant could sell. In fewer words, though an offer to sell a specified number of tons of coal is not uncertain or lacking in definiteness, such offer is no contract, unless the other party agrees to receive what is offered. In still fewer words, while a writing may be so uncertain as not to be enforceable, a perfectly definite writing may still be unenforceable because there is no mutuality of obligation.

And the asserted lack of consideration is bottomed on the claim that mutuality is lacking. Appellant does not deny that a promise may be a consideration for a promise. Its position is that this is so only of an enforceable promise. That is the law. If, from lack of mutuality, the promise is not binding, it cannot form a consideration. Bailey v. Austrian, 19 Minn. 535 (Gil. 465). To like effect is Walsh v. Myers, 92 Wis. 397, 66 N. W. 250, which holds there was consideration, because there were mutual promises which were enforceable. And so of Young v. Springer, 113 Minn. 382, 129 N. W. 773; Hazlehurst v. Supply Co. (C. C.) 166 Fed. 191; Chicago Railway v. Dane, 43 N. Y. 242. There is no consideration by promises which lack mutuality. Cold Blast Co. v. Bolt Co., 114 Fed. at 81, 82, 52 C. C. A. 25, 57 L. R. A. 696; Campbell v. Lambert, 36 La. Ann. 35, 51 Am. Rep. 1. In the last-named case it is said that, while a promise may be a good consideration for another promise, this is not so "unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement"—citing 1 Parsons on Contracts, 448. To the same effect are Utica Railway v. Brinckerhoff, 21 Wend. (N. Y.) 139, 34 Am. Dec. 220, Missouri Railway v. Bagley, 60 Kan. 424, 56 Pac. 762; Tucker v. Woods, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305, Corbitt v. Gas Co., 6 Or. 405, 25 Am. Rep. 541, and 1 Chitty on Contracts, 297.

The question of first importance, then is whether there is a lack of mutuality. In the last analysis the counterclaim is based on the allegation that plaintiff undertook to furnish defendant such described coal "as defendant would want to purchase from plaintiff." The defendant never "accepted." Indeed, it is its position that it gave orders, and that plaintiff did the accepting. But concede, for argument's sake, that defendant did accept. What was the acceptance? At the utmost, it was a consent that plaintiff might ship it such coal as defendant "would want to purchase from plaintiff." What obligation did this fasten upon defendant? It did not bind itself to buy all it could sell. It did not bind itself to buy of plaintiff only. It merely "agreed" to buy what it pleased.

It may have been ascertainable how much it would need to buy of some one. But there was no undertaking to buy that much, or indeed, any specified amount of coal of plaintiff. * * *

The "contract" on part of appellee is to buy if it pleased, when it pleased, to buy if it thought it advantageous, to buy much, little, or not at all, as it thought best.

A contract of sale is mutual where it contains an agreement to sell on the one side, and an agreement to purchase on the other. But it is not mutual where there is an obligation to sell, but no obligation to purchase, or an obligation to purchase, but no obligation to sell. * * *

Where plaintiff offers to deliver stone "in such quantities as may be desired," and the other party accepts this without qualification, and without making reference to any existing contract for using the stone, there is no mutuality, because the defendant was not bound to desire any stone. Hoffman v. Maffioli, 104 Wis. 630, 80 N. W. 1032, 47 L. R. A. 427. To same effect is Oil Co. v. Kirk, 68 Fed. 793, 15 C. C. A. 540.

A contract to sell personal property is void for want of mutuality if the quantity to be delivered is conditioned entirely on the will, wish, or want of the buyer. 13 Corpus Juris, 339; Cold Blast Co. v. Bolt Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696. So of an agreement to supply all pig iron wanted by defendants in their business between stated dates, at specified prices, even though the other party promised to purchase such iron. The argument advanced is that the buyer did not engage "to want any quantity whatever," nor even agree to continue in their business. Bailey v. Austrian, 19 Minn. 535 (Gil. 465). It is said in Hickey v. O'Brien, 123 Mich. 611, 82 N. W. 242, 49 L. R. A. 594, 81 Am. St. Rep. 227, that in National Furnace Co. v. Manufacturing Co., 110 Ill. 427, the case of Bailey v. Austrian is distinguished by pointing out that in the Bailey Case stress is laid on the word "want"; while in the Illinois case the plaintiff agreed to sell to defendant all the iron "needed" in its business during the three ensuing years at $22.35 a ton, and the defendant agreed to take its year's supply at that price.[174] We are unable

[174] "A contract to purchase the entire output of a mill or plant, for a given and reasonable time, at a given price, is valid, and so, likewise, is a contract to purchase the entire output of a certain product of a plant, such as all the heart lumber, at a certain price; but an agreement to purchase all that the manufacturer desires to sell to the purchaser at a certain price, or all that the purchaser desires to take, at a certain price, would be void. The mere fact that the amount of the product is uncertain or depends upon the will or efforts of the manufacturer does not render the contract void. It is the fact that whether he will be bound depends upon his will or caprice that renders the contract void. All contracts for the entire output of a given plant or business, of course, as to amount produced, depend more or less upon the will and efforts of the manufacturer; likewise does the amount of the purchase of all the materials a party may need in his business depend in a measure upon his will and efforts." Mayfield, J., in McIntyre Lumber & Export Co. v. Jackson Lumber Co., 165 Ala. 268, 271 (1910).

to find any substantial difference between an "agreement" to buy what one might "want" and what one might "need." Be that as it may, in the case at bar the language was, "would want to purchase," and the Austrian Case is well supported in authority . An agreement to receive and pay for such beer as the plaintiff might from time to time want from the defendant lacks binding force for want of mutuality, though plaintiff agreed to sell all the beer of specified brands which plaintiff should order at prices to be agreed on. Teipel v. Meyer, 106 Wis. 41, 81 N. W. 982. To like effect is Gipps Brewing Co. v. De France, 91 Iowa 108, 58 N. W. 1087, 28 L. R. A. 386, 51 Am. St. Rep. 329. And see Hoffman v. Maffioli, 104 Wis. 630, 80 N. W. 1035, 47 L. R. A. 427; Tarbox v. Gotzian, 20 Minn. 139 (Gil. 122); Stensgaard v. Smith, 43 Minn. 11, 44 N. W. 669, 19 Am. St. Rep. 205; Turnpike Co. v. Coy, 13 Ohio St. 84; Railroad Co. v. Brinckerhoff, 21 Wen. (N. Y.) 139, 34 Am. Dec. 220.

Indeed, in American Steel Co. v. Copeland, 159 N. C. 556, 75 S. E. 1004, and in Hickey v. O'Brien, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227, our case of Drake v. Vorse, 52 Iowa 417, 3 N. W. 465, is construed to support the rule in Bailey v. Austrian, 19 Minn. 535 (Gil. 465), to wit: That there is no mutuality in an offer to supply all the other wants, because he is under no engagement to want any quantity whatever. * * * Both reason and the very great weight of authority work that the "contract" in review was no contract, because

**"A promise is a good consideration for a promise. But no promise constitutes such a consideration which is not obligatory upon the party promising. It must bind the promisor, so that the promisee may maintain an action for its breach, or it is without legal effect and void. A promise to furnish, deliver, or receive specified articles at certain prices, without any agreement to order or to accept any amounts or quantities of the articles, is without binding force or effect, because neither party is thereby bound to deliver or to accept any quantity or amount whatever. Such promises are void, because they lack one of the essential elements of an agreement,—certainty in the thing to be done. Contracts for the future supply during a limited time of articles which shall be required or needed or consumed by an established business, or used in the operation of certain steamships or other machinery, are no exceptions to this principle, because they fall under the rule. *'Id certum est quod certum reddi potest.'* But an accepted promise to furnish goods, merchandise, or other property, at certain prices, during a limited time, in such quantities as the acceptor shall require or want in his business, is without consideration and void, because the acceptor is not bound thereby to require or take any articles whatever under the supposed agreement. The line of demarkation between valid and invalid contracts here runs between the requirements of machinery, or of an established business, and the wants, desires or requirements of the tentative vendee; and that because the former are either reasonably certain, or may be made so by evidence, while the latter are conditioned by the will of the tentative vendee alone, and are both uncertain and capable of infinite variation." Sanborn, J., in Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77, 79-80 (1902).**

defendant was under no binding obligation.[175]

III. Three cars of coal were shipped and received. Upon this appellee urges that thereby the so-called contract was completed and made mutual. Part performance was ineffectual in Hoffman v. Maffioli, 104 Wis. 630, 80 N. W. 1032, 47 L. R. A. 427, to found a case as for breach of contract on refusal to ship more. The same is held in Crane v. Crane, 105 Fed. 871, 45 C. C. A. 96, and in Cold Blast Co. v. Bolt Co., 114 Fed. 82, 52 C. C. A. 25, 57 L. R. A. 696, Teipel v. Meyer, 106 Wis. 41, 81 N. W. 982, and in Campbell v. Lambert, 36 La. Ann. 35, 51 Am. Rep. 1, Utica R. Co. v. Brinckerhoff, 21 Wend. (N. Y.) 139, 34 Am. Dec. 230, Missouri Railway v. Bagley, 60 Kan. 424, 56 Pac. 762, and Chicago Railway v. Dane, 43 N. Y. 243.

If there never was a contract to ship anything, that is still the situation when a contract to ship what has not yet been shipped is asserted as the

[175] "The essential feature of the agreement, according to paragraph sixth of the complaint, is that defendant agreed to sell to plaintiff, for delivery within the named territory, all coal which plaintiff would order up to 25,000 tons per annum. There is no obligation whatever upon plaintiff to order any coal. If plaintiff had refused or neglected to order coal, defendant would not have had any cause of action against him. The case is not one where one party agrees to supply the requirements of another. See U. S. v. Republic Bag & Paper Co., 250 Fed. 79, 162 C. C. A. 251, where there is a general discussion of this type of agreement, with leading cases cited.

"On the contrary, the agreement is in principle, in one aspect, within that class of cases which have come to be known as 'will, wish, or want' contracts. It is an agreement clearly lacking in mutuality. American Cotton Oil Co. v. Kirk, 68 Fed. 791, 15 C. C. A. 540; Commercial Wood & Cement Co. v. Northampton, 115 App. Div. 388, 100 N. Y. Supp. 960; Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696. * * *

"Where, however, orders under the agreement were accepted, each order so accepted, or sale, may give rise to the cause of action." Mayer, J., in Leach v. Kentucky Block Cannel Coal Co., 256 Fed. 686, 688 (1919).

"We think that, having in view reasonable business necessities, a contract for all of certain articles, at a certain price, that may be needed or required in a certain business, is a mutual obligation; one to furnish and the other to buy, the quantity being reasonably approximated. *'Id certum est quod certum reddi potest.'* But a contract for all of an article that one may desire or that he may want is bad. The distinction is this: The first is an absolute engagement to buy all that is needed for a certain purpose, and nothing is left to the caprice or whim of the purchaser. He must buy of his contractee all that is required. Whereas the second is that he only buys if he wishes to. Nothing is obligatory; if he does not want to buy he need not." Ellison, P. J., in Royal Brewing Co. v. Uncle Sam Oil Co. (Mo. App.), 226 S. W. 656, 658 (1920).

"In many lines of business it has become common in late years for those engaged therein to contract in advance, at specified prices, for such quantity of materials or of goods as may be needed in such business during a specified period of time. Where such contracts are supported by a consideration other than the mutual promises of the parties, their validity is beyond question. Where the only consideration for the promise to sell is the promise of the buyer to purchase such quantity as he may need, the authorities are not unanimous, but the decided weight of authority is to the effect that, if the

basis of an action. As said in Cold Blast Co. v. Bolt Co., 114 Fed. 80, 52 C. C. A. 25, 57 L. R. A. 696, even though there had been some shipments, there was still no consideration and no mutuality in the contract as to any articles which defendant had not ordered, or which plaintiff had not delivered, and therefore the refusal of plaintiff to honor the orders of defendants was no breach of any valid contract, and formed no legal cause of action whereon to base a counterclaim. It was further said:

"As to all undelivered articles, that defect still inheres in the argument. The plaintiff is not bound to deliver, nor the defendant to take and pay for, any articles that have not been delivered [that is to say, so much as has not been performed still rests upon an agreement which is not enforceable, and for the refusal to honor which there can be no recovery]. * * * The defendant never agreed to order or to pay for any quantity of these undelivered articles. If it had refused to order and take them, no action could have been maintained for its failure, because no court could have determined what amount it was required to take."

It is thus stated in 13 Corpus Juris, 341:

"Accepted orders for goods under contracts void within these rules constitute sales of the goods thus ordered at the price named in the contracts, but do not validate the agreements as to articles which the one refuses to purchase or the other refuses to deliver, or to deliver under the void contract. This is so because neither party is bound to take or deliver any amount or quantity of these articles thereunder."

Defendant alleges further that, by reason of the conduct of plaintiff in furnishing defendant two carloads at $1.50 per ton under the contract terms, plaintiff is now estopped from claiming there was no binding between the parties for furnishing coal to defendant under the contract contended for by defendant. But the claimed estoppel is no broader than the claimed breach of a contract which is no contract.

IV. Cases relied on by appellee do not, on careful consideration, militate with what we have declared. All that Keller v. Ybarru, 3 Cal. 147, holds is that, when one party offers to sell as much as the other wishes,

buyer has an established business whose requirements may be estimated approximately, the contract is not void either for uncertainty or want of mutuality; but is valid and may be enforced to the extent of the ordinary requirements of such business when carried on and conducted in the manner contemplated by the parties at the time of making such contract. Lima Locomotive & Machine Co. v. National Steel Casting Co. [155 Fed. 77], 11 L. R. A. (N. S.) 713, and numerous cases cited in the note appended thereto; T. B. Walker Mfg. Co. v. Swift & Co. [200 Fed. 529], 43 L. R. A. (N. S.) 730, and cases cited in note appended thereto." Taylor, C., in Scott v. T. W. Stevenson Co., 130 Minn. 151, 159-160 (1915).

On the construction of contracts for the sale of the season's output of a commodity, or a sale to the extent of the buyer's requirements, see 1 A. L. R. 1392, note; 7 A. L. R. 498, note; 9 A. L. R. 276, note. On mutuality, see 11 L. R. A. (N. S.) 713, note; 43 L. R. A. (N. S.) 730, note; L. R. A. 1918E, 296, note.

there is a contract after the other declares what quantity he will take. In Cooper v. Lansing, 94 Mich. 272, 54 N. W. 39, 34 Am. St. Rep. 341, the defendant entered the following order:

"Owosso, Mich., Dec. 16, 1889.

"Mess. Lansing Wheel Co., Lansing, Mich.—Gentlemen: Please enter our order for what wheels we may want during the season of 1890, at following prices and terms: B, $6.00; C, $5.00; D, $4.00—per set, f. o. b. Owosso, 30 days. All the wheels to be good stock, and smooth. Should you want a few D wheels, to be extra nice stock, all selected white, they are to be furnished at same price, not to exceed 10 set in a 100.

"Very respectfully yours,

"Owosso Cart Co."

Upon receipt of this instrument, defendant indorsed thereon: "Accepted. Lansing Wheel Co." It is held there was a contract after shipment at the specified prices.

In Steel Co. v. Copeland, 159 N. C. 556, 75 S. E. 1002, it is ruled that an agreement by a manufacturer to furnish a dealer all the wire he needed for his trade constitutes a continuing offer on the part of the company to sell, which, when accepted *pro tanto* by an order before withdrawal of the offer, becomes effective as a contract. The facts distinguish McCall v. Icks, 107 Wis. 232, 83 N. W. 300. In Furnace Co. v. Keystone Co., 110 Ill. 427, and Smith v. Morse, 20 La. Ann. 220, there was what is indubitably a mutual promise. Of course, we are not concerned with the cases wherein it is plain that the court enforced the agreement by justifiably holding that, while certain things were not expressed, there was an affirmative agreement by necessary implication. See Cold Blast Co. v. Bolt Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696; Shadbolt v. Topliff, 85 Wis. 513, 55 N. W. 854; Minneapolis Co. v. Goodnow, 40 Minn. 497, 42 N. W. 356, 4 L. R. A. 202. If any of these may be said to conflict with our conclusions, they are against the great weight of authority, and we decline to follow them.

The case of Holtz v. Schmidt, 59 N. Y. 253, is not relevant. It merely holds that, where there is an engagement to supply goods at prices represented to be the lowest made to any buyer, then, on proof that the same kind of goods were sold to another at lower prices than to complainant, he may recover, though either might have refused to deal. What is decided is that, having been induced to deal by such representation, the law will imply a promise to restore the money inequitably obtained by having exacted a price beyond said representation, and that the payment is to be held as one made under a mistake of fact, and to have been received by the other with knowledge that it was not entitled to it.

The demurrer should have been sustained.

*Reversed.*

## MOWBRAY PEARSON CO. *v.* E. H. STANTON CO.

**(Supreme Court of Washington, 1920. 109 Wash. 601, 187 Pac. 370, 190 Pac. 330.)**

Action by the Mowbray Pearson Company against the E. H. Stanton Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions.

FULLERTON, J.[176] On March 31, 1916, the appellant, E. H. Stanton Company, executed and delivered to the Mowbray Pearson Company the following offer in writing:

"In consideration of Mowbray Pearson Company soliciting and delivering ice in Spokane north of the Spokane river to Olive Street bridge and north of N. P. R. R. east of Olive Street bridge and south of Cora avenue west of Division street, and Dalton avenue east of Division street, E. H. Stanton Company agrees to sell pure merchantable ice to Mowbray Pearson Company for $1.50 per ton at their plant for their requirements during 1916, and further agrees not to sell any other dealer for distribution in that district."

The parties acted under the terms of the offer for the year 1916, and at the end of that year the time thereof was extended to the end of the year 1917 by a writing indorsed thereon, signed by both of the parties. When the respondent called upon the appellant to perform at the opening of the ice season in the second year, it refused, announcing that they would not comply with the terms of the writing, and refused repeated subsequent demands for ice; no ice at all being furnished during the extended period pursuant to its terms. The respondent thereupon brought this action to recover in damages as for a breach of contract, and recovered on a trial had before a jury in the sum of $2,321.29. * * *

Turning to the writing under consideration, we can find in it no obligation assumed by the respondent. By its terms the appellant promised, in consideration of the respondent's soliciting and delivering ice within a certain described district, it would sell the respondent sufficient ice at a named price to supply the district; but the respondent promised nothing. It neither promised to solicit and deliver ice in the district, nor promised, in case it did do so, to buy the ice it should sell from the appellant. The writing itself is therefore wholly unilateral. The promise is entirely upon the one side, without any corresponding promise on the other.

Nor did the writing of the word "Accepted" upon the contract alter its effect in this respect. This was merely agreeing to the terms of the writing. It did not constitute a promise on the part of the respondent to solicit and deliver ice in the district defined, nor did it constitute a promise to buy of the appellant the ice it might sell in case it did solicit sales therein. A case in point is Thayer v. Burchard, 99 Mass. 508. There the defendants, who were operating a railroad for the benefit of

[176] Parts of the opinion are omitted.

bondholders, wrote to the plaintiffs, who were flour and grain dealers, that they would transport flour and grain between certain named places at $4 per ton, "this rate to continue in force until close of navigation, unless notice to the contrary." The plaintiffs answered: "We accept the proposition." This was held to constitute a mere offer on the part of the plaintiffs, and not an obligatory contract, because the plaintiffs did not assume any obligation to furnish flour or grain for transportation, being at liberty to buy flour and grain or not, as they chose, and, if they did buy any, to transport it on a road other than the defendants', if they saw fit, and hence would not support an action as for a breach of contract. * * *

Being a promise on its part only, the appellant was at liberty to withdraw it at any time, and since it did do so at the beginning of the second season the respondent no longer had any rights thereunder, and cannot recover as for its breach. The trial judge should have sustained some one of the several challenges made to the sufficiency of the writing as an obligatory contract.

The judgment is therefore reversed, and the cause remanded, with instruction to enter a judgment in favor of the appellant, to the effect that the respondent take nothing by its action.

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## LOUDENBACK FERTILIZER CO. *v.* TENNESSEE PHOSPHATE CO.

**(United States Circuit Court of Appeals, Sixth Circuit, 1903. 121 Fed. 298, 58 C. C. A. 220, 61 L. R. A. 402.)**

This is an action to recover damages for a breach of a contract. The plaintiff in error, hereafter styled the "plaintiff," is an Ohio corporation, engaged in making fertilizers at its factory in Ohio. The defendant in error, hereafter referred to as the "defendant," is a Tennessee corporation, engaged in mining phosphate rock at Attilla, Tenn. The plaintiff and defendant entered into a written contract, by which the defendant agreed to sell to the plaintiff its entire "consumption of phosphate rock" for a term of five years beginning January 1, 1897, at a stipulated price per ton. This contract, among other things, provided:

(1) That the rock should be shipped as ordered by defendant.

(2) Shipments to commence as soon as 500 tons previously contracted for should be consumed, and thereafter the plaintiff agreed to buy its entire consumption from defendant.

(3) The plaintiff to have the right to demand as much as 3,000 tons annually. But the contract recited: "It is understood that your present annual consumption is estimated at something like 1,500 tons under normal conditions."

(4) Rock to be settled for on the 10th of each month for all rock received during the preceding month.

The breach alleged is that defendant refused to comply with the orders of the plaintiff given between January 25, and July 10, 1899, for the shipment of rock aggregating 3,000 tons.

In lieu of a general averment that the plaintiff had not itself previously breached the agreement, the pleader sets forth the circumstances surrounding the making of the contract and precisely what had been done by each party under the agreement. Thus it is averred that the plaintiff was engaged in making and selling two grades or qualities of fertilizer, one styled a "complete" and the other an "incomplete" fertilizer. The "incomplete fertilizer," otherwise called "acid phosphate" or "acidulated phosphate," is made by treating the crushed rock with sulphuric acid, and then grinding the dried mass into powder. The resulting product is called "acid phosphate," and is itself sold and used as a fertilizer; and the business of plaintiff at the time this agreement was made was in part the manufacture and sale of this grade of fertilizer. Plaintiff's factory was equipped for the manufacture of this acidulated phosphate, and plaintiff informed the defendant that it proposed to enlarge its facilities for making acid phosphate, and to increase its output of that product. It is also averred that this acidulated phosphate was the principal constituent in the making of a more complete fertilizer.

The declaration then avers that between August, 1897, and January, 1899, it did not order any phosphate rock from the defendant, nor did it buy any from any other producer. To explain this, it is averred that the makers of sulphuric acid so advanced the price by a combination as to make it cheaper for plaintiff to buy the acidulated phosphate, both to supply its customers for that grade of fertilizer and as the basis for the higher grade of fertilizers made and sold by it. The declaration proceeds as follows: "So that the plaintiff found it absolutely necessary for its economic life, and therefore it was, by these abnormal conditions, driven to cease the manufacture, temporarily, of acid phosphate, either for use in plaintiff's own factory of complete fertilizers, or for sale for use as a direct, though incomplete, fertilizer." It is then averred that in the latter part of 1898 the promise for a much larger demand for fertilizers, together with a great decline in the price of sulphuric acid and a rise in the price of crude rock, induced the plaintiff to enlarge its capacity for producing this acid phosphate, and for extending its sale, and to meet this increased capacity it ordered the maximum amount of crude rock admissible under the contract. It is then averred that plaintiff gave notice that it would be obliged to buy acid phosphate if defendant did not ship the crude rock as ordered, and would look to it for the difference between the price paid and the cost of manufacture, but that the defendant had refused to carry out its agreement, claiming that plaintiff had first breached the agreement by buying acid phosphate as aforesaid. It is further averred

that plaintiff had bought about 3,000 tons of acidulated phosphate to supply its contracts for that product and to carry on its manufacture of the complete fertilizer. The defendant demurred. The demurrer was sustained by Judge Clark, and the plaintiff has sued out this writ of error.

LURTON, J.[177] The only consideration upon which this contract rests is the mutual obligation to perform. It is not an agreement for the sale and purchase of a definite quantity of phosphate rock. But that is not fatal. If the agreement had been to supply to the plaintiff 1,500 tons of rock each year, no one would question the definiteness of the agreement. That amount was the estimated annual consumption of such rock by the plaintiff under ordinary conditions. But in a particular year it might be more or it might be less than this estimated average consumption. Now, in this situation the seller, in effect, says: "You say your usual consumption is 1,500 tons per year, but that the demand for the rock is dependent on the demand for fertilizers, and that the latter demand is dependent on agricultural conditions, which are variable; that one year you may need more than that amount, and another less. Very well, let us contract with regard to this. I, too, must know something about the amount I may be called upon to supply. We will fix a maximum on that side of 3,000 tons. You, on your part, instead of agreeing to take each year a definite number of tons, must agree to take all of your consumption of rock from me at the stipulated price, and I will agree to hold myself in readiness to furnish you all of your rock as you may order same. But you must take your entire supply from me, for, if you are to take it only as you choose to buy it from me, you may choose to buy none if the price goes down and a great deal if the price goes up." Now, such a contract would not be unilateral. The plaintiff would be bound to take its entire supply from the defendant. The amount which is to be bought is made as definite as possible under the circumstances. The quantity is to be measured by the requirements of the factory in a business which necessarily requires a very large amount if it shall continue to be operated in the future as in the past. Though the quantity to be bought and sold was indefinite, it was ascertainable by the terms of the agreement, and therefore certain. *"Certum est quod certum reddi potest."* A contract to buy all that one shall require for one's own use in a particular manufacturing business is a very different thing from a promise to buy all that one may desire, or all that one may order. The promise to take all that one can consume would be broken by buying from another, and it is this obligation to take the entire supply of an established business which saves the mutual character of the promise. Manhattan Oil Co. v. Richardson Lubricating Co., 51 C. C. A. 553, 113 Fed. 923; National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427;[178]

[177] Part of the opinion is omitted.

[178] "It cannot be said that appellee was not bound by the contract. It had no right to purchase iron elsewhere for use in its business. If it had done

Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218; Brawley v. U. S., 96 U. S. 168, 172, 24 L. Ed. 622; Staver Co. v. Park Steel Co., 43 C. C. A. 471, 104 Fed. 200; Smith v. Morse, 20 La. Ann. 220.

The contract, thus interpreted, is distinguishable from a class of cases where the agreement was held to be a mere option. Thus, in Railroad v. Dane, 43 N. Y. 240, an offer to receive and transport railroad iron from New York to Chicago, not to exceed a certain number of tons, during a specified period, at a definite rate, was accepted without any agreement to deliver any iron for transportation. This contract was held not to be binding on either party for want of mutuality. In Petroleum Co. v. Coal, Coke & Mfg. Co., 89 Tenn. 381, 387, 18 S. W. 65, a lease was upon consideration that, if the lessee should "deem it advisable" to test for and work mines discovered thereon, he should pay a royalty upon the output. The lease was held void, the lessee not being required to make any test or operate any mine if discovered. In American Cotton Oil Co. v. Kirk, 15 C. C. A. 540, 68 Fed. 791, a contract to sell 10,000 barrels of oil at an agreed price, in such quantities per week as the buyer might desire, and to be paid for as delivered, was held void, because the buyer was held not to be under obligation to take or receive any particular quantity per week, or the whole in a definite number of weeks. In Crane v. Crane, 45 C. C. A. 96, 105 Fed. 869, a contract by a wholesale dealer to sell a retailer, during a certain time, at stated prices, so much lumber as the latter "should require for his trade," was held void for want of mutuality, as there was no approximation of what might be the trade of the retailer. If prices should go down, he would naturally make no sales at a price below what he was to pay; but, if prices went up, he would be in a situation to drive his rivals from business by increasing his trade at the expense of the vendor. In Davis v. Mining Co., 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357, a contract by which the plaintiffs agreed to work an ore bank for $1.50 per ton of ore produced "as long as we can make it pay" was held void for want of mutuality and definiteness of terms.

so, appellant might have maintained an action for a breach of the contract. It was bound by the contract to take of appellant, at the price named, its entire supply of iron for the year—that is, such a quantity of iron, in view of the situation and business of appellee, as was reasonably required and necessary in its manufacturing business. Such contracts are not unusual. A foundry may purchase its supply of coal for the season of the coal dealer. A hotel may do the same. A city, for the use of the public schools, may engage its supply of coal for the winter, at a specified price. Such contracts are not uncommon, and we have never understood that they were void. Smith v. Morse, 20 La. Ann. 220, is a case in point. In this case Smith agreed to furnish Morse all the ice he might require for the use of his hotel for five years, at a certain price. Smith undertook to avoid the contract, on the ground that Morse was not bound, but the court held the contract valid and binding on both parties." Craig, J., in Nat. Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427, 433-434 (1884).

See T. B Walker Mfg. Co. v. Swift & Co., 200 Fed. 529 (1912).

But how does the plaintiff interpret the agreement? For two years it bought no rock. The third year it demands the maximum quantity allowable under any conditions. It excuses itself for its failure to take any rock in 1897 and 1898 by, in effect, saying that "it was more profitable for me to stop making acid phosphate altogether, and to buy my supply of that product." "As I bought 'acid phosphate,' and did not buy the crude rock, I did not violate my agreement with you, for my factory was during that period consuming no crude rock whatever." But, as illustrating the inconsistency of this position, the plaintiff, when it became cheaper to make than to buy acidulated rock, notified the defendant that if it did not supply its demand for crude rock it would buy acidulated rock, and hold defendant liable for the difference between the price paid and what it would cost to make it; and the damages sued for in this case is the difference between the price paid for the acidulated rock and the cost of making same. If this result is possible, the operation of the contract is most unjust. The only "consumption" of phosphate rock by plaintiff's factory at the date of this contract was in the making of the lower form of fertilizer called "acid phosphate" or "acidulated phosphate." This product is made and sold as a fertilizer. It also used it as a base in making a higher grade of fertilizer. To justify the demand for 3,000 tons of crude rock in 1899—that being double the average or normal demand—the plaintiffs in this declaration aver that when the contract was made they notified defendant that it expected to greatly increase its capacity for making and storing that kind of fertilizer.

Now, in the face of this character of operation conducted by its factory and the known normal "consumption" of rock in its factory, the plaintiff excuses its purchase of acid phosphate by, in effect, saying, "I found it more economical to buy acidulated phosphate than to make it, as I have been doing. This I did in good faith. That is, it was in fact more economical for me to buy than to make, and this good faith of mine justifies my conduct, and now, that it is more profitable to take the rock from you at the stipulated price, seeing that such rock has now doubled in price, and sulphuric acid gone down, than to buy the rock already acidulated, I now elect to resume the consumption of rock for the making of acidulated rock on as great a scale as my agreement with you will permit." Thus interpreted, the agreement is a mere option, and utterly void. Addison on Contracts, § 18; Crane v. Crane, 45 C. C. A. 96. 105 Fed. 869; Amer. Cotton Oil Co. v. Kirk, 15 C. C. A. 540, 68 Fed. 791; The Chicago & Great Eastern Railway Co. v. Dane, 43 N. Y. 240; Davie v. Mining Co., 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357; Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218.

The only consideration for the promise of the defendant to sell is the obligation of the plaintiff to take its entire consumption of rock, and if the plaintiff is in fact at liberty to carry on its business by buying its acidulated rock when its price was less than the cost of making it, and

thereby avoiding any actual consumption of crude rock, the contract is one which it may perform or not, as it pleases. "The mutuality of the obligation is the very essence of all contracts founded upon mutual promises. Hence it follows, observes Pothier, that nothing can be more contradictory to such an obligation than an entire liberty in either of the parties making the promise to perform it or not, as he may please. An agreement giving such liberty would be absolutely void for want of obligation." Addison on Contracts, § 18. But we do not accept the plaintiff's interpretation of the agreement as correct. From all the surrounding circumstances it was intended to make the amount of rock which the plaintiff was bound to take as definite as possible by the statement of the average or normal consumption in the manner in which the factory was operated and by the agreement to take the entire consumption for a definite time at a stipulated price. Undoubtedly, there is a margin of allowance to be made for the contraction or expansion of the business incident to the varying conditions to which it is ordinarily subject. These conditions may be said to be within the contemplation of the parties when, instead of contracting for a definite amount, deliverable each year, the contract was made for "all of the consumption" of the rock during a definite period of time. This contract gave the plaintiff liberty to use more or less, so long as it did not reduce or increase its consumption beyond the requirements of the usual fluctuations incident to the character of manufacturing carried on by it. This diminution or increase according to the reasonable fluctuations of such a business, if the result of the carrying on of the business with good faith in view of the obligations of the plaintiff to the defendant, constitutes the limit of the liberty allowed by the contract, and it is only in this respect that the question of good faith has any bearing upon the rights of the parties under the agreement.

Any interpretation of the agreement which will enlarge the discretion of the plaintiff so as to allow him to desist from carrying on the business substantially as it was carried on when the agreement was made by permitting it to substitute purchased acid phosphate for that of its own make, simply because it could temporarily be bought more cheaply than it could be made, would place the defendant at the mercy of the plaintiff, and convert the agreement into a mere option. The contract must be read in the light of the fact that the principal business of the plaintiff was to make "acidulated phosphate" both for sale and for mixing in combination with other chemicals to make another grade of fertilizer. The defendant had the right to believe that the plaintiff's purpose was to continue the making of acid phosphate and that the rock consumed in that business was to be all taken from it. To say that the plaintiff was at liberty to desist entirely from making acidulated phosphate whenever it could buy the product to meet the demands of its business cheaper than it could make it, and was only bound to take rock when it could make that grade of product cheaper than it could buy it, is in opposition to the plain

meaning of the agreement, as well as destructive of the mutuality of the contract.

In Crane v. Crane, 45 C. C. A. 96, 105 Fed. 869, the contract was by a wholesale dealer in lumber to supply a retailer during a certain time, and at a stipulated price, with so much of a certain grade of lumber as the purchaser "should require for his trade." This contract was held void for want of mutuality, inasmuch as it left it practically optional with the purchaser to increase or diminish his orders with the rise or fall in price. The opinion of the court was by Grosscup, Circuit Judge, who, after referring to such cases as National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427, and Smith v. Morse, 20 La. Ann. 220, and Railway Co. v. Witham, L. R. 9 C. P. 16, said:

"In all these cases contracts looking towards the future, and embodying subject-matter necessarily indefinite in quantity, have been upheld; but it will be observed that, although the quantity under contract is not measured by any certain standard, it is capable of an approximately accurate forecast. The capacity of the furnace, the needs of the railroad, or the requirements of the hotel are, within certain limits, ascertainable by the vendor. He is thus enabled to make reasonably accurate calculation of the extent of his obligation. Then, too, the purchase is only an incident of the vendee's business. Presumably, the business will go on irrespective of a rise or fall in the prices of subsidiary supplies. There thus remains to the vendee little or no temptation, on account of the rise or fall in prices, to greatly enlarge or diminish the quantity of his orders."

In Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218, the contract was to furnish all the steamers of the defendant's line with coal for a definite time at a stipulated price. These steamers were at the time making regular trips between certain ports. Coal was delivered as needed for a part of the time, when defendants sold and ceased to operate their steamers, and declined to receive coal thereafter, although the purchaser of the steamers continued to operate them as before. The contract was construed as one to furnish all of the coal which should be required to operate the steamers during the period covered by the agreement, and that the sale of the steamers did not operate to relieve the defendants from the obligation to take the coal "which the ordinary and accustomed use of the steamers required."[179]

[179] In Wells v. Alexandre, 130 N. Y. 642 (1891), the offer dated Dec. 31, 1887 and accepted January 4, 1888, was:

"Messrs. F. Alexandre & Sons, New York:

"Gents,—We propose to furnish your steamers, 'City of Alexandria' 'City of Washington' and 'Manhattan,' with strictly free burning pea coal, delivered along side Pier 3, North River, for the year 1888, commencing January 1st to Dec. 31st for the sum of $3.05 per ton. We also agree to furnish any other steamers of your line with same coal and at same price at any time you wish.

The plaintiff in error has cited and greatly relied upon the case of McKeever & Co. v. Cannonsburg Iron Co., 138 Pa. 184, 16 Atl. 97, 20 Atl. 938. The agreement involved there was to supply an iron mill "with all of the coal you will require for your mill for three years." The prices fixed were for three grades of coal—"forked coal," "run of mines," and "slack." The mill, pending this agreement, introduced natural gas, a fuel unknown when the agreement was made, which greatly reduced the quantity of coal required. It also bought a grade of coal called "nut" from another person, and claimed that they were liable only for the coal of the kinds specified actually required after the consumption of gas was begun. It was held that the mill was at liberty to diminish the use of coal as fuel by the introduction of gas, but that, as it appeared the "nut" coal took the place of "slack," it had no right to use it without liability to the plaintiffs. The case differs in its principal point on the facts and circumstances from the one at bar, though in the minor question—the right to substitute one grade of coal for another—it quite resembles the present case, and supports the conclusion we have reached. The opinion is, however, entitled only to that weight which attaches to a judgment of the Pennsylvania Supreme Court, for it is not supported by either argument or authority.

2. The plaintiff, by the facts stated on the face of the declaration, shows that it committed the first substantial breach of the contract. Having desisted from receiving phosphate rock for a period of nearly two years, because it found it more profitable to buy than to make acidulated phosphate, it now demands damages from the defendant because it had to buy acidulated phosphate at a loss in consequence of the refusal of the defendant to supply it with phosphate rock after it became more profitable to make than to buy that grade of fertilizer. If there is anything well settled it is that the party who commits the first breach of the contract cannot maintain an action against the other for a subsequent failure to perform. The plaintiff has not kept the contract, and shows no excuse for its breach. It does not, therefore, show any such performance on its own part as to entitle it to demand that the defendant

**If, through any cause, we are unable to deliver pea coal, we will deliver you other sizes at an equitable adjustment of price.**

**"Yours very respectfully,**

**"Jos. K. Wells, Agt."**

**The court said that "the evident intention of the parties was that the plaintiff should furnish to the defendants all the coal which the steamers named should require in the work in which they were employed for the year ensuing, and that the parties should perform all needful acts to give effect to the agreement"; and that "the fact that the defendants deemed it best to sell the steamers, cannot be permitted to operate to relieve them from the obligation to take the coal which the ordinary and accustomed use of the steamers required, for the provisions of the agreement do not admit of a construction that it was to terminate in the event of a sale or other disposition of them by the defendants."**

shall go on and perform, or pay damages for a subsequent refusal to recognize the contract as in force.

3. The contract was clearly an entire contract. It was for the sale of all the phosphate rock which should be needed for the ordinary requirements of the plaintiff's factory, and was not a number of single contracts for the sale and delivery of definite quantities as ordered from time to time. The breach went to the whole of the consideration. Cherry Valley Iron Works v. Florence Iron River Co., 64 Fed. 569, 12 C. C. A. 306; Monarch Cycle Co. v. Royer Wheel Co., 44 C. C. A. 523, 105 Fed. 324; Norrington v. Wright, 115 U. S. 213, 6 Sup. Ct. 12, 29 L. Ed. 366; Cattle Co. v. Martindale, 11 C. C. A. 35, 63 Fed. 84; Cleveland Rolling Mill v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920. * * *

*The demurrer was properly sustained, and the judgment is affirmed.*

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## RAMEY LUMBER CO., Limited, *v.* JOHN SCHROEDER LUMBER CO.

**(United States Circuit Court of Appeals, Seventh Circuit, 1916. 237 Fed. 39, 150 C. C. A. 241.)**

Action at law by the Ramey Lumber Company, Limited, against the John Schroeder Lumber Company. Judgment for defendant, and plaintiff brings error. Reversed.

The plaintiff sued the defendant on a contract under which plaintiff agreed to sell at specified prices to the defendant all the lumber of certain grades which the plaintiff should manufacture or own during 1911 and the defendant agreed to purchase and receive the lumber. The District Court concluded among other things that the contract was void for want of certainty and mutuality, and dismissed the complaint. Plaintiff brought error. Reversed.

ALSCHULER, J.[180] * * * As to the defenses of uncertainty and want of mutuality, we are unable to concur in the decision of the trial court. The contract did not lack mutuality of obligation. While defendant promised to buy of plaintiff all the lumber of a certain quality that plaintiff might own during the season, plaintiff bound itself, if it did manufacture or acquire any such lumber, to sell all of it to defendant and to no one else. Thus plaintiff deprived itself of the right to sell lumber to whom it pleased. The promise to restrict its freedom by giving up its right to sell to others was real and definite. It was the substantial and contemplated consideration for defendant's promise to buy all that plaintiff might own during the season. There was the mutuality of obligation essential to a bilateral contract; there was the consideration essential

[180] The statement of facts is much abbreviated in substitution for the reporter's statement. Parts of the opinion are omitted.

to the validity of any contract. Conley Camera Co. v. Multiscope & Film Co., 216 Fed. 892, 133 C. C. A. 96; Burgess Sulphite Fiber Co. v. Broomfield, 180 Mass. 283, 62 N. E. 367. That the plaintiff did not bind itself to acquire or manufacture any such lumber is immaterial. Its promise to deal with defendant was the valid consideration for the obligation by defendant—a consideration that made the undertaking of the other party binding and enforceable.

With regard to the question of uncertainty, a contract is void (save for the possibility of reformation in equity) because of uncertainty, only when it is so worded that the intention of the parties cannot be deduced therefrom. If the intention be clear, the mere uncertainty of the amount involved does not invalidate the obligation, however it may affect the possibility of proving damages for a breach. In the present case the preliminary negotiations demonstrate that defendant wanted to secure all such lumber that it could possibly obtain, without limit, and without binding plaintiff absolutely and under all circumstances to deliver any lumber. The parties had a right to make such a contract, even though the amount that would be deliverable thereunder was not specified, and was in a sense optional with the vendor; and this they did, in terms which are clear and certain.

The contract expresses without uncertainty the intention of obtaining all the lumber plaintiff might acquire and manufacture during that season. That plaintiff might take advantage of market conditions, and buy or refrain from buying heavily, was of the very essence of the agreement. Inasmuch as it gave a valuable consideration for this right, this case is distinguishable from Crane v. Crane, 105 Fed. 869, 45 C. C. A. 96; Tweedie Trading Co. v. Parlin & Orendorff Co., 204 Fed. 50, 122 C. C. A. 364; Oakland Motor Co. v. Indiana Automobile Co., 201 Fed. 499, 121 C. C. A. 319; and Velie Motor Car Co. v. Kopmeier Motor Car Co., 194 Fed. 324, 114 C. C. A. 284.

Moreover, there were definite limitations on the amount that could and must be tendered. While plaintiff had the option either to manufacture and to buy from others, or to refrain therefrom, it was absolutely obligated to sell all that it manufactured or owned during the season. When the contract was executed, the maximum amount that would be deliverable thereunder, while unknown to the parties, and in that sense uncertain, was, under the finding of facts, the amount of specified grades of a definite kind of lumber that could be manufactured between March and July of the year 1911 either by plaintiff or others. So much thereof as plaintiff might own within a definitely limited time, the season of 1911, was the amount that it had obligated itself to sell. This would necessarily have become certain during the season, even if the time limit for plaintiff's ownership included, not merely the manufacturing season, but also the short period thereafter within which delivery must be made.

No claim, however, is made for any lumber not owned by plaintiff prior

to defendant's repudiation of the obligation. The amount then owned, and as to which, by reason of plaintiff's ownership, both parties were bound, the one to sell, the other to buy, was necessarily certain, and the amount of lumber, in respect to which damages are claimed, was thus definitely fixed at the date of defendant's repudiation.

We therefore conclude that the plaintiff is entitled to recover as its damages the loss it incurred from defendant's nonacceptance of the 20 carloads, and on account of the 1,455,919 feet on hand at time of repudiation of the contract. * * *

The judgment is therefore reversed, and the cause remanded, with directions to the District Court to enter a judgment in favor of plaintiff for $4,899.82, together with interest as above stated to date of entry of judgment, and costs.[181]

[181] In Oscar Schlegel Mfg. Co. v. Peter Cooper's Glue Factory, 179 N. Y. Supp. (1919) the plaintiff was a jobber and the defendant had agreed to furnish plaintiff's requirements of a certain glue for the year 1916 at 9 cents per pound. Glue rose steadily in the market until it reached 25 cents per pound. Plaintiff solicited orders from its customers, and whereas in previous years its annual requirements, as stated by the dissenting opinion, had not exceeded 35,000 pounds, it ordered in the first nine months of 1916 some 43,700 pounds and in the last three months of 1916, it ordered some 126,100 pounds. Defendant filled orders to the extent of 64,659 pounds and then refused to make further deliveries. Dowling, J., for the majority of the court, said (pp. 273-274): "The recovery herein is based upon the loss which plaintiff sustained by reason of defendant's failure to fill orders which plaintiff had so obtained from customers, and of which the defendant had been promptly notified. The defendant had not protected itself against any abnormal variation in price during the year, nor had it fixed any limitation upon the amount of glue which it would furnish the plaintiff, if it received orders from its customers therefor. The only proviso in the contract which the defendant cared to insert was that the contract was contingent upon fires, strikes, accidents, and other causes beyond the control of the parties. A rising market could have been guarded against by the defendant, by inserting in the contract a clause fixing the maximum amount which the plaintiff might be entitled to receive thereunder; but instead the defendant made an absolute contract at a fixed price for the entire year to deliver as much glue as plaintiff might be able to sell to customers during that period.

"If the plaintiff had taken orders for this quality of glue, and had failed to buy the amount to fill such orders from the defendant, the defendant could have held the plaintiff under the contract and recovered the damages which it sustained by reason of plaintiff's failure to order such glue from the defendant. And this it could have done, no matter how low the market price might have fallen during the year. Both parties acted with full knowledge of their respective methods of doing business, and of the uncertain and fluctuating demand for glue which might come from plaintiff's customers, and which must naturally to some extent be dependent upon the market price. They entered upon this contract with their eyes open to all the conditions then existing, or which might possibly arise, and with the intention of being mutually bound thereby. I believe that under the contract the plaintiff was bound to order from the defendant every pound of this quality of glue which it sold to its customers, and that in like manner defendant was bound to supply every

## WILLIAM McMULLAN *v.* DICKINSON COMPANY.

(Supreme Court of Minnesota, 1896. 63 Minn. 405, 65 N. W. 661.)

COLLINS, J.[182] * * * 1. From the resolution which was incorporated bodily into the instrument executed by both parties as their contract it appears that it was resolved to employ plaintiff as an assistant manager of the corporate business at a fixed salary per year, payable in monthly instalments. The term of employment was determined upon as the period of time during which the corporate business might be carried on; not

pound of this quality of glue which plaintiff sold to customers and called upon the defendant to furnish. The mere uncertainty as to the amount which might be required to be furnished under the contract is no reason why it was not a mutual one, nor does it make the contract unenforceable.

"The court has found that the orders in question were received by plaintiff and transmitted to defendant under the contract. The plaintiff's good faith in soliciting those orders, and their validity, have not been successfully attacked. Having a valid and enforceable contract with the defendant, obtained without any unfair dealing on its part, but as the result of the deliberate judgment of both parties thereto, the plaintiff had a right, in the absence of any notification from the defendant that it could not or would not fill all its orders, to proceed legitimately in good faith to solicit orders from the trade for this quality of glue and to expect the filling of these orders by the defendant. The defendant had no right to arbitrarily limit the amount which plaintiff should receive under the contract, and it was therefore properly held liable for the damages which the plaintiff sustained." [Compare Diamond Alkali Co. v. Aetna Explosives Co., 264 Pa. St. 304 (1919)].

Page, J., in a vigorous dissenting opinion, relied on T. W. Jenkins & Co. v. Anaheim Sugar Co., 237 Fed. 278 (1916) which held that if the contract gives one party an option to buy or not as he sees fit it is without consideration, even though that party is prohibited by the contract from buying from any one else, but, treated the contract as in one point of view a provision for plaintiff's requirements as jobber. He then said (pp. 278-279):

"In some of the cases a distinction is sought to be drawn between contracts for requirements, where the subject thereof is an article incidental to the business of the purchaser, or where the purchaser is under contract to resell, and where the purchaser buys to sell again as a principal part of his business (Crane v. C. Crane & Co., 105 Fed. 869, 45 C. C. A. 96); the theory being that the amount in one case is made certain or capable of an approximation to certainty as to the requirements by reference to a standard or measure while in the latter there is no such standard or measure by which the amount of the requirements could even be approximated in advance, and therefore the contract is too indefinite and uncertain to be enforceable.

"The question as I understand it is not dependent for its solution upon the character of the business of the purchaser, but rather whether there is anything whereby the very indefinite and uncertain word 'requirements' can be made approximately definite and certain. Something within the knowledge of both parties, so that their minds met in a mutual understanding of the limit of the quantity to be furnished under the contract. Where a purchaser, to the knowledge of the seller, has entered into a contract for a resale of the goods purchased, the amount called for by the contract of resale would be the measure of the requirements of the purchaser's contract. Shipman v. Straits-

[182] Parts of the opinion are omitted.

to exceed, of course, the life of the corporation as fixed by law. Two provisos were appended to the paragraph relating to the term of employment,—one that plaintiff should properly and efficiently discharge his duties as such assistant; the other, that his term of employment should continue only so long as he owned and held, in his own name, fifty shares, fully paid up, of the defendant's capital stock. A recital that plaintiff had accepted the employment followed, and then the agreement whereby defendant employed plaintiff and the latter entered into the employment, each party being subject to the terms and conditions mentioned and prescribed by the resolution.

ville Mining Co., 158 U. S. 356, 362, 15 Sup. Ct. 886, 39 L. Ed. 1015. Where the purchaser contracts for his requirements of a thing incidental to the business carried on by him, his reasonable needs for the particular article can be approximately arrived at by a consideration of the proportion of the requirements incidental to the main business in which it was employed. For example, to furnish the coal for certain steam vessels for a year (Wells v. Alexandre, 130 N. Y. 642, 645, 29 N. E. 142, 15 L. R. A. 218), or all the cans needed in a canning factory (E. G. Dailey Co. v. Clark Can Co., 128 Mich. 591, 87 N. W. 761), or all the lubricating oil for its own use (Manhattan Oil Co. v. Richardson Lub. Co., 113 Fed. 923, 51 C. C. A. 553). In all such cases a limit to the quantity is fixed at the legitimate needs of the particular article in carrying on the purchaser's main business. While this amount is uncertain it is capable of an approximately accurate forecast.

"Where a contract is made by a jobber or wholesale dealer for goods that he is to sell, but for which he has no present contract of resale, and the contract is for his requirements, it must mean for his regular and ordinary business purposes. In the case of T. W. Jenkins Co. v. Anaheim Sugar Co., *supra*, the plaintiff only demanded that the defendant should furnish the amount that in previous years had been sold during the period covered by the contract. This would be one test, and if the amount demanded under the contract was greatly in excess of that amount, the question would be whether the orders were in excess of the purchaser's reasonable needs and were justified by the conditions of the business. N. Y. C. Iron Works Co. v. U. S. Radiator Co., *supra*, 174 N. Y. 335, 66 N. E. 967. While in such a case the amount of the purchaser's requirements are uncertain, and more difficult of forecast than in the case where the article was for incidental use, yet it can be determined with reasonable approximation. Therefore such a contract is not void for uncertainty. But the purchaser is limited to demand such as he requires to meet orders received in the ordinary and usual course of dealing. He must carry out the contract in a reasonable way, with regard to the obligations of good faith and fair dealing that is implied in the contract. It was therefore competent for the defendant to prove that the plaintiff was not acting reasonably or in good faith, but using the contract for a purpose not within the contemplation of the parties, for a speculative, as distinguished from an ordinary and regular, business purpose. N. Y. C. Iron Works Co. v. U. S. Radiator Co., *supra*. * * * The facts in this case show conclusively, in my opinion, that the plaintiff was not acting in good faith, but was using the contract speculatively, and not as was contemplated by the parties."

On the dissenting opinion's contention that the buyer could not unreasonably increase his requirements, compare Dowd v. Hercules Powder Co., 66 Colo. 302 (1919).

Counsel for defendant urges several objections to the validity of the contract, but they are all disposed of by considering the claim that it is and was void for lack of mutuality of consideration, the point being that, while the character of the services to be rendered and the compensation were fixed, no definite period of time was agreed upon during which the plaintiff should work or defendant employ and pay. The language used, independent of the provisos, was: "Said employment is to continue during the time the business of said corporation shall be continued, not exceeding the term and existence of the corporation." The only conditions mentioned and imposed being that, while in defendant's employ, the plaintiff should render proper and efficient service, and should own and hold in his own name certain shares of corporate stock.

As we construe the expressions used, the duration of the term of employment was sufficiently defined, for the law does not require that the precise number of days or months or years shall be stated; and there was mutuality of consideration. The term fixed, dependent only upon the condition as to plaintiff's ownership of the stock shares, was for such period of time as defendant corporation might continue to transact business. It might cease to do business voluntarily, or there might be an involuntary termination of its business transactions; for instance by proceedings in insolvency instituted by its creditors, or the business might terminate by operation of law at the end of not to exceed thirty years from the date of its organization,—that being the life term of corporations of this character under the statutes. The defendant agreed to keep plaintiff in its employ so long as he retained as the owner, and held in his own name, the shares, and it continued in business; and plaintiff, in consideration of defendant's agreement, stipulated that, so long as he remained in such employment, he would own and hold the stock, and would perform proper and efficient service. The requirement that plaintiff should own and continue to hold the stock as a condition to his retention by defendant was, presumptively, for the benefit of the latter, and a detriment to the former. It was in defendant's interest to have its stock shares permanently held by its employés, for such holding would serve to stimulate them in the performance of their duties. It was an injury to plaintiff to hold the stock as a condition for his employment, especially when we consider that the business of the concern could be closed out at any time, leaving him out of employment, with the stock upon his hands. Had the plaintiff disposed of his shares, the defendant would have suffered a loss; and, had the latter ceased business, the former would have been injured. Had the relation of employer and employé terminated between these parties through the happening of either of these two contingencies, neither party would have been in *statu quo*. The consideration for the agreement was ample and mutual, although the term of service might be terminated by defendant's cessation of business or plaintiff's selling his stock in the corporation. See Bolles v. Sachs, 37 Minn. 315, 33 N. W. 862.

The expressions of a contingency whereby the contract might be terminated by the act of either party expressly excluded the idea that each was at liberty to terminate it at any time without regard to the happening of either contingency. * * *

[Order denying a new trial after a verdict for plaintiff]

*Affirmed.*

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## CITY OF POCATELLO *v.* FIDELITY & DEPOSIT CO. OF MARYLAND.

**(United States Circuit Court of Appeals, Ninth Circuit, 1920. 267 Fed. 181.)**

Action by the City of Pocatello against the Fidelity & Deposit Company of Maryland. Judgment for defendant in sustaining demurrer to the complaint, and plaintiff brings error. Affirmed.

HUNT, J. Action by the city of Pocatello, Idaho, upon a bond given by Mitchell, contractor, with the Fidelity Company as surety, for the faithful performance of a construction contract relating to an additional water supply for the city. The complaint states that work was to begin February 1, 1917, and to be finished not later than May 10. No work was done, and under the provisions of the contract, if the contractor failed diligently to proceed, the city could have the work done at the expense of the contractor. After notice to the contractor to proceed, and after his failure to act, the city did the work at an expense in excess of the contract price, and thereafter brought this action against the surety company to recover the excess sum paid. General demurrer was sustained, and the action was dismissed, whereupon the city brought writ of error.

Article 11 of the contract provided that if—

"for any reason the city of Pocatello shall fail to make sale of and receive money for the $150,000 of waterworks bonds due to be sold on the 8th day of January, 1917, then and in that event this contract, at the option of the party of the second part, may be terminated without the party of the second part becoming liable in any manner or upon any account to the party of the first part upon any claim or demand whatsoever."

There is no allegation that the city failed to sell the bonds on January 8th, but it is alleged that upon April 16th the city engineer notified the contractor that he must proceed by the 19th, and that on April 19th the contractor said he could not proceed with the work unless the city would grant an extension of time for performance sufficient to cover the delay in selling bonds, and that he would proceed "only upon the condition" that the extension be granted. Whether Mitchell was ever advised by the city that it waived or intended to waive whatever right of option it may have had under article 11 does not appear

Under the contract the option of the city was conditional upon the

failure to sell the bonds, and the city had the right to exercise the option of terminating the contract at any time. Had Mitchell proceeded with the work, he would have done so, knowing that the city could terminate the contract any time without liability to him in any manner, or upon any account, or upon any claim or demand that he might have had for work he had already done. There is no provision in the contract requiring the city to make an effort to sell its bonds, and no specification as to terms or conditions upon which sale of the bonds was to have been had. The purpose of the city, as made apparent by the language of article 11, was to reserve the right to terminate the contract, provided it did not dispose of its bonds, and in the exercise of such right, to escape any liability to any one upon any claim or demand whatever. A contract of such a nature could not be enforced; it lacks mutuality. There was no performance by either party to the contract and no waiver of lack of mutuality. Parsons on Contracts (9th Ed.) 486.

*The judgment is affirmed.*

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## THOMAS *v.* THOMAS.

**(Court of Queen's Bench, 1842. 2 Q. B. 851.)**

Assumpsit by a widow against her deceased husband's executors. At the trial, it appeared that John Thomas, the deceased husband of the plaintiff, at the time of his death, in 1837, was possessed of a row of seven dwelling houses in Merthyr Tidvil, in one of which, being the dwelling house in question, he was himself residing; and that by his will he appointed his brother Samuel Thomas (since deceased) and the defendant executors thereof, to take possession of all his houses, etc., subject to certain payments in the will mentioned, among which were certain charges in money for the benefit of the plaintiff. In the evening before the day of his death he expressed orally a wish to make some further provision for his wife; and on the following morning he declared orally, in the presence of two witnesses, that it was his will that his wife should have either the house in which he lived and all that it contained, or an additional sum of £100 instead thereof.

This declaration being shortly afterward brought to the knowledge of Samuel Thomas and the defendant, the executors and residuary legatees, they consented to carry the intentions of the testator so expressed into effect; and, after the lapse of a few days, they and the plaintiff executed the agreement declared upon; which, after stating the parties, and briefly reciting the will, proceeded as follows:

"And, whereas the said testator, shortly before his death, declared, in the presence of several witnesses, that he was desirous his said wife should have and enjoy during her life, or so long as she should continue

his widow, all and singular the dwelling house," etc., "or £100 out of his personal estate," in addition to the respective legacies and bequests given her in and by his said will; "but such declaration and desire was not reduced to writing in the lifetime of the said John Thomas and read over to him; but the said Samuel Thomas and Benjamin Thomas are fully convinced and satisfied that such was the desire of the said testator, and are willing and desirous that such intention should be carried into full effect. Now these presents witness, and it is hereby agreed and declared by and between the parties, that, in consideration of such desire and of the premises," the executors would convey the dwelling house, etc., to the plaintiff and her assigns during her life, or for so long a time as she should continue a widow and unmarried: "provided, nevertheless, and it is hereby further agreed and declared, that the said Eleanor Thomas, or her assigns, shall and will, at all times during which she shall have possession of the said dwelling house, etc., pay to the said Samuel Thomas and Benjamin Thomas, their executors, etc., the sum of £1 yearly toward the ground rent payable in respect of the said dwelling house and other premises thereto adjoining, and shall and will keep the said dwelling house and premises in good and tenantable repair;" with other provisions not affecting the questions in this case.

The plaintiff was left in possession of the dwelling house and premises for some time; but the defendant, after the death of his co-executor, refused to execute a conveyance tendered to him for execution pursuant to the agreement, and, shortly before the trial, brought an ejectment, under which he turned the plaintiff out of possession. A verdict being found for the plaintiff on all the issues, a rule *nisi* was obtained pursuant to leave reserved to move to enter a nonsuit.

LORD DENMAN, C. J.[183] There is nothing in this case but a great deal of ingenuity, and a little wilful blindness to the actual terms of the instrument itself. There is nothing whatever to show that the ground rent was payable to a superior landlord; and the stipulation for the payment of it is not a mere proviso, but an express agreement. (His Lordship here read the proviso.) This is in terms an express agreement, and shows a sufficient legal consideration quite independent of the moral feeling which disposed the executors to enter into such a contract. Mr. Williams's definition of consideration is too large; the word *causa* in the passage referred to means one which confers what the law considers a benefit on the party.[184] Then the obligation to repair is one which might impose charges heavier than the value of the life estate.

[183] The statement of the pleadings is omitted from the statement of facts.

[184] E. V. Williams, counsel for defendant, had asked in arguing: "What is meant by the consideration for a promise, but the cause or inducement for making it" and had quoted from Plowden's note to Sharington v. Strotton, Plowd. 309 and from Chitty on Contracts.

PATTESON, J. It would be giving to *causa* too large a construction if we were to adopt the view urged for the defendant; it would be confounding consideration with motive. Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff; it may be some benefit to the plaintiff, or some detriment to the defendant; but at all events it must be moving from the plaintiff. Now that which is suggested as the consideration here, a pious respect for the wishes of the testator, does not in any way move from the plaintiff; it moves from the testator; therefore, legally speaking, it forms no part of the consideration. Then it is said that, if that be so, there is no consideration at all, it is a mere voluntary gift; but when we look at the agreement we find that this is not a mere proviso that the donee shall take the gift with the burdens; but it is an express agreement to pay what seems to be a fresh apportionment of a ground rent, and which is made payable not to a superior landlord, but to the executors. So that this rent is clearly not something incident to the assignment of the house, for in that case, instead of being payable to the executors, it would have been payable to the landlord. Then as to the repairs, these houses may very possibly be held under a lease containing covenants to repair; but we know nothing about it, for anything that appears the liability to repair is first created by this instrument. The proviso certainly struck me at first as Mr. Williams put it, that the rent and repairs were merely attached to the gift by the donors; and, had the instrument been executed by the donors only, there might have been some ground for that construction; but the fact is not so. Then it is suggested that this would be held to be a mere voluntary conveyance as against a subsequent purchaser for value; possibly that might be so, but suppose it would, the plaintiff contracts to take it, and does take it, whatever it is, for better for worse, perhaps a *bona fide* purchase for a valuable consideration might override it, but that cannot be helped.

COLERIDGE, J. The concessions made in the course of the argument have, in fact, disposed of the case. It is conceded that mere motive need not be stated, and we are not obliged to look for the legal consideration in any particular part of the instrument, merely because the consideration is usually stated in some particular part; *ut res magis valeat*, we may look to any part. In this instrument, in the part where it is usual to state the consideration, nothing certainly is expressed but a wish to fulfill the intentions of the testator, but in another part we find an express agreement to pay an annual sum for a particular purpose, and also a distinct agreement to repair. If these had occurred in the first part of the instrument, it could hardly have been argued that the declaration was not well drawn and supported by the evidence. As to the suggestion of this being a voluntary conveyance, my impression is that this payment of £1 annually

is more than a good consideration, it is a valuable consideration, it is clearly a thing newly created and not part of the old ground rent.

*Rule discharged.*[185]

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## STRONG *v.* SHEFFIELD.

(Court of Appeals of New York, 1895. 144 N. Y. 392, 39 N. E. 330.)

ANDREWS, C. J. The contract between a maker or endorser of a promissory note and the payee forms no exception to the general rule that a promise, not supported by a consideration, is *nudum pactum*. The law governing commercial paper which precludes an inquiry into the consideration as against *bonâ fide* holders for value before maturity, has no application where the suit is between the original parties to the instrument. It is undisputed that the demand note upon which the action was brought was made by the husband of the defendant and endorsed by her at his request and delivered to the plaintiff, the payee, as security for an antecedent debt owing by the husband to the plaintiff. The debt of the husband was past due at the time, and the only consideration for the wife's endorsement, which is or can be claimed, is that as part of the transaction there was an agreement by the plaintiff when the note was given to forbear the collection of the debt, or a request for forbearance, which was followed by forbearance for a period of about two years subsequent to the giving of the note. There is no doubt that an agreement by the creditor to forbear the collection of a debt presently due is a good consideration for an absolute or conditional promise of a third person to pay the debt, or for any obligation he may assume in respect thereto. Nor is it essential that the creditor should bind himself at the time to forbear collection or to give time. If he is requested by his debtor to extend the time, and a third person undertakes in consideration of forbearance being given to become liable as surety or otherwise, and the creditor does in fact forbear in reliance upon the undertaking, although he enters into no enforceable agreement to do so, his acquiescence in the

185 Of Thomas v. Thomas, Professor Williston says: "There the plaintiff in return for a promise to convey a life estate in a house agreed to pay a portion of the ground rent and keep the premises in repair at all times during which she should have possession. As there was no promise on her part, and none could fairly be implied, that she should take possession or keep possession, it was wholly at her option whether she should incur any detriment or not. Remaining out of possession was no legal detriment since she had no right of possession at the time the agreement was made. The point was not raised, and the court held the agreement binding." 1 Williston on Contracts, § 105, p. 220 n. 91. But does not this undervalue the fact that plaintiff already was in possession and remained there, so at once incurred a detriment which might possibly suffice for consideration purposes if a contract, and not merely a gift upon condition in the guise of a contract, was intended?

request, and an actual forbearance in consequence thereof for a reasonable time, furnishes a good consideration for the collateral undertaking In other words, a request followed by performance is sufficient, and mutual promises at the time are not essential, unless it was the understanding that the promisor was not to be bound, except on condition that the other party entered into an immediate and reciprocal obligation to do the thing requested. (Morton v. Burn, 7 A. & E. 19; Wilby v. Elgee, L. R., 10 C. P. 497; King v. Upton, 4 Maine, 387; Leake on Con., p. 54; Am. Lead. Cas., Vol. II., p. 96 *et seq.* and cases cited.)[186] The general rule is

[186] In Manter v. Churchill (1878-1879), 127 Mass. 31, defendant promised plaintiff to pay an indebtedness due plaintiff from the estate of a third party, and plaintiff was induced by this promise to forbear bringing action for the indebtedness against the administratrix of the estate, for three months. Judgment for defendant, in a suit on this promise, was affirmed. Lord, J., said that "Mere forbearance to sue is not a sufficient consideration for a promise to pay the debt of another. Mecorney v. Stanley, 8 Cush. 85." In the case of Mecorney v. Stanley, cited, the reason given is that "It [forbearance] is a mere omission on the part of the creditor to exercise his legal right to which he is not bound by any promise, which right he may at any moment at his own pleasure enforce. * * * To constitute a forbearance to sue a third person a good consideration for a promise by a stranger to the original consideration, it must have been in pursuance of an agreement to forbear. In such a case, the injury to the promisee and the benefit to the debtor, both concur in making the consideration valid. It is undoubtedly true that an actual forbearance to sue may often, in connection with other facts, be evidence of an agreement to forbear, and as such, form a good consideration for a promise. But this is a very different proposition from that contended for by the plaintiff that forbearance of itself without any promise, is a good consideration." See Saunders v. Bank of Mecklenburg, 112 Va. 443 (1911).

Yet, as in Strong v. Sheffield, the principal case, it is stated just as positively the other way that "forbearance, even without an agreement to forbear, will serve as a consideration, if it be completed." Learned Hand, J., in In re All Star Feature Corp., 232 Fed. 1004, 1009 (1916).

In Fullerton v. Provincial Bank of England, [1903] A. C. 309, 313-314, Lord Macnaghten said of a contention that there was no stipulation for forbearance for any definite time and so no consideration for the agreement to create an equitable charge before the court: "In such a case as this it is not necessary that there should be an arrangement for forbearance for any definite or particular time. It is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance for a time, and that forbearance for a reasonable time was in fact extended to the person who asked for it. That proposition seems to me to be established by the case of Alliance Bank v. Broom, 2 D. & S. 289 (1864) * * * and other cases * * * and I may add that the proposition seems to be good sense."

In Edgerton v. Weaver, 105 Ill. 43 (1882) Scholfield, J., said: "A promise to pay the debt of another, it has been held, can not be rendered binding by proof that it was followed by forbearance, unless there be something to show, not only that it was made for the purpose of obtaining time, and that time was actually given, but that the indulgence thus accorded was in

clearly and in the main accurately, stated in the note to Forth v. Stanton (1 Saund. 210, note b). The learned reporter says: "And in all cases of forbearance to sue, such forbearance must be either absolute or for a definite time, or for a reasonable time; forbearance for a little, or for some time, is not sufficient." The only qualification to be made is that in the absence of a specified time a reasonable time is held to be intended. (Oldershaw v. King, 2 H. & N. 517; Calkins v. Chandler, 36 Mich. 320.)[187] The note in question did not in law extend the payment of the debt. It was payable on demand, and although being payable with interest it was in form consistent with an intention that payment should not be immediately demanded, yet there was nothing on its face to prevent an immediate suit on the note against the maker or to recover the original debt. (Merritt v. Todd, 23 N. Y. 28; Shutts v. Fingar, 100 N. Y. 539.)

In the present case the agreement made is not left to inference, nor was it a case of request to forbear, followed by forbearance, in pursuance of the request, without any promise on the part of the creditor at the time. The plaintiff testified that there was an express agreement on his part to the effect that he would not pay the note away, nor put it in any bank for collection, but (using the words of the plaintiff) "I will hold it until such time as I want my money, I will make a demand on you for it." And again: "No, I will keep it until such time as I want it." Upon this alleged agreement the defendant endorsed the note. It would have been no violation of the plaintiff's promise if, immediately on receiving the note, he had commenced suit upon it. Such a suit would have been an assertion that he wanted the money and would have fulfilled the condition of forbearance. The debtor and the defendant, when they became parties to the note, may have had the hope or expectation that forbearance

pursuance of the request implied by the promise. Snyder v. Leibengood, 4 Barr. 305; Cobb v. Page, 5 Harris 469; Shape v. Galbraith, 8 Casey, 10; Young v. Hill et al., 67 N. Y. 167. The question is one of fact, which can not be found affirmatively in the absence of proof. *Ibid.* And so, obviously, whether actual forbearance, following a promise to pay interest upon interest for forbearing, is evidence of an acceptance of the promise, is a question of fact. If, under all the circumstances in evidence throwing light upon the question, it is reasonable to believe the party acted upon the faith of and pursuant to the promise, a jury would be justified in finding that he so acted—otherwise not."

On mere forbearance to sue as consideration for a promise by a third person to pay an existing obligation, see 19 L. R. A. (N. S.) 842, note.

[187] "The whole current of authority is to the effect that an agreement to withhold suit is a good consideration to support a promise to pay a debt, although no fixed and definite time is expressly agreed upon. * * * The legal effect of such an agreement is to bind the creditor to withhold suit for a reasonable time. What would be a reasonable time, if not always a question of fact, would at least be a mixed question of law and fact, depending for its solution upon the circumstances of each case." Brown, J., in Traders' National Bank v. Parker, 130 N. Y. 415, 420-421 (1892).

would follow, and there was forbearance in fact. But there was no agreement to forbear for a fixed time or for a reasonable time, but an agreement to forbear for such time as the plaintiff should elect. The consideration is to be tested by the agreement, and not by what was done under it. It was a case of mutual promises, and so intended. We think the evidence failed to disclose any consideration for the defendant's endorsement, and that the trial court erred in refusing so to rule.

The order of the General Term reversing the judgment should be affirmed, and judgment absolute directed for the defendant on the stipulation with costs in all courts.

*Ordered accordingly.*

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## WOOD *v.* LUCY, LADY DUFF-GORDON.

**(Court of Appeals of New York, 1917. 222 N. Y. 88, 118 N. E. 1082.)**

Action by Otis F. Wood against Lucy, Lady Duff-Gordon. From a judgment of the Appellate Division (177 App. Div. 624, 164 N. Y. Supp. 576), which reversed an order denying defendant's motion for judgment on the pleading, and which dismissed the complaint, plaintiff appeals. Reversed.

CARDOZO, J. The defendant styles herself "a creator of fashions." Her favor helps a sale. Manufacturers of dresses, millinery, and like articles are glad to pay for a certificate of her approval. The things which she designs, fabrics, parasols, and what not, have a new value in the public mind when issued in her name. She employed the plaintiff to help her to turn this vogue into money. He was to have the exclusive right, subject always to her approval, to place her indorsements on the designs of others. He was also to have the exclusive right to place her own designs on sale, or to license others to market them. In return she was to have one-half of "all profits and revenues" derived from any contracts he might make. The exclusive right was to last at least one year from April 1, 1915, and thereafter from year to year unless terminated by notice of 90 days. The plaintiff says that he kept the contract on his part, and that the defendant broke it. She placed her indorsement on fabrics, dresses, and millinery without his knowledge, and withheld the profits. He sues her for the damages, and the case comes here on demurrer.

The agreement of employment is signed by both parties. It has a wealth of recitals. The defendant insists, however, that it lacks the elements of a contract. She says that the plaintiff does not bind himself to anything. It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism

when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be "instinct with an obligation," imperfectly expressed (Scott, J., in McCall Co. v. Wright, 133 App. Div. 62, 117 N. Y. Supp. 775; Moran v. Standard Oil Co., 211 N. Y. 187, 198, 105 N. E. 217). If that is so, there is a contract.

The implication of a promise here finds support in many circumstances. The defendant gave an exclusive privilege. She was to have no right for at least a year to place her own indorsements or market her own designs except through the agency of the plaintiff. The acceptance of the exclusive agency was an assumption of its duties. Phoenix Hermetic Co. v. Filtrine Mfg. Co., 164 App. Div. 424, 150 N. Y. Supp. 193; W. G. Taylor Co. v. Bannerman, 120 Wis. 189, 97 N. W. 918; Mueller v. Mineral Spring Co., 88 Mich. 390, 50 N. W. 319. We are not to suppose that one party was to be placed at the mercy of the other. Hearn v. Stevens & Bro., 111 App. Div. 101, 106, 97 N. Y. Supp. 566; Russell v. Allerton, 108 N. Y. 288, 15 N. E. 391. Many other terms of the agreement point the same way. We are told at the outset by way of recital that:

"The said Otis F. Wood possesses a business organization adapted to the placing of such indorsements as the said Lucy, Lady Duff-Gordon, has approved."

The implication is that the plaintiff's business organization will be used for the purpose for which it is adapted. But the terms of the defendant's compensation are even more significant. Her sole compensation for the grant of an exclusive agency is to be one-half of all the profits resulting from the plaintiff's efforts. Unless he gave his efforts, she could never get anything. Without an implied promise,, the transaction cannot have such business "efficacy, as both parties must have intended that at all events it should have." Bowen, L. J., in the Moorcock, 14 P. D. 64, 68. But the contract does not stop there. The plaintiff goes on to promise that he will account monthly for all moneys received by him, and that he will take out all such patents and copyrights and trade-marks as may in his judgment be necessary to protect the rights and articles affected by the agreement. It is true, of course, as the Appellate Division has said, that if he was under no duty to try to market designs or to place certificates of indorsement, his promise to account for profits or take out copyrights would be valueless. But in determining the intention of the parties the promise has a value. It helps to enforce the conclusion that the plaintiff had some duties. His promise to pay the defendant one-half of the profits and revenues resulting from the exclusive agency and to render accounts monthly was a promise to use reasonable efforts to bring profits and revenues into existence. For this conclusion the authorities are ample. Wilson v. Mechanical Orguinette Co., 170 N. Y. 542, 63 N. E. 550; Phoenix Hermetic Co. v. Filtrine Mfg. Co., *supra;* Jacquin v. Boutard, 89 Hun 437, 35 N. Y. Supp. 496; Id. 157 N. Y. 686, 51 N. E.

1091; Moran v. Standard Oil Co., *supra;* City of N. Y. v. Paoli, 202 N. Y. 18, 94 N. E. 1077; McIntyre v. Belcher, 14 C. B. [N. S.] 654; Devonald v. Rosser & Sons [1906] 2 K. B. 728; W. G. Taylor Co. v. Bannerman, *supra;* Mueller v. Mineral Spring Co., *supra;* Baker Transfer Co. v. Merchants' R. & I. Mfg. Co., 1 App. Div. 507, 37 N. Y. Supp. 276.

The judgment of the Appellate Division should be reversed, and the order of the Special Term affirmed, with costs in the Appellate Division and in this court.

*Order reversed, etc.*[188]

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## DEMENT BROS. CO. *v.* COON, ET UX.

**(Supreme Court of Washington, 1919. 104 Wash. 603, 177 Pac. 354.)**

Action by the Dement Brothers Company against Carl Coon and Eva Coon, his wife. From judgment for plaintiff, defendants appeal. Affirmed.

MITCHELL, J.[189] A transaction occurred between the parties to this action on August 4, 1916, and thereafter another, relating to the same subject-matter, both of which were reduced to writing and signed, as follows:

"August 4, 1916.

"I sell to Dement Bros. Co. 6,000 bushels of bluestem wheat basis No. one grade, 201 sacks turkey red wheat basis No. one grade and 500 bushels fortyfold wheat basis No. one grade all at $1.03½ per bushel f. o. b. Reese or Welland seller's option. Delivery to be made on or before Sept. 30, 1916. Carl Coon.

"Confirmed:

"Dement Bros. Co., by Morrison."

* * * No wheat was delivered, and suit for damages followed. * * * The court granted plaintiff's motion [for judgment notwithstanding the verdict] and entered judgment for the full amount of damages claimed. Defendants appeal. * * *

Errors assigned are expressed by three contentions of appellants as follows: (1) That said contract is void for want of mutuality. * * *

As to the first contention: The contract is an executory one, and evidently it was intended to be and is bilateral. Appellants argue that the contract contains no promise on the part of respondent to receive the

[188] See Thomas-Huycke-Martin Co. v. Gray, 94 Ark. 9 (1910); American Distributing Co. v. Hayes Wheel Co., 250 Fed. 109 (1918). Whether there is an implied counter promise is a question of fact in each case. Grayling Lumber Co. v. Hemingway, 124 Ark. 354 (1916).

[189] Parts of the opinion are omitted.

wheat nor to pay for it. We are satisfied to the contrary. By the writing signed by Carl Coon, he said that he sells wheat to respondent, future delivery, at a stated price, f. o. b. at either of two places the seller prefers. Respondent wrote the word "confirmed" and signed it * * * The rule by which we determine the intent of the parties and the meaning or lack of meaning of such a written instrument does not encourage an attempt to charm or transform it into a word puzzle, nor to do otherwise than take the words and signatures in their ordinary, everyday, popular sense. The contract is not an option given by Carl Coon, nor is it a unilateral agreement, such as the offer of a reward. By it Carl Coon said he sells wheat, future delivery, at a certain price, to Dement Bros. Company. It is impossible to sell unless at the same time there is a purchaser. The one obligation must have its corresponding and correlative obligation. Therefore, when Carl Coon signed the contract he obligated himself to sell wheat, future delivery, at the price stated, to Dement Bros. Company, and, when the latter wrote on it the word "confirmed" and then signed it, respondent entered into the correlative obligation of purchasing wheat, future delivery, at the price stated, from Carl Coon. The same may be said with reference to the obligation of respondent to receive the wheat. Butler v. Thomson et al., 92 U. S. 412, 23 L. Ed. 684; Jordan v. Patterson, 67 Conn. 473, 35 Atl. 521. * * *

*Judgment affirmed.*[190]

[190] "A contract includes not only what the parties said but also what is necessarily to be implied from what they said. (Milliken v. Western Union Tel. Co., 110 N. Y. 403, 408.) Thus the words 'cash on delivery' with no other promise to pay 'imply a promise and create an obligation' to make payment upon delivery. (Justice v. Lang, *supra*.) So the word 'sold' in a written agreement implies not only a contract to sell but also a contract to buy (Butler v. Thomson, 92 U. S. 412, 414); and a contract to buy with no express promise to sell implies the latter obligation. (Hudson Canal Co. v. Penn. Coal Co., 75 U. S. (8 Wall.) 276, 289.) 'What is implied in an express contract is as much a part of it as what is expressed' [Bishop on Contracts (3d ed.), § 241]; for 'the law is a silent factor in every contract.' (Long v. Straus, 107 Ind. 94, 95.)

"A mutual agreement implies an offer and acceptance, or a promise for a promise in some form, and if, as alleged, it was 'mutually agreed * * * that the defendant would pay to the plaintiff the sum of $500 for such superintendence [of the work of altering the buildings of defendant,]' necessarily there was not only an express promise by the defendant to pay but also an implied promise by the plaintiff to superintend. (Allen v. Patterson, 7 N. Y. 476, 479; Marie v. Garrison, 83 N. Y. 14, 23; Hadden v. Dimick, 31 How. Pr. 196, 226; Stilwell v. Ocean Steamship Co., 5 App. Div. 212, 214; Jones & Co. v. Binford, 74 Me. 439; Foulks v. Falls, 91 Ind. 315, 320.) Payment of the sum named was to be made by the one for something to be done by the other, or for "such superintendence," and by necessary implication the service of superintendence was to be rendered by the plaintiff. His implied promise to superintend had the same effect as an express promise, and thus there was a promise for a promise, which constitutes a good consideration

## HOLT *v.* WARD CLARENCIEUX.

**(Court of King's Bench, 1732. 2 Strange, 937.)**

The plaintiff declared that it was mutually agreed between the plaintiff and defendant that they should marry at a future day which is past, and that, in consideration of each other's promise, each engaged to the other; notwithstanding which the defendant did not marry the plaintiff, but had married another, which she lays to her damage of £4,000.

The defendant, with leave of the court, pleaded double; viz., *non assumpsit,* and that the plaintiff, at the time of the promise, was an infant of fifteen years of age.

The plaintiff joins issue on the *non assumpsit,* and a verdict is found for her, with £2,000 damages. And, as to the plea of infancy, demurred.

The Chief Justice, [Sir Robert Raymond,] delivered the resolution of the court.

The objection in this case is, that, the plaintiff not being bound equally with the defendant, this is *nudum pactum,* and the defendant cannot be charged in this action. Formerly it was made a doubt by my Lord Vaughan whether any action could be maintained on mutual promises to marry; but that is now a point not to be disputed.[191] And as to the present case, we should have had no difficulty in giving judgment for the plaintiff, if we could have been satisfied by the arguments of the civilians that, as the plaintiff was of the age of consent, any remedy, though not by

and also makes the engagement mutual." Vann, J., in Grossman v. Schenker, 206 N. Y. 466, 469 (1912).

"A 'promise' is an express undertaking or agreement to carry the purpose into effect; a declaration which binds the person who makes it, either in honor, conscience, or law, to do or forbear a certain specific act. It is a declaration which gives to the person to whom made a right to expect or claim the performance of some particular thing. 32 Cyc. 633. In Harrow v. Dugan, 36 Ky. (6 Dana) 341, the words 'I have borrowed so much money' were held to import a promise to pay. In Cheatham v. Cheatham, 6 Ky. Op. 450, a writing executed by an administrator, stating there is due a certain person as his share of the estate $200, 'to be paid' was properly treated, not as an agreement to pay the debt out of the administrator's individual funds, but as the evidence of a fiducial liability, and therefore was not affected by the bankruptcy of the administrator individually. The expression in a writing, 'to be paid in solvent notes,' was held in Williams v. Sims, 22 Ala. 512, to be a contract on the part of the maker to pay the sum specified. The words 'to be paid' and 'payable' were treated as convertible terms. In Webster's New International Dictionary 'promise' is defined as:

" 'To engage to do, give or make; to covenant; to engage; to afford reason to expect.' * * *

"The words 'to be paid,' as used in the mortgage, import an undertaking or agreement that the debt would be settled, an obligation to see to its payment; that is, a promise to pay." Quin, J., in Hoskins v. Black (Ky.) 226 S W. 384, 385-386 (1920).

191 In Harrison v. Cage, 5 Mod. 411 (1698), the point was settled. It was there held that the man could sue the woman for breach of promise.

way of action for damages could be had against her. But since they seem to have had no precedent in the case, we must consider it upon the foot of the common law. And upon that the single question is, whether this contract, as against the plaintiff, was absolutely void. And we are all of opinion that this contract is not void, but only voidable at the election of the infant; and as to the person of full age it absolutely binds.

The contract of an infant is considered in law as different from the contracts of all other persons. In some cases his contract shall bind him; such is the contract of an infant for necessaries, and the law allows him to make this contract as necessary for his preservation; and therefore in such case a single bill shall bind him, though a bond with a penalty shall not. 1 Lev. 87.

Where the contract may be for the benefit of the infant, or to his prejudice, the law so far protects him as to give him an opportunity to consider it when he comes of age; and it is good or voidable at his election. Cro. Car. 502; 2 Rol. 24, 427; Hob. 69; 1 Brownl. 11; 1 Sid. 41; 1 Vent. 21; 1 Mod. 25; Sir W. Jones, 164. But though the infant has this privilege, yet the party with whom he contracts has not; he is bound in all events. And as marriage is now looked upon to be an advantageous contract, and no distinction holds whether the party suing be man or woman, but the true distinction is whether it may be for the benefit of the infant, we think, that though no express case upon a marriage contract can be cited, yet it falls within the general reason of the law with regard to infants' contracts. And no dangerous consequence can follow from this determination, because our opinion protects the infant even more than if we rule the contract to be absolutely void. And as to persons of full age, it leaves them where the law leaves them, which grants them no such protection against being drawn into inconvenient contracts.

For these reasons we are all of opinion that the plaintiff ought to have her judgment upon the demurrer.[192]

[192] "In Holt v. Ward Clarencieux, Strange, 937, it was held, on great consideration, that a person of full age contracting with an infant was bound absolutely, although the infant had a right to avoid her contract. The decision was on demurrer to a plea of the plaintiff's infancy, not alleging that the defendant was ignorant of the fact when he made the contract, but seems to have been made without regard to whether the defendant knew or not. This case is accepted without dispute as the law." Holmes, J., in Atwell v. Jenkins, 163 Mass. 362, 363, (1895).

See Wright v. Buchanan, 287 Ill. 468 (1919); Voorhees v. Wait, 15 N. J. L. 343 (1836); O'Rourke v. John Hancock L. Ins. Co., 23 R. I. 457 (1902).

In Holmes v. Rice, 45 Mich. 142, 7 N. W. 772 (1881). Marston, C. J., said: "The law in recognizing the incapacity of infants to enter into certain contracts and declaring such contracts voidable does so for the infant's protection. Their contracts are not void but voidable, and it is for the infant to avoid the contract or ratify it, and not within the power of a stranger, certainly not of a wrongdoer, to set up the infant's incapacity to contract as a protection to himself. The contract though voidable, at the option

## ALLEN, by his guardian STEPHENS *v.* BERRYHILL.

(Supreme Court of Iowa, 1869. 27 Iowa 534, 1 Am. Rep. 309.)

DILLON, C. J.[193] In substance this action is one to recover judgment upon the notes made by the defendant to Allen [a person of unsound mind.] * * *

The peculiarity of the case now under consideration consists in the fact that the representative of the party alleged to be insane, and with whom the contract was made, is the party seeking to have it enforced. It is the sane party to the contract that makes defense, and the defense is that the other party to the contract was totally insane at the time it was entered into. * * * This circumstance is regarded as important, and as distinguishing the case from those in which it is the insane party who pleads his incapacity and seeks to prevent the sane party to the contract from enforcing it against him.

It is the opinion of the court, that justice and sound policy concur

of the infant, is valid as to third parties who are strangers to both parties to the contract, and not claiming under either."

In Baldwin, Executrix v. Van Deusen, 37 N. Y. 487 (1868) the action was by an executrix, against Norman Van Deusen, upon a promissory note made by the defendant for $85, the purchase price of another promissory note made by an infant, named Onley, who had refused payment on the ground that he was a minor. At the time of the sale of the infant's note, the plaintiff agreed with the defendant merely that the note was the genuine note of Onley, the maker. Because Onley did not pay his note, the defendant offered to rescind the contract of sale of the Onley note, and return the same to the plaintiff, on the ground that Onley was an infant, and demanded a return of the note in suit. In affirming a judgment for the plaintiff, Grover, J., said: "The sale by the plaintiff to the defendant of the Onley note, constituted a good consideration for the note in suit. Although Onley was an infant, that did not make his note void; he had the right to ratify it, upon coming of age, and thus render it entirely valid. (Roof v. Stafford, 7 Cow. 169, and cases cited.) This ratification required no new consideration. The Onley note was not entirely without value, and unless this appeared the consideration of the note in suit was valid." And Woodruff, J., said: "The purchaser may, if he will, take upon himself the hazard or chance that the infant will pay the note which he has signed, and if he chooses to pay, or promises to pay, therefor, he will be bound."

In England by the Infants Relief Act of 1874 many contracts of infants are absolutely void (see note 87 to Kent v. Rand, reported, *ante*, p. 295). Contracts which are not made void by statute and which are for the infant's benefit are binding there. Clements v. London & N. W. R. Co. [1894], 2 Q. B. 482; Stephens v. Dudbridge Iron Works Co. [1894], 2 K. B. 225; Roberts v. Gray [1913], 1 K. B. 520. The English common law rule is followed in Rhode Island. Pardey v. American Ship Windlass Co., 20 R. I. 147 (1897). But the great weight of authority in the United States is that the infant's contract is voidable by him, even though beneficial to him.

On the infant's capacity to contract, see 18 Am. St. Rep. 573, note.

[193] The statement of facts, parts of the opinion of Dillon, C. J., and all of the dissenting opinion of Cole, J., are omitted.

in requiring it to hold, as it does, that where a contract has been entered into (under circumstances which would ordinarily make it binding) by a sane person with one who is insane, and that contract has been adopted and is sought to be enforced by the representatives of the latter, it is no defense to the sane party merely to show that the other party was *non compos mentis* at the time the contract was made.

There are obvious reasons, founded on the justice and propriety of protecting those whom the visitations of providence have incapacitated from protecting themselves, against contracts which are discovered to be prejudicial to their interests. Their incapacity to contract is a shield which the law places in their own hands to protect them, not a sword in the hands of others with which to cut down their rights.

If a person who is of unsound mind, or who is afterwards shown to have been of unsound mind, shall chance to make a contract which is really advantageous to him, can a satisfactory reason be given why he should not have the right to enforce it? No such reason occurs to us.

The reason advanced by the appellant is, that in law two minds must concur to make a contract; that where one of the parties is insane there are not two minds capable of contracting; hence there is and can be no contract; and, therefore, no liability by either party to the other thereon. It cannot be denied that there is to the legal mind, prone to draw and often delighting to indulge in refined and acute distinctions, much that is plausible in the ground here assumed. But, after all, is that ground really tenable?

As applied to this case, the defendant says to the plaintiff: "You cannot recover because you have no contract." The plaintiff replies, "But I have a contract: here it is: it consists in your own notes." Now what does the defendant rejoin: "I admit you have my notes, but, though signed by me, they are not, in legal contemplation, my act, because you had no power to agree to take them." Is this rejoinder not subtle rather than substantial? In fact, the plaintiff has the promise or contract of the defendant, and, if fairly obtained, it ought to be no defense to a sane defendant, that the plaintiff's mind was not sound at the time the contract was made. The objection relied on by the defendant is one of the many difficulties which have arisen out of the use of the words "void" and "voidable," and the uncertain extent of meaning attached to them.

The conclusion which we reach derives a very strong support in the analogies of the law. Thus, if an infant make a contract with one of full age it may, as is well known, be enforced by the infant against the adult, but not by the adult against the infant, if the latter pleads (and the plea is purely personal) his disability.

So also the same doctrine applies to the disability of coverture. And this court has decided, that, while, as a general rule, it is true that the discharge of a principal releases a surety, yet it holds that "where a person *sui juris* becomes surety for a married woman, a minor, or other

person incapable of contracting," the surety is bound, notwithstanding a successful plea of disability on the part of the principal. Jones v. Crosthwaite, 17 Iowa 393, 396, and cases cited.

Another illustration: delivery is essential to a deed, and acceptance essential to delivery, and there can be no acceptance without mental assent. This is a general rule of law, and yet a deed made to an infant or to a lunatic, although there be no mental capacity capable of understanding the nature of the instrument, is valid. The law supplies or presumes the requisite assent to an act beneficial to the party; or it dispenses with it.

So here. Where a person of unsound mind makes a contract which is beneficial to him, the law supplies or presumes the existence of the requisite capacity, or, for his protection, estops the other party to set up and sustain this objection.

The subject might be further elaborated, but it is scarcely needful to do so. * * *

[Order sustaining demurrer to answer]

*Affirmed.*[194]

[194] "An insane person, * * * not a raving madman or an idiot, is capable of an act, even if his act be voidable. The promise of an insane man is not absolutely void. Carrier v. Sears, 4 Allen, 336, 337; Bullard v. Moor, 158 Mass. 418, 424. So that it cannot be argued that the contract was formally defective and void because only one party had done the necessary overt act. A voidable promise is a sufficient consideration. Plympton v. Dunn, 148 Mass. 523, 527. If a person unwittingly dealing with an insane man were given the right to avoid his contract when he found out the fact, it would be on grounds of policy and fairness, and of course it would be possible to read in a condition or personal exception to that effect. But there seems to be no more reason to do it in this case than when a man has contracted with an infant. The general rule is that a man takes the risk of facts which he deems material, unless he expressly stipulates for them in his contract, or unless he is misled by a fraudulent misrepresentation. See Ring v. Phoenix Assurance Co., 145 Mass. 426, 429. The right to avoid is for the personal protection of the insane, and those who deal with them have been held to have no corresponding rights in all the cases which we have seen. * * * We express no opinion as to the law in case of a bilateral contract wholly unexecuted on both sides." Holmes, J., in Atwell v. Jenkins, 163 Mass. 362, 363-364 (1895).

The contracts of lunatics not under guardianship are generally treated as voidable only by the lunatic as above. But some cases hold the contracts of lunatics void. American Trust & Banking Co. v. Boone, 102 Ga. 202 (1897); Bursinger v. Bank of Watertown, 67 Wis. 75 (1886). Still others are inclined to accept the English view that if the other party does not know that the lunatic was so insane as not to be capable of understanding what he was about the contract is binding on the lunatic (Imperial Loan Co. v. Stone [1892], 1 Q. B. 601), provided the contract is so far executed that the parties cannot be put in *statu quo* and no advantage was taken of the lunatic. Merry v. Bergfeld, 264 Ill. 84 (1914); Bokemper v. Hazen, 96 Ia. 221 (1895); Swartwood v. Chance, 131 Ia. 714 (1906); Gribben v. Maxwell, 34 Kan. 8 (1885); Flach v. Gottschalk Co., 88 Md. 368 (1898); Hosler v. Board, 54 Oh. St. 398

## BIDWELL *v.* CATTON.

**(At Nisi Prius, 1618. Hobart, 216.)**

Bidwell, an attorney, brought an action of the case against Catton, executor of Reve, and counted that, whereas he had in Michaelmas Term, 14 Jac., prosecuted an attachment of privilege against Reve the testator, returnable in Hill. Term, the testator knowing of it, in consideration that, at his request, the plaintiff would forbear to prosecute the said writ any further against the testator, the testator did promise to pay him 50 pounds and then avers, &c. And after a verdict it was excepted in arrest of judgment:

First, that it was not alleged that the plaintiff had any just cause of

(1896). It is to be noticed therefore that Iowa has thus restricted the cases where the contracts are voidable by the lunatic.

If the lunatic is under guardianship at the time of the alleged contract, the general rule is that the contract is void. Church v. Rosenstein, 85 Conn. 279 (1912); Barnham v. Kidwell, 113 Ill. 425 (1885).

On the capacity of insane persons to contract, see 71 Am. St. Rep. 638, note.

DRUNKENNESS. Drunkenness is a matter of degree, and the courts do not look with the same favor on this defense as on insanity. See Burroughs v. Richman, 1 Green (13 N. J. L.) 233, 238 (1832); Oakley v. Shelley, 129 Ala. 467 (1900). But if it is extreme enough it is dealt with in the same way, in general, as the defense of insanity. In some states extreme intoxication, preventing a contracting mind, makes the contract void. Shackelton v. Sebree, 86 Ill. 616 (1877); Hunter v. Tolbard, 47 W. Va. 258 (1899). But in most states it is only voidable by the drunkard.

In Mansfield v. Watson, 2 Iowa 111 (1855), Wright, C. J., said: "In law, the acts of the drunkard are avoided on the ground of incompetency; in equity, on that of fraud. But as mere moderate drunkenness does not deprive the mind of the power of rational consent, and is not always apparent to others, it should not of itself avoid any deed or contract. In order to avoid the deed or contract, there must be that state of excessive drunkenness which deprives the person of the consciousness of what he is doing. This is the modern English doctrine, and that followed by the courts of this country, as well as of France. Ray's Med. Ins. of Ins., § 450; Story's Eq. Jur., § 231. And this excessive drunkenness is a defense, whether voluntary, or caused by the fraud or procurement of the other party to the contract. 2 Greenl. Ev., § 374. But there may be such contrivance or management on the part of the plaintiff, to draw the party into drink, and thus to take advantage of his intoxication, as would justify the interposition of a court of equity, on the ground of fraud, even where the drunkenness is less than excessive. Story's Eq. Jur., § 231. In either event, such intoxication only renders the contract voidable, and not void, and the party, on recovering his understanding, may adopt the same. Story on Cont., § 27; Reiniker v. Smith, 2 Har. & John. (Md.) 423; Reynolds v. Waller's Heirs, 1 Wash. 164."

See Martin v. Harsh, 231 Ill. 384 (1907).

In Bawlf Grain Co. v. Ross, 55 Canada Sup. Ct. Rep. 232 (1917), the court divided over whether the fact that a drunken man, with whom a contract was made for the sale of wheat for future delivery, was bound where he did not disaffirm within a reasonable time after becoming sober. The majority held the contract voidable only and subject to ratification and ratified if not disaffirmed

action.

Secondly, that this action still remains. * * *

But the court[195] nevertheless gave judgment: For first, suits are not presumed causeless, and the promise argues cause, in that he desired to stay off the suit.[196] *Quære,* if the defendant had averred that there was no cause of suit.

Secondly, though this did not require a discharge of the action, yet it requires a loss of the writ, and a delay of the suit, which was both a benefit to the one, and a loss to the other. * * *

within a reasonable time. The minority held that it was not binding where only lapse of time without disaffirmance was shown. Most courts in the United States agree with the majority opinion. See Wright v. Waller, 127 Ala. 557 (1900). But see Reinskopf v. Rogge, 37 Ind. 207 (1871).

On contracts with intoxicated persons, see 107 Am. St. Rep. 537, note; 54 L. R. A. 440, note; 25 L. R. A. (N. S.) 596, note; L. R. A. 1915B, 1121, note; 8 Ann. Cas. 254, note; Ann. Cas. 1918E, 319, note.

DURESS. In United States, Lyon, et al. v. Huckabee, 16 Wall. (U. S.) 414, 432 (1872), Clifford, J., said: "Unlawful duress is a good defense to a contract, if it includes such degree of constraint or danger, either actually inflicted or threatened and impending as is sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness. Chitty on Contracts, 217; 2 Greenleaf on Evidence, 283. Decided cases may be found which deny that contracts procured by menace of a mere battery to the person, or of trespass to lands, or loss of goods, can be avoided on that account, as such threats, it is said, are not of a nature to overcome the will of a firm and prudent man; but many other decisions of high authority adopt a more liberal rule, and hold that contracts procured by threats of battery to the person, or of destruction of property, may be avoided by proof of such facts, because, in such a case, there is nothing but the form of a contract without the substance. Foshay v. Fergurson, 5 Hill. (N. Y.) 158; Central Bk. v. Copeland, 18 Md. 317; Eadie v. Slimmon, 26 N. Y. 12; 1 Story's Eq. Jur., 9th ed. 239. Positive menace of battery to the person, or of trespass to lands, or of destruction of goods, may undoubtedly be, in many cases, sufficient to overcome the mind and will of a person entirely competent, in all other respects, to contract, and it is clear that a contract made under such circumstances is as utterly without the voluntary consent of the party menaced as if he were induced to sign it by actual violence; nor is the reason assigned for the more stringent rule, that he should rely upon the law for redress, satisfactory, as the law may not afford him anything like a sufficient and adequate compensation for the injury. Baker v. Morton, 12 Wall. (U. S.) 158."

See Ann. Cas. 1917C, 1031, note.

[195] Part of the report of the case is omitted.

[196] "It has been ruled by this court that the compromise of matters in dispute between parties or litigants, in the absence of fraud, is of itself a sufficient consideration to uphold a contract of settlement which, when made, was binding on both parties. Wyatt v. Evins, 52 Ala. 285; Allen v. Prater, 30 Ala. 458. On a subsequent appeal in the latter case (35 Ala. 169), it is said that the mere existence of a controversy, with no suit pending, without more, is not a sufficient consideration to support a verbal settlement; that there must in addition, be some reasonable ground for the controversy. This has been frequently repeated by this court. Crawford v. Engram, 157 Ala. 321.

## LOYD *v.* LEE.

**(At Nisi Prius, 1718. 1 Strange, 94.)**

A married woman gives a promissory note as a *feme sole;* and after her husband's death, in consideration of forbearance, promises to pay it. And now in an action against her it was insisted that though she being under coverture at the time of giving the note, it was voidable for that reason; yet by her subsequent promise, when she was of ability to make a promise, she had made herself liable, and the forbearance was a new consideration. But the Chief Justice [Pratt] held the contrary, and that the note was not barely voidable but absolutely void; and forbearance, where originally there is no cause of action, is no consideration to raise an assumpsit. But he said it might be otherwise where the contract was but voidable. And so the plaintiff was called.[197]

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## WADE *v.* SIMEON.

**(Court of Common Pleas, 1846. 2 C. B. 548.)**

TINDAL, C. J.[198] The only question now remaining is upon the demurrer to the fourth plea. I am of opinion that the fourth plea is a good and valid plea, on general demurrer. The declaration alleges that the plaintiff had commenced an action against the defendant in the Exchequer, to recover two sums of £1300 and £700 respectively, which action was about to be tried, and that, in consideration that the plaintiff would forbear proceeding in that action, until December 14th then next, the defendant promised the plaintiff that he would on that day pay the money, with interest and costs; that the plaintiff, confiding in the defendant's promise, forbore prosecuting the action, and stayed the proceedings until the day named; but that the defendant did not pay the money or the costs. The fourth plea states that the plaintiff never had any cause of action against the defendant in respect of the subject-matter of the action in the Court of Exchequer, which he, the plaintiff, at the time of the commencement of the said action, and hence until the time of the making the promise in the first count mentioned, well knew. By demurring to that plea, the plaintiff admits that he had no cause of action against the defendant in the action therein mentioned, and that he knew it. It appears to me, therefore, that he is estopped from saying that there was any valid consideration for the defendant's promise. It is almost *contra bonos mores,* and certainly contrary to all the principles of natural justice, that a man should institute

Here there was a pending suit, and reasonable ground for the controversy." Mayfield, J., in Burleson v. Mays, 189 Ala. 107, 111 (1914).

197 Compare note 88, *ante.*

198 The statement of facts and the opinions of Erle, J., and Maule, J., are omitted. Parts of the opinions of Tindal, C. J., and Cresswell, J., are omitted.

proceedings against another, when he is conscious that he has no good cause of action. In order to constitute a binding promise, the plaintiff must show a good consideration, something beneficial to the defendant, or detrimental to the plaintiff. Detrimental to the plaintiff it cannot be, if he has no cause of action; and beneficial to the defendant it cannot be; for, in contemplation of law, the defense upon such an admitted state of facts must be successful, and the defendant will recover costs, which must be assumed to be a full compensation for all the legal damage he may sustain. The consideration, therefore, altogether fails. On the part of the plaintiff it has been urged, that the cases cited for the defendant were not cases where actions had already been brought, but only cases of promises, to forbear commencing proceedings. I must, however, confess that, if that were so, I do not see that it would make any substantial difference. * * * The defendant asserts, and the plaintiff admits, that there never was any cause of action in the original suit and that the plaintiff knew it. I therefore think the fourth plea affords a very good answer, and that the defendant is entitled to judgment thereon.

CRESWELL, J. * * * It has been surmised, in the course of the argument, that there is a distinction between abstaining from commencing an action and forbearing to prosecute one already commenced. In the older cases I find no such distinction. Lord Coke lays it down broadly that the staying of an action that has been unjustly brought is no consideration for a promise to pay money. I cannot help thinking, on general principles, that the staying proceedings in an action brought without any cause is no good consideration for a promise such as is relied on here. The plea, in plain terms, avers that the plaintiff never had any cause of action, and that he well knew it. Are we to assume that the defendant might, by some slip in pleading, have failed in his defense to that action, if it had proceeded? I think not. On general demurrer the plea appears to me to be sufficient * * *

*Judgment for the defendant on the fourth plea.*[199]

[199] See Melcher v. Insurance Co. of Pa., 97 Me. 512 (1903); Elmengreen v. Kern (Wis.) 182 N. W. 947 (1921).

In Smith v. Monteith, 13 M. & W. 426 (1844), the action was on a promise by defendant made to secure and which did secure the discharge from arrest of one C. J., Dunlop, in a civil action brought against Dunlop by the plaintiffs. After argument on special demurrer to the plea, Pollock, C. B., said: "The substance of the plea is that there was not any claim or demand or cause of action, in respect of which the plaintiffs were entitled to sue the defendant in the former action; but there is no averment that the plaintiffs were aware of that; and for anything that is stated in the plea, the original inception of that action was perfectly *bona fide*, although the plaintiffs may have been mistaken as to their remedy or the form of proceedings adopted by them. The plea goes on to state, that the plaintiffs did not, by discharging Dunlop, give up or part with any available remedy against him. The words 'available remedy' are rather loose and vague; they may mean several things; they would be satisfied by the fact of Dunlop being a mere pauper, for it is not stated that the plaintiffs had no legal right or remedy which they gave up, but merely that

## HERRING *v.* DORELL.

**(Court of Queen's Bench, 1840. 8 Dowling's Practice Cases, 604.)**

*R. V. Richards* showed cause against a rule *nisi,* obtained by *V. Williams* for arrest of judgment or a new trial in this case. The case had been tried before the sheriff of Brecon, and a verdict found in favor of the plaintiff for £2 10s. 1d. The ground of seeking to arrest the judgment was, that no sufficient consideration for the promise by the defendant was disclosed on the face of the declaration. The substance of the declaration was that a person named Watkins and a person named Voss were joint debtors to the plaintiff. The plaintiff proceded against them, and ultimately took Watkins and Voss in execution. An arrangement was made between Watkins and the plaintiff, and accordingly the former was discharged out of custody. Voss remained in custody, and in consideration of the discharge of Voss, the declaration alleged that the defendant undertook to pay the sum of £2 10s. 1d. due from Voss to the plaintiff, and Voss was accordingly discharged. It was contended, in support of the rule, that the plaintiff having discharged Watkins, who was

they had no *available* remedy. So also those words would be satisfied if there were some latent defect which might appear in pleading or come out in evidence; yet the action might be honestly commenced, and the claim founded in justice; and it cannot be said that, because the proceedings were open to such latent defect, the defendant's promise would not be founded on a good consideration. And this is the only part of the plea as to which there is any averment of the plaintiff's *knowledge.* It then goes on to say that the action against Dunlop was not brought for the purpose of trying any doubtful or contested right. It seems to me that the declaration in its form calls for an answer, and that this plea is no sufficient answer. I agree with the general scope of Mr. Peacock's argument. If a party does an illegal act, or if he abuses the process of the court to make it the instrument of oppression or extortion, that is a fraud on the law; and if the original arrest, or the continuance of that arrest, were of that character, and were shown to be so by proper averments in the plea, that would very probably constitute a good defence to an action like the present. But this plea falls far short of that, the arrest being legal, and there being no averment of knowledge on the part of the plaintiffs except that they knew they did not part with any available remedy by discharging Dunlop out of custody. It does not, therefore, contain a sufficient statement in fact to bring it within the scope of Mr. Peacock's argument or the cases cited by him. The judgment must therefore be for the plaintiffs."

In Anderson v. Nystrom, 103 Minn. 168 (1908), it was held that a promise to make an insolvent estate of a deceased person no trouble on account of notes barred by the statute of limitations did not constitute a consideration for a promissory note given by the heirs of the deceased. Brown, J., said: "The old notes were outlawed and the estate was insolvent. Defendants were neither legally nor morally bound to pay them and there was no trouble plaintiff could make, conceding that a promise to refrain therefrom would constitute a sufficient consideration for the new note. Whatever efforts plaintiff would have been able to make to collect the old notes from the estate would have been fruitless. He lost nothing by his promise, and was deprived, at most, of a little recreation in pursuing in the probate court an insolvent estate."

jointly liable with Voss, that had the effect of entitling Voss to his discharge.

*Richards* submitted that even after the discharge of Watkins, some step being necessary, in order to obtain the discharge of Voss, some portion of his imprisonment, until that step could be taken, must be considered as lawful. * * * In the present case Voss was not taken in execution after the discharge of Watkins, but both were legally in custody at the time of Watkins' discharge. The detention of one prisoner in such a case could not be considered as a trespass. But suppose it should be said that the plaintiff was bound to take steps to discharge Voss. If he was, he was entitled to a reasonable time for that purpose. During the time that elapsed before his actual discharge he was in legal custody. That custody furnished a sufficient consideration to support the defendant's promise.

*V. Williams* in support of the rule. This was an action on a promise alleged to have been made by the defendant to pay a certain debt due from Voss, who was in custody, if the plaintiff would release him. The joint debt of the two had, in point of law, been satisfied, by taking defendants, Watkins and Voss, in execution and discharging Watkins out of custody. It was, therefore, no consideration for the plaintiff to consent to the discharge of Voss out of custody, since it was that to which he was absolutely entitled. * * *

COLERIDGE, J. The question in this case, whether this was a good consideration or not, depends upon the situation of Voss at the time of his discharge. Both he and Watkins had been taken under a joint execution. Watkins made certain terms with the plaintiff, and the latter voluntarily discharged him. No terms were made as to the situation of Voss, his rights were, therefore, to be considered according to the situation in which the law had placed him. Suppose Watkins alone had been in custody, it is clear that the voluntary discharge of him would have been a discharge of the debt, and no other proceedings could have been taken to recover it. It seems to me in the same way that the discharge of Watkins operated to release Voss his co-debtor. I think, therefore, both on principle and authority that this rule ought to be made absolute.

*Rule absolute.*

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## COOK *v.* WRIGHT.

**(Court of Queen's Bench, 1861. 1 Best & Smith, 559.)**

BLACKBURN, J. In this case it appeared on the trial that the defendant was agent for a Mrs. Bennett, who was non-resident owner of houses in a district subject to a local act. Works had been done in the adjoining

street by the commissioners for executing the act, the expenses of which, under the provisions of their act, they charged on the owners of the adjoining houses. Notice had been given to the defendant, as if he had himself been owner of the houses, calling on him to pay the proportion chargeable in respect of them. He attended at a board meeting of the commissioners, and objected both to the amount and nature of the charge, and also stated that he was not the owner of the houses, and that Mrs. Bennett was. He was told that if he did not pay he would be treated as one Goble had been. It appeared that Goble had refused to pay a sum charged against him as owner of some houses, and the commissioners had taken legal proceedings against him, and he had then submitted and paid with costs. In the result it was agreed between the commissioners and the defendant that the amount charged upon him should be reduced, and that time should be given to pay it in three instalments; he gave three promissory notes for the three instalments; the first was duly honored, the others were not, and were the subject of the present action. At the trial it appeared that the defendant was not in fact owner of the houses. As agent for the owner he was not personally liable under the act. In point of law, therefore, the commissioners were not entitled to claim the money from him; but no case of deceit was alleged againt them. It must be taken that the commissioners honestly believed that the defendant was personally liable, and really intended to take legal proceedings against him, as they had done against Goble. The defendant, according to his own evidence, never believed that he was liable in law, but signed the notes in order to avoid being sued as Goble was. Under these circumstances the substantial question reserved (irrespective of the form of the plea) was whether there was any consideration for the notes. We are of opinion that there was.

There is no doubt that a bill or note given in consideration of what is supposed to be a debt is without consideration if it appears that there was a mistake in fact as to the existence of the debt, (Bell v. Gardiner, 4 M. & Gr. 11); and, according to the cases of Southall v. Rigg and Forman v. Wright, 11 C. B. 481, the law is the same if the bill or note is given in consequence of a mistake of law as to the existence of the debt. But here there was no mistake on the part of the defendant either of law or fact. What he did was not merely the making an erroneous account stated, or promising to pay a debt for which he mistakingly believed himself liable. It appeared on the evidence that he believed himself not to be liable; but he knew that the plaintiffs thought him liable, and would sue him if he did not pay, and in order to avoid the expense and trouble of legal proceedings against himself he agreed to compromise; and the question is, whether a person who has given a note as a compromise of a claim honestly made on him, and which but for that compromise would have been at once brought to a legal decision, can resist the payment of the note on the ground that the original claim thus compromised might

have been successfully resisted.

If the suit had been actually commenced, the point would have been concluded by authority. In Longridge v. Dorville [5 B. & A. 117,] it was held that the compromise of a suit instituted to try a doubtful question of law was a sufficient consideration for a promise. In Atlee v. Blackhouse, 3 M. & W. 633, where the plaintiff's goods had been seized by the excise, and he had afterwards entered into an agreement with the commissioners of excise that all proceedings should be terminated, the goods delivered up to the plaintiff, and a sum of money paid by him to the commissioners, Parke, B., rests his judgment, p. 650, on the ground that this agreement of compromise honestly made was for consideration, and binding. In Cooper v. Parker, 15 Com. B. 822, the Court of Exchequer Chamber held that the withdrawal of an untrue defense of infancy in a suit, with payment of costs, was a sufficient consideration for a promise to accept a smaller sum in satisfaction of a larger.

In these cases, however, litigation had been actually commenced; and it was argued before us that this made a difference in point of law, and that though, where a plaintiff has actually issued a writ against a defendant, a compromise honestly made is binding, yet the same compromise, if made before the writ actually issues, though the litigation is impending, is void. Edwards v. Baugh [11 M. & W. 641,] was relied upon as an authority for this proposition. But in that case Lord Abinger expressly bases his judgment (pp. 645, 646) on the assumption that the declaration did not, either expressly or impliedly, show that a reasonable doubt existed between the parties. It may be doubtful whether the declaration in that case ought not to have been construed as disclosing a compromise of a real *bona fide* claim, but it does not appear to have been so construed by the court. We agree that unless there was a reasonable claim on the one side, which it was *bona fide* intended to pursue, there would be no ground for a compromise; but we cannot agree that (except as a test of the reality of the claim in fact) the issuing of a writ is essential to the validity of the compromise. The position of the parties must necessarily be altered in every case of compromise, so that, if the question is afterward opened up they cannot be replaced as they were before the compromise. The plaintiff may be in a less favorable position for renewing his litigation, he must be at an additional trouble and expense in again getting up his case, and he may no longer be able to produce the evidence which would have proved it originally. Besides, though he may not in point of law be bound to refrain from enforcing his rights against third persons during the continuance of the compromise, to which they are not parties, yet practically the effect of the compromise must be to prevent his doing so. For instance, in the present case, there can be no doubt that the practical effect of the compromise must have been to induce the commissioners to refrain from taking proceedings against Mrs. Bennett, the real owner of the houses, while the notes given by the

defendant, her agent, were running; though the compromise might have afforded no ground of defense had such proceedings been resorted to. It is this detriment to the party consenting to a compromise arising from the necessary alteration in his position which, in our opinion forms the real consideration for the promise, and not the technical and almost illusory consideration arising from the extra cost of litigation. The real consideration therefore depends, not on the actual commencement of a suit, but on the reality of the claim made and the *bona fides* of the compromise.

In the present case we think that there was sufficient consideration for the notes in the compromise made as it was.

The rule to enter a verdict for the plaintiff must be made absolute.

*Rule absolute.*[200]

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## SMITH *v.* FARRA.

**(Supreme Court of Oregon, 1891. 21 Ore. 395, 28 Pac. 241, 20 L. R. A. 115.)**

Action by Cyrus Smith against G. R. Farra and D. B. Montieth to recover $700 on an agreement of compromise between plaintiff and the defendant Farra. Judgment for plaintiff. Farra appeals. Affirmed.

On July 24, 1888, defendant, Farra, and one Montieth, for $305 cash,

[200] "A *bona fide* claim, with a color of right, although there be in fact no right, so long as the party asserting it does not know he has no right, and acts in good faith, is sufficient to sustain a compromise; for a party may buy his peace in a case in which he knows there is no right against him.

"There would be no such thing as a compromise or settlement of a dispute by the party if the original controversy was not thereby closed." Manning, J., in Gates v. Shutts, 7 Mich. 127, 132 (1859).

"But a party may buy his peace, and when an action is brought against one who compromises it by the payment of money, he cannot recover the money back on the ground that had the litigation been pursued the plaintiff would have failed in his case. This is elementary; and if it is true, then it follows that a contract for the compromise of such litigation may be enforced." Irvine, C., in Carter White Lead Co. v. Kinlin, 47 Neb. 409, 416-417 (1896).

"It is the settled law of this state that if a debt or claim be disputed or contingent at the time of payment the payment when accepted of a part of the whole debt is a good satisfaction and it matters not that there was no solid foundation for the dispute. The test in such cases is, was the dispute honest or fraudulent? If honest it affords the basis for an accord between the parties, which the law favors, the execution of which is the satisfaction. (Simons v. American Legion of Honor, 178 N. Y. 263.)

"The law wisely favors settlements and where there is a real and genuine contest between the parties and a settlement is had without fraud or misrepresentation for an amount determined upon as a compromise between the conflicting claims such settlement should be upheld, although such amount is materially less than the amount claimed by the person to whom it is paid." Chase, J., in Post v. Thomas, 212 N. Y. 264, 272-273 (1914).

sold and conveyed by deed containing covenants of title and warranty, lots 7 and 8 in block 4, in West Yaquina, Benton County, Or., to plaintiff. In August, 1890, Farra discovering that he and Montieth did not own the property sold to plaintiff, wrote him the following letter: "Corvallis, Oregon, Aug. 7th, 1890. Mr. Cyrus Smith, Amity, Or.—Dear Sir: The men who have been engaged in getting up an abstract of Benton county have made a discovery that we sold you two lots—Nos. 7 and 8, in block 4, in West Yaquina—that had been sold and deeded before to Mr. W. P. Keady. We would like you to select two other lots in or near those, or even in some other portion, of about the same value, and we will deed them to you. Yours, respectfully, G. R. Farra." To this letter plaintiff replied as follows: "Amity, Oregon, Aug. 11th, 1890. Dr. G. R. Farra—Dear Sir: Your letter of the 7th inst. is at hand, and in reply will say I was very much surprised to hear that Mr. Keady had a deed made prior to mine to the lots in West Yaquina that you had deeded to me. I was also a little diverted at the idea that you should say, 'The lots Mr. Buford sold you,' when the record shows that you and Mr. Montieth sold me the lots, and Mr. Buford not known in the transaction. I have had those lots in a real-estate man's hands for some time. He has been instructed by me to sell the two for one thousand dollars, and nothing less. I have been offered eight hundred dollars for them, and refused it. I have taken counsel in the matter, and have been told that beyond a doubt I could recover from you and Mr. Montieth all the damage it is to me, but, as I am averse to lawsuits, I had much rather settle the matter ourselves, providing I can do so without too much loss. Please write me how it happened that you deeded those lots to me after you had deeded them to Mr. Keady. In regard to taking other lots in place of them, I would do so, providing I could get what I consider a fair deal. I know every foot of that ground, and excepting about six lots, I would rather have those lots than any other two lots in West Yaquina. Please send me a plat of West Yaquina, marking all the lots sold. Also make me an offer of what you propose to do, and oblige, yours truly, Cyrus Smith." Several other letters of both parties appear in the record, which are unnecessary to be set out here, but which show an honest, *bona fide* attempt on the part of each to arrive at some satisfactory settlement of the controversy, but, without being able to do so, until September 8, 1890, when plaintiff wrote to defendant the following letter: "Amity, Sept. 8th, 1890. Dr. G. R. Farra—Dear Sir: Yours in answer to my inquiry as to your least cash price on certain lots in West Yaquina came to hand over a week ago, but not before I had informed you that I did not want them at any price. For some reason I have received no answer to my last letter to you, written Aug. 30th. I now write to inform you that something must be done. We have talked this matter over enough to come to some conclusion. I want it understood that I refuse to take the lots you have offered me for those I bought of you, and I presume you will not contend that I am under any obliga-

tion to do so. I merely want you and Mr. Montieth to perfect my title to the lots I bought of you, or I want you to pay me eight hundred dollars. I think I am very reasonable in this offer. In fact you have indirectly offered me that, for you have offered me two lots that you valued at $350 each, and $100, which is exactly $800. I am aware that you would rather dispose of the lots than come out with the money, which I presume is the reason you don't give me my choice to take the money or the lots. But the lots I bought of you I bought for a particular purpose, and the lots you have offered me won't fill that purpose in any sense, owing to the lay of the land. In fact I would rather have the lots I bought of you than lots 1 and 2 immediately in front of them. Please let me know immediately your final conclusion. Yours, truly, Cyrus Smith." To this letter Farra replied as follows: "Corvallis, Oregon, Sept. 22, 1890. Mr. Cyrus Smith, Amity, Or.—Dear Sir: Your last has been to hand for quite a while, but I have been conferring with others of the company to know what best to do. We have decided that we made you a fair proposition on your lots and more than the lots can be sold for today, and more than you can collect for them if carried into litigation. We will make you one more proposition: We will give you, as stated in one of my letters, two lots in block 3, facing as yours face, and one hundred dollars ($100,) or we will give you seven hundred dollars in cash. If this is not satisfactory, you can proceed to collect your damages by law. Yours, respectfully, G. R. Farra." Upon receipt of this letter plaintiff wrote, accepting the cash offer of $700, as follows: Amity, Sept. 24, 1890. Dr. G. R. Farra, Corvallis, Or.—Dear Sir: Yours of the 22nd was received yesterday, and in reply will say in justice I believe I am entitled to eight hundred dollars, but I can't afford to go into litigation for one hundred dollars. Therefore I accept your offer of seven hundred dollars, and on receipt of the money I will relinquish all my claims on you and Mr. Montieth for lots seven and eight in block 4 of West Yaquina. Send check on the bank, and I will receipt you for it. Yours truly, Cyrus Smith." Defendant having refused to comply with his agreement and pay the $700, this action was brought. The trial in the court below resulted in a verdict and judgment in favor of the plaintiff, from which defendant appeals.

BEAN, J. The only question presented on this record is the validity of the agreement of compromise between plaintiff and defendant under the facts heretofore stated. The contention of defendant is that for a breach of the covenant of title contained in his deed to plaintiff the law fixes the measure of damages at the purchase price and interest, and that, therefore, the claim of plaintiff was a fixed and liquidated one, and in no sense such a doubtful claim as will support an agreement of compromise. Upon this record it must be conceded that plaintiff had a valid cause of action against defendant for a breach of the covenants of the deed upon which he could have successfully maintained legal pro-

ceedings, and that both parties in their negotiations for a settlement, in good faith, believed that the measure of damages was the actual value of the property conveyed at the time the negotiations took place; and not the consideration and interest; and, in order to avoid litigation, and compromise the matter in dispute between them, the agreement sued on was made. Both parties were acting in the utmost good faith, with equal knowledge of the facts, and plaintiff had reasonable ground to think, for he had taken legal advice on the question, that his damages amounted to $800, and intended in good faith to assert his claim, but to avoid litigation he forebore to do so, on account of defendant's promise to pay him $700, preferring to accept that amount rather than go into litigation, and defendant preferring to pay that sum rather than to suffer the consequences of a lawsuit. That there was an actual, bona fide dispute between these parties as to the amount of plaintiff's damages, which each in good faith believed to be doubtful, and that the settlement was intended, in good faith, as a compromise of such dispute, is not open to question on this record. But it is now insisted that the dispute was about a matter not in fact doubtful, although the parties so considered it, and therefore the agreement of compromise is without consideration. The law favors voluntary settlements of controversies between the parties, which are characterized by good faith and a full disclosure of all the facts. Wells v. Neff, 14 Or. 66, 12 Pac. Rep. 84, 88. And such settlements will be upheld and enforced, although the disposition made by the parties in their agreement may not be what the court would have adjudged had the controversy been brought before it for decision. Nor need the dispute to have been about a claim or matter actually doubtful. If the parties bona fide, and on reasonable grounds, believed it to be doubtful, it is a sufficient consideration to support the compromise. "If the requisites of good faith exist," says Mr. Pomeroy, "it is not necessary that the dispute should be concerning a question really doubtful, if the parties bona fide consider it so. It is enough that there is a question between them to be settled by their compromise." Pom. Eq. Jur. § 850. And "no investigation into the character or value of the different claims submitted," says Mr. Parsons, "will be entered into for the purpose of setting aside a compromise, it being sufficient if the parties entering into the compromise thought at the time that there was a dispute between them." 1 Parsons, Cont. (7th Ed.) 439. It is not every disputed claim, however, which will support a compromise, but it must be a claim honestly and in good faith asserted, concerning which the parties may bona fide and upon reasonable grounds disagree. The compromise of such a claim in good faith is a good consideration to pay money in settlement thereof, and when an action is brought upon such promise it is no defense to say that the claim was not in fact a valid one, or that the parties were mistaken either as to the law or the facts. Stewart v. Ahrenfeldt, 4 Denio 189; Crans v. Hunter, 28 N. Y. 389; White v. Hoyt, 73 N. Y. 505;

Griswold v. Wright, 61 Wis. 195, 21 N. W. Rep. 44; Brooks v. Hall (Kan.) 14 Pac. Rep. 236; Flannagan v. Kilcome, 58 N. H. 443; Wehrum v. Kuhn, 61 N. Y. 623. Nor is it a defense that the claim could not have been maintained if suit or action had been brought upon it, or that the parties were mistaken as to the law; for if it is, then it would follow that contracts by the parties settling their own disputes would at least be made to stand or fall according to the opinion of the courts as to how the law would have determined it. "If, therefore," says Logan, J., "the solemn compromise of the parties is made to depend on the question whether the parties have so settled the dispute as the law would have done, then it may be truly said that a compromise is an unavailing, idle act, which questions even the power of the parties to bind themselves." Fisher v. May, 2 Bibb. 448.

The settlement of a controversy is valid and binding, not because it is the settlement of a valid claim, but because it is the settlement of a controversy. And when such settlement is characterized by good faith the court will not look into the question of law or fact in dispute between the parties, and determine which is right. All that it needs to know is that there was a controversy between the parties, each claiming in good faith rights in himself against the other, and that such controversy has been settled. In Cook v. Wright, 1 Best & S. 559, it appeared from the evidence that defendant believed himself not liable on the demand of plaintiff; but he knew that plaintiff thought him liable, and would sue him if he did not pay, and, in order to avoid the expense and trouble of legal proceedings against him, agreed to compromise, and gave his note for the amount agreed on in compromise, and the question was whether a person who has given a note as a compromise of a claim honestly made upon him, and which, but for that compromise, would at once have been brought to a legal decision, can resist payment of the note on the ground that the original claim thus compromised might have been successfully resisted; and it was held he could not, Blackburn, J., saying: "The real consideration depends on the reality of the claim made and the bona fides of the compromise." In Callisher v. Bischoffsheim, L. R. 5 Q. B. 449, the plaintiff claimed that certain moneys were due him from the government of Honduras, and was about to take proceedings to enforce payment, and, in consideration that the plaintiff would forbear taking such proceedings for an agreed time, the defendant promised to deliver to him certain debentures. In an action for a breach of the contract the plea was that at the time of making the contract no money was due the plaintiff from the government of Honduras. This plea was held bad on demurrer, Cockburn, C. J., saying: "No doubt it must be taken that there was in fact no claim by the plaintiff against the Honduras government which could be prosecuted by legal proceedings to a successful issue; but this does not vitiate the contract, and destroy the validity of what is alleged as the coonsideration. The authorities clearly establish that, if

an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration, and, whether proceedings to enforce the disputed claim have or have not been instituted, makes no difference."[201] In Grandin v. Grandin, 49 N. J. Law, 508, 9 Atl. Rep. 756, the plaintiff was an heir at law of the deceased, and in good faith filed objections to the probate of the will, and, in consideration of his withdrawing his objections and making no further opposition to the probate of the will, the defendant agreed to pay him $300. In an action on this promise it was held that the compromise was valid and binding, although it ultimately appeared that the claim of the plaintiff was wholly unfounded. In Bellows v. Sowles, 55 Vt. 391, the facts are as in the case last above cited, except that the plaintiff had not instituted proceedings to contest the will, but was making arrangements to do so, and defendant promised to pay him $5,000 if he would desist from such opposition to the will. In an action on the promise the court held that plaintiff was not bound to show that his ground of opposition to the will would have been sufficient to have defeated its probate. It was enough if he was able to show that he honestly thought he had good and reasonable ground for making the claim that the will, so far as it related to him, was the production of undue influence, and for that reason he honestly and in good faith intended to oppose its establishment. In some of the authorities it is said that, in order that a compromise may constitute a sufficient consideration to support an executory contract, the claim must be at least doubtful, and there must be colorable ground of dispute, and some legal or equitable foundation for the claim. Anthony v. Boyd, 15 R. I. 495, 8 Atl. Rep. 701, and 10 Atl. Rep. 657; Mortgage Co. v. Henderson, 111 Ind. 24, 12 N. E. Rep. 88. This statement must be construed with reference to the facts of the particular case, and, when so read, will, we think, be found to mean nothing more than that the claim must be a serious one, honestly made, which the party asserting does not know is unsubstantial, but believes he has a fair chance of sustaining, or does not know facts to

[201] In Callisher v. Bischoffsheim, quoted in the text, Cockburn, C. J., added: "If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he *bona fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it. The defendant's contention is unsupported by authority.

"It would be another matter if a person made a claim which he knew to be unfounded, and, by a compromise, derived an advantage under it; in that case his conduct would be fraudulent. If the plea had alleged that the plaintiff knew he had no real claim against the Honduras Government, that would have been an answer to the action."

his knowledge unknown to the other party, which show his claim a bad one.

As a result from the authorities, we think a doubtful or disputed claim, sufficient to constitute a good consideration for an executory contract of compromise, is one honestly and in good faith asserted, arising from a state of facts upon which a cause of action can be predicated, with the reasonable belief on the part of the party asserting it that he has a fair chance of sustaining his claim, and concerning which an honest controversy may arise, although in fact the claim may be wholly unfounded. In the case before us plaintiff not only had a cause of action, but an admitted right of action, growing out of the sale of the property and the execution and delivery of the deed, which he could have prosecuted to a successful issue, and upon the facts of which he honestly and in good faith believed his damages amounted to at least $800. This question he intended to submit to judicial decision. It was a question concerning which there could be and actually was an honest controversy. The proposition of settlement came from defendant, and the compromise was effected after weeks of negotiation, at his solicitation. He had as full and complete knowledge of all the facts as the plaintiff, and presumedly more so. By the compromise, and on the faith of defendant's promise, plaintiff forebore to assert his claim in the courts, and gave up a portion of what he believed to be a valid claim, and defendant, instead of being annoyed with an action, escaped the vexations incident thereto, although other motives may have prompted him to make the proposition of settlement; and this is a sufficient consideration to support defendant's promise. This is so, although it may now be clear that plaintiff could only have recovered in an action the consideration by him paid for the property, and that his claim for $800 was in law wholly unfounded. The defendant cannot escape liability on his solemn contract, entered into at his request and solicitation, by now showing or claiming that he was mistaken as to the law. It is sufficient for us to know that there was a dispute between the parties, and that it has been in the utmost good faith settled. Whether it was entirely the desire to avoid litigation, or what appeared to him some sufficient consideration, that induced the defendant to make the offer of settlement accepted by plaintiff, is unnecessary for us to inquire. It is enough that with full knowledge of all the facts, and without any fraud or concealment on the part of plaintiff, the offer was made and accepted. Nor is it necessary for plaintiff to show that the law would have awarded him the damages claimed. It is enough if he had an honest, reasonable ground to think his damages amounted to $800, and intended in good faith to assert it, and forebore to do so on account of defendant's promise. Conceding, therefore, that the measure of damages growing out of the sale of the property and execution and delivery of the deed from defendant to plaintiff is the purchase price and interest,—a question, however, we are not called upon to determine,—the compromise between plaintiff and

defendant was supported by a sufficient consideration, and is valid and binding.

Judgment of court below

*Affirmed.*

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## BLOUNT *v.* DILLAWAY, ET AL.

**(Supreme Judicial Court of Massachusetts, 1908. 199 Mass. 330, 85 N. E. 477, 17 L. R. A. (N. S.) 1036.)**

Suit by Edith Eliza Dillaway Blount against Frank Henry Dillaway and Frank A. Wheeler to compel specific performance of an agreement of compromise. Decree for plaintiff, and defendants appeal. Affirmed.

LORING, J.[202] This is a bill brought by a sister against her brother and against the executor of the will of their mother. The plaintiff seeks to establish an agreement of compromise between her brother and herself as to the will and property of their mother, and to have the executor directed to pay to her one-third of the residue when his accounts are settled in the Probate Court and the time for distribution shall come. * * *

The judge made findings of the material facts and ordered a decree to be entered for the plaintiff. In pursuance of that order a decree was entered declaring that by virtue of the agreement of compromise the plaintiff was entitled to one-third of all moneys coming to the defendant in addition to one-third of the legacy of $5 bequeathed to her, and directing the defendant Wheeler as executor to make said payments after the settlement of his final account in the Probate Court. It was further provided in said decree that the plaintiff should have the same standing in the probate proceedings that she would have had if the plaintiff and defendant had been residuary legatees.

The case is now before us on appeal by both defendants. * * *

The judge * * * found that "the plaintiff in good faith stated to the defendant, her brother, that she would contest the will on the ground of undue influence and want of sanity, and in consideration of his agreement to share the estate with her promised not to make any contest." * * *

The judge further ruled "that she is not required to go further and prove that there was a doubtful question as to sanity or undue influence in order to establish a valid consideration. She had the right, acting in good faith, to go to court and make a contest and she promised not to exercise that right, and did not exercise it."

There are decisions in other jurisdictions for the position taken by the

[202] Parts of the opinion are omitted.

appellants. A collection of the decisions to that effect may be found in Wald's Pollock on Contracts (3d Am. Ed.) 214, note 23. But since the decision of this court in Prout v. Pittsfield Fire District, 154 Mass. 450, 28 N. E. 679, those cases are not law in this commonwealth, and the earlier case of Pafrey v. Portland, Saco & Portsmouth Ry. Co., 4 Allen 55, must be taken to be modified accordingly. This court in Prout v. Pittsfield Fire District adopted the rule finally established in England in Miles v. New Zealand Alford Estate Co., 32 Ch. D. 266, in which Cook v. Wright, 1 B. & S. 559, Callisher v. Bischoffsheim, L. R. 5 Q. B. 449, Ockford v. Barrelli, 20 W. R. 116, and the doubts thrown on those decisions by Lord Esher, M. R., in Ex parte Banner, 17 Ch. D. 480, 490, were considered at length. The rule there laid down was stated on page 291 with accuracy by Lord Bowen to be: "If an intending litigant bona fide forbears a right to litigate, he does give up something of value." He added, speaking of the case then before him: "I think therefore that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession." Again, on page 292, Lord Bowen says: "When the Master of the Rolls in Ex parte Banner, 17 Ch. D. 480, says he doubts, if there was really and obviously no cause of action, whether the belief of the parties that there was. would be sufficient ground for a compromise, I agree if by that he means there must be a real cause of action, that is to say, one that is bona fide and not frivolous or vexatious; but I do not agree if he means by a real cause of action some cause of action which commends itself to the ultimate reasoning of the tribunal which has to consider and determine the case." The case of Prout v. Pittsfield Fire District, 154 Mass. 450, 453, 28 N. E. 679, was affirmed in Kennedy v. Welch (Mass.) 83 N. E. 11.

In the case at bar, having regard to the knowledge of the plaintiff, can it be said that her claim was a vexatious or frivolous one? Unless a duly executed will had been made she was entitled as one of the two next of kin to a half of her mother's estate. She had just been told by the other next of kin, her brother, that their mother had left a will by which everything had been bequeathed to him. Even although she had been estranged from her mother for ten years, a determination to examine the will and the circumstances under which it had been made could not be said (having regard to the knowledge of the plaintiff) to be either vexatious or frivolous. We are of opinion that this finding and this ruling were right. The claim in Palfrey v. Portland, Saco & Portsmouth Ry. Co., 4 Allen 55, was a frivolous and vexatious one. * * *

*Decree affirmed.*[203]

[203] "The abandonment of an honest purpose to carry on a litigation, even though its character is not such, either in law or fact or both, as ultimately to commend itself to the judgment of the tribunal which finally passes upon

## CARUANA *v.* PRUDENTIAL SPICE CO., Inc.

(Supreme Court, Appellate Term, First Department, 1919. 178 N. Y. Supp. 401.)

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Joseph Caruana against the Prudential Spice Company, Incorporated. From a judgment for plaintiff entered upon verdict of jury, defendant appeals. Reversed, and verdict directed for defendant.

BIJUR, J. Defendant had purchased from plaintiff's principal certain goods to be shipped from Spain at an agreed value of some $1,700, and the written contract of sale provided that cost, insurance, and freight were included in the price, the goods to be delivered in New York. When they arrived, plaintiff called on defendant, and told him that his principal in Spain had been put to some delay and expense by reason of war conditions which had compelled him to pay out some $440, and that plaintiff would not deliver the goods or documents of title to defendant, unless he would pay half of that amount. Thereupon defendant drew his check to plaintiff's order for $220, marking it with the words "Paid under protest." As soon as he obtained the documents, he stopped payment on the check, and plaintiff brought suit thereon.

It is quite plain that the check was without consideration, and a verdict in defendant's favor should have been directed as duly requested. While it is quite true that the abandonment of even a colorable claim advanced by one party is consideration for the reciprocal promise of the other, the claim must at least be colorable. White v. Hoyt, 73 N. Y. 505, 514; Springstead v. Nees, 125 App. Div. 230, 232, 109 N. Y. Supp. 148; Eysaman v. Nelson, 79 Misc. Rep. 304, 340, 140 N. Y. Supp. 183. In the instant case there was not even a claim advanced against defendant, colorable or otherwise. The best that respondent's counsel can say in justification of the demand was that the contract did not require plaintiff to pay for these expenses in Spain, which are alluded to as "demurrage." There may doubtless be many other expenses which plaintiff's principal may have had in Spain, either in connection with this contract or any other matter; but there is not the slightest suggestion anywhere why defendant should be bound to reimburse him therefor, nor why any one should have expected him to do so.

Judgment reversed, and verdict directed in favor of defendant, with $30 costs of this appeal and in the court below.

**the question, is a surrender of something of value and is a sufficient consideration for a contract." Rugg, J., in Silver v. Graves, 210 Mass. 26, 30 (1911). See 25 L. R. A. (N. S.) 283, note.**

## MOERS *v.* MOERS.

(Court of Appeals of New York, 1920. 229 N. Y. 294, 128 N. E. 202.)

COLLINS, J. The plaintiff seeks a judgment directing the defendant to specifically perform a contract between the parties. The demurrer of the defendant that the complaint does not state facts sufficient to constitute a cause of action was overruled by the Special Term and sustained by the Appellate Division. The complaint was not, under the leave of the Appellate Division to amend, amended, and was dismissed by the final judgment, which was affirmed by the Appellate Division.

The complaint alleges, in effect, and the demurrer admits the facts: The contract in question, in writing and under seal, was dated December 7, 1918. It recited the existence of various differences and controversies between the parties; the pendency of an action by the defendant here against the plaintiff, who is defending it, to recover $51,470.24 with interest, and the desire of the parties to compromise and settle "all matters in dispute between them of every kind and nature whatsoever including the matters and things embraced in said action above referred to," and stipulated that the plaintiff should pay the defendant on December 9, 1918, $12,500, and he or his legal representative should pay her on January 1, 1919, and on the first day of each month thereafter during her life, $250; the defendant "upon the receipt of said $12,500" should immediately reassign to the plaintiff all policies of insurance upon his life and indorse a certain designated check payable to the parties jointly, and "contemporaneously with the receipt of said sum of $12,500," sign and deliver to him a letter retracting all derogatory statements made by her against plaintiff or his wife, should refrain from making similar future statements, and should return to him a designated last will and testament executed by him and all his books, papers, or documents "such as old notes, checks and letters, including all letters heretofore written by" him to her "and all other property." It further provided:

"In consideration of the payment by the party of the first part (the plaintiff) to the party of the second part (the defendant) of said $12,500, and his promise to pay her the sum of $3,000 per annum for the balance of her life, said party of the second part promises and agrees that she at no time or under any circumstances or conditions directly or indirectly will engage in any speculation of any kind or nature, without first obtaining the written consent" of the plaintiff, and in the event of her violation of such promise he shall be under no further liability or obligation to support or make further payment to her. "General releases shall be exchanged between the parties hereto; the release from the party of the second part to the party of the first part to be made and executed by her individually and as executrix of the estate of Charles Z. Moers, deceased, and in addition said party of the second part is to make, exe-

cute and deliver a general release in favor of the wife of the party of the first part, Theresa Moers."

The plaintiff duly tendered to the defendant the sum of $12,500 and the general release, as provided by the contract, executed by him, and full performance on his part of the contract; the defendant refused performance in all respects on her part and threatens and intends to and will, unless restrained by the court, proceed with the prosecution of the pending action brought by her against the plaintiff here; the plaintiff will suffer irreparable damage and has not an adequate remedy at law. The relief is demanded: Judgment of specific performance by the defendant, and injunction against the prosecution of the pending action in her behalf.

The defendant asserts and argues that the contract is an accord only, and therefore not binding upon her because she refused the satisfaction it provided. The Appellate Division sustained the assertion. The assertion is ill-founded and erroneous.

There is no doubt that a mere accord without satisfaction is unenforceable, and that an accord with tender of satisfaction unaccepted is of like quality. An executory agreement for accord of a pending action without satisfaction made under it does not bar the prosecution of the action, and tender of performance is insufficient for that purpose. A mere accord without a satisfaction is ineffective and does not supersede or discharge the original contract or claim. A new executory agreement, whether performed or not, may be accepted in satisfaction of a previous obligation or liability, and if it is so accepted the remedy for breach thereof is upon the new and not the old agreement. But, as a rule, it is the accepted performance of the agreement and not the mere promise or tendered performance which amounts to a satisfaction. An accord not executed does not discharge the original claim. Whether there is an accord and satisfaction ordinarily involves a pure question of intention, which is, as a rule, a question of fact. If the evidence directly or through reasonable inference creates no conflict concerning the intention, it is a question of law. Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491. These rules, however, do not apply to the present case.

The contract in the instant case is not a mere accord, or an accord executory. It is a new and superior contract superseding and extinguishing the contract or contracts upon which the original action between the parties was based, and the action itself. It relates to matters of differences and controversies other than, as well as, those involved in the original action. It concerns all the claims and grievances of the plaintiff against the defendant and of the defendant against the plaintiff. Each party enters into new agreements and assumes new obligations. Mutual releases shall be executed extinguishing all disputes and controversies between them. Those new and reciprocal covenants and obligations were considerations legally sufficient to invest the contract with completeness

and binding effect. It is immaterial that certain obligations on the part of the defendant were to be performed "upon the receipt of said $12,500," or "contemporaneously with the receipt of said sum of $12,500." Refusal by the defendant to receive the moneys accomplished nothing. It did not extinguish her agreements or absolve her from the obligations they created. It is enough that the agreements of the parties were new or created by the contract, were absolute and not dependent or conditional, were reciprocal, and affected legal rights of either or both of the parties —a case of mutual promises, one of which is the consideration for the other. A recent definition of a sufficient consideration in a bilateral contract is:

"Mutual promises in each of which the promisor undertakes some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is rendered void by any rule of law other than that relating to consideration, are sufficient consideration for one another." 1 Williston on Contracts, § 103f.

A new executory contract between a claimant and the person charged, by which they reciprocally agree to do or not to do an act or acts not obligatory by contract or law, which will affect a legal right of either and which, expressly or through implication, includes the settlement of the original claim, is not a mere accord, but is the substitute for the original claim or contract, which is merged in it and is, in and of itself, binding upon the parties. Davis v. Spencer, 24 N. Y. 386; Bryant v. Gale, 5 Vt. 416; Billings v. Vanderbeck, 23 Barb. 546; Crowther v. Farrer, 69 Eng. C. L. 675; Vedder v. Vedder, 1 Denio 257; Morehouse v. Second National Bank of Oswego, 98 N. Y. 503; Allison v. Abendroth, 108 N. Y. 470, 15 N. E. 606; Williams v. London Commercial Exchange Company, 10 Exchequer, 569; Merry v. Allen, 39 Iowa 235.

The agreement set forth in the complaint was valid and binding upon both parties. It expressly contracted that each party should execute and deliver to the other a general release. It, as a matter of law, makes manifest the intention of the parties that the original action and all disputes and controversies between them were merged into it. There was sufficient legal consideration in it. The plaintiff had duly offered to perform on his part. The defendant threatens and intends to prosecute the original action and to withhold wholly performance on her part. The allegations of the complaint permit the plaintiff to invoke equitable jurisdiction. Very v. Levy, 13 How. 345, 14 L. Ed. 173; Burke v. Burke, 212 N. Y. 303, 307, 106 N. E. 62, 63. In the case last cited Judge, now Chief Judge, Hiscock stated the rule:

"The general rule of course is that equity will not entertain such an action as this to restrain an action at law unless special reasons demonstrate that full justice cannot be done in the latter action, and that an action in equity is necessary to secure to a party a more complete enjoyment of the rights to which he is entitled than could be obtained in the

action at law. If the equitable action holds out no promise of relief which may not be secured in the other and more restricted proceeding there is no occasion for interference and it will be withheld."

In view of our conclusion we have not deemed it necessary to consider, in connection with the question of consideration, the effect of the fact that the contract was under seal.

The judgments should be reversed, with costs in all courts; the demurrer should be overruled, with leave to withdraw demurrer and answer the complaint within twenty days on payment of costs.

*Judgments reversed, etc.*[204]

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## SEWARD & SCALES *v.* MITCHELL.

**(Supreme Court of Tennessee, 1860. 1 Coldwell, 87.)**

CARUTHERS, J. On the 16th Oct., 1856, Mitchell sold to Seward & Scales, for the consideration of $8,596.50, a tract of land in the county of Gibson, described in a deed of that date, by metes and bounds, "containing 521 acres, being a part of a 5,000 acre tract granted to George Dougherty, and bounded as follows," &c. The title is warranted with the usual covenants, but nothing more said about the grants than what is above recited.

Some time after the deed was made, the parties, differing as to the quantity of land embraced in the tract, made an agreement that it should be surveyed by Gillespie, and if there were more than five hundred and twenty-one acres, the vendees should pay for the excess at the rate of $16.50 per acre, that being the price at which the sale was made, and if less, then the vendor should pay for the deficiency, at the same rate. It turned out that there was an excess of fifty-seven acres, and the tract embraced in the deed was five hundred and seventy-eight acres, instead of five hundred and twenty-one, as estimated in the sale. For this excess, the present suit was brought, and recovery had, for $1,079.

[204] See Flegal v. Hoover, 156 Pa. St. 276 (1893).

"The distinction between an accord and satisfaction and a compromise and settlement has not been clearly drawn in the reported cases. In some there has been an interchangeable use of the terms. See City of San Juan v. St. John's Gas Co., 195 U. S. 510, 25 Sup. Ct. 108, 49 L. Ed. 299, 1 Ann. Cas. 796; Shubert v. Rosenberger, 204 Fed. 934, 123 C. C. A. 256, 45 L. R. A. (N. S.) 1062." Lees, C., in C. W. La Moure Co. v. Cuyuna-Mille Lacs Iron Co. (Minn.), 180 N. W. 540, 541 (1920).

It is objected here that the court below erred in refusing to charge, as requested, that the agreement sued upon was void for want of a writing, and because there was no consideration for the promise.

1. The contract, or promise sued upon, is not for the sale of land, so as to require a writing, under the Statute of Frauds.

The sale had already been reduced to writing. This was a subsequent collateral agreement in relation to the price, which was binding by parol, and to which the statute can have no application whatever. This is too plain for argument.

2. There is more plausibility in the second objection, that there was no sufficient consideration for the promise. But this is also untenable. The argument is, that the deed embraced the whole tract, and passed a perfect title to the extent of the boundaries, and consequently there was nothing passing as a consideration for the new promise, that the party did not own before by a perfect legal right.

It is true, if the sale was by the tract and not by the acre, as appears from the deed, and no stipulations as to quantity, that the title was good for the whole and covered the excess. But if the sale was not in gross, but by the acre, and the recitation in the deed would not be conclusive in a court of equity on that point if the fact could be shown to be otherwise, then there would be mutual remedies for an excess or deficiency in proper cases, as we held in Miller v. Bents, 4 Sneed, and a more recent case; but independent of that, and taking it to have been purely a sale in gross, and both parties desiring to act justly, and being of different opinions as to the quantity, mutually agreed to abide by an accurate survey to ascertain which was bound to pay, and recover from the other, and what amount, we see no good reason in law or morals why such an agreement should not be binding upon them. The case of Howe v. O'Malley, 1 Murphey's L. and Eq. R., 287, is precisely in point. The court there held that a promise to refund in case of deficiency is a good consideration for a promise to pay for any excess over what is called for in the deed,—that such mutual promises are sufficient considerations for each other.[205]

[205] In Howe v. O'Malley, cited in the text, *supra*, the deed was given in 1792 describing a tract of land by metes and bounds purporting to contain 220 acres, "be the same more or less." It was not until 1806 that "it was mutually agreed to have the land surveyed, the defendant to pay $10.00 an acre for any excess and the plaintiff to refund at the same rate for any deficiency. The excess amounted to 87 acres, and plaintiff had judgment. The full opinion of the Supreme Court was:

"By the court—Here are mutual promises; one is made the consideration of the other and we are of opinion that the plaintiff's promise to refund in the event of a deficiency in the number of acres is a good consideration to support the defendant's promise to pay, should there be more acres than called for by his deed. Judgment for the plaintiff."

Even in the common law an occasional situation arises where a promise not under seal is enforced although there is no consideration. See, for example,

The case of Smith v. Ware, 13 Johns. Rep. 259, which is supposed to conflict with this, is entirely different; "there was no mutuality" because the promise sued upon was to pay for the deficiency, without any obligation on the other party to pay for an excess, if any there had been.

The principle of the North Carolina case commends itself to our approbation, because of its equity and justice.

Without further citation of authorities we are satisfied to hold that the promise in this case was binding upon the defendant, as his Honor charged, and therefore affirm the judgment.[206]

Assignment of Rich Hardware Co. (Ariz.), 196 Pac. 454, 456 (1921) where Baker, J., said:

"A stipulation concerning a pending cause in court is an obligation unlike ordinary contracts between parties not in court. Ward v. Clay, 82 Cal. 508, 23 Pac. 50, 227; Barry v. Mutual Life Ins. Co., 53 N. Y. 536. Since no consideration is necessary to its validity (Howe v. Lawrence, 22 N. J. Law, 104) no mutuality is required, and it is to be construed like other contracts or written instruments *inter partes*. 20 Enc. Pl. & Pr. p. 657."

[206] In Supreme Assembly of the Royal Society of Good Fellows v. Campbell, 17 R. I. 402 (1891), the next of kin of a deceased all agreed on a disposition among them of his property before they knew which had an advantage. "In the uncertainty as to who had been named as beneficiary or beneficiaries, each was willing to surrender his chance of getting a larger share, or the whole, for the certainty of an equal share with the others." One of them finding that she was entitled to some insurance, claimed that there was no consideration for the agreement. But it was held, in an interpleader suit, that there was a sufficient consideration. Matteson, C. J., for the court said: "If there was no other consideration for the agreement than this mutual surrender by each of his or her chance to receive a larger share we think the agreement could be supported" (pp. 404-5). He pointed out that the case was analogous to a compromise, where later it turned out that one party had no right: "The agreement in the case at bar was not strictly a compromise, since at the time it was made no dispute had arisen between the parties and neither had made any claim to any greater share in the whole, or any part of the estate, than the others. There are, however, cases which do not involve any element of disputed right, and which, therefore, were no more compromises than the agreement in question, which rested upon the consideration of a mutual chance." (p. 405.)

Professor Langdell thought it was impossible to find a consideration for the promise of the man who loses where the parties conditioned their promises on the happening or not happening of some event which was present or past, but unknown to them. He said: "Thus, if a wager be made by mutual promises upon a race which has already taken place, but the result of which is unknown to the parties, it is the losing party alone who promises, and he really receives no consideration for his promise." Langdell's Summary of Contracts, § 89.

Still in marine insurance a contract to insure a vessel at sea, "whether lost or not", has always been held to be on good consideration. And it seems fair to say that a present or past event about which parties are uncertain should be regarded as to them as if future for all contract purposes. Even in the case

of the wager suggested by Professor Langdell that was so. March v. Pigot, 3 Burr. 2802 (1771), mentioned by him, is the most striking instance. There a bet was made as to which of two fathers would live the longer and at the time of the bet, unknown to the parties, one father was dead. There was held to be sufficient consideration.

A case like Smith v. Knight, 88 Ia. 257 (1893), where the contract was that partners should settle on the basis of interest to the one who had contributed an excess of capital and where the court was anxious to apply Professor Langdell's view, may be supported on the ground that under the facts of that case only one party was even supposed to have a chance to gain by the agreement. The only uncertainty was as to the amount he would gain. It was like betting on a sure thing and no consideration should be found to exist in such a case.

## CHAPTER IV.

### ASSIGNMENTS OF CONTRACTS.

W. S. Holdsworth, *The History of the Treatment of Choses in Action by the Common Law*,[1] 33 Harvard Law Review 997, 1018-1022. Rights of action of a contractual kind must always be of a purely personal nature. Therefore in early law the prohibition against their assignment was absolute. It is true that in most cases they became transmissible on death at a comparatively early date.[2] It is true also that it was recognised that certain covenants might be so annexed to a particular estate in the land that successive holders of that estate could enforce them.[3] But to the end the common law never in theory departed from its rule that rights of a contractual kind could not be assigned by an act of the parties to the contract.[4] As early, however, as the beginning of the fourteenth century the merchants had begun to circumvent this prohibition. If the right was to an ascertained sum of money, that is if it was a debt, the creditor could appoint the assignee his attorney, to sue for the debt, and could stipulate that he should keep the amount realised; and in the fifteenth century this method of assigning a debt was recognised as valid by the common-law courts.[5] Thus, as in Roman law,[6] the assignee sued for the debt in the assignor's name and as his attorney.

But upon this device the influence of the idea that the assignment of any *chose* in action was void because it tended to encourage maintenance exercised a retarding influence. Cases in which this device was employed were often attacked on this ground.[7] But, the fact that the person maintaining had some sort of common interest with the person maintained of a legal or moral kind, was recognised as a good defence to an action for maintenance. Therefore, if the assignment of a debt by

[1] Appreciation is expressed of the courtesy of the author quoted and of the Harvard Law Review Association in granting permission to print this passage here. The foot notes are from the original. The passage forms part of a chapter which the author quoted has written for his forthcoming enlarged History of English Law.

[2] 3 Holdsworth, History of English Law, 458.

[3] 3 Holdsworth, History of English Law, 130-135.

[4] Thus in 1867 Willes, J. said in the case of Gerard v. Lewis, L. R. 2 C. P. 305, 309, "the rule against assigning a chose in action stood in the way of an actual transfer of the debt." *Cf.* Ames, "Disseisin of Chattels," 3 Select Essays in Anglo-American Legal History, 584.

[5] Y. B. 34 Hen. VI, Mich., pl. 15, per Wangford *arg.*, and Prisot, C. J.; in Y. B. 15 Hen. VII, Hil., pl. 3, it is said that, "Si on soit endette a moy et livre a moy un obligation en satisfaction de cest det, en que un auter est tenu a luy, jeo suirai action en le nom cesty que fuit endette a moy"; Brooke, Abridgment, *Chose in Action*, pl. 3, in abridging this case, says, "Et sic vide que chose in accion poet estre assigne oustre pur loyal cause come just det, et nemy pur maintenance." West, Symboleography, § 521. *Cf.* Ames, 3 Select Essays in Anglo-American Legal History, 584, note 2; Pollock, Contracts, 5 ed. App. 700-701.

[6] Moyle, Justinian, 5 ed., 482-483.

[7] Y. BB. 34 Hen. VI, Mich., pl. 15, 15 Hen. VII, Hil., pl. 3.

way of the appointment of the assignee as the assignor's attorney was attacked on this ground, it was necessary to show that the assignee and the assignor had some sort of common interest. It was held that a sufficient common interest existed if it could be proved that the assignor owed money to the assignee, and that the assignment was made in satisfaction of the debt.[8] On the other hand, a common interest could not be proved if it appeared that the assignee had merely purchased the debt from the assignor without any particular reason for so doing.[9] It is true that in 1590, in the case of Penson v. Hickbed,[10] it seems to have been held that any assignment of a debt, coupled with a power of attorney to sue for it, was valid, unless it was void for champerty. But this case does not seem to have been followed. Right down to the latter part of the seventeenth century it seems to have been held, both by the common-law courts and by the court of Chancery, that, unless the assignor owed money to the assignee and had made the assignment on this ground, the objection of maintenance was fatal. This principle was laid down in 1596[11] by the court of Common Pleas, and by Lord Keeper Bridgman (1667-72) in the court of Chancery.[12]

When this point had been reached it was inevitable that further developments should be made. At the beginning of the eighteenth century it was quite settled that equity would recognise the validity of the assignment both of debts and of other things recognised by the common law as *choses* in action.[13] In other words it would, as the Judicature Act expresses it,[14] recognise the validity of the assignment of "any debt or other legal chose in action."[15] In equity, therefore, there was no need

[8] *Ibid.*

[9] Y. B. 37 Hen. VI, Hil., pl. 3—a case which shows that the common-law courts and the court of Chancery took the same view on this question.

[10] Cro. Eliza. 170—to the objection that buying of bills of debts was maintenance, the judge said it was not, "for it is usual among merchants to make exchange of money for bills of debt, *et e contra.* And Gawdy said, it is not maintenance to assign a debt with a letter of attorney to sue for it, except it be assigned to be recovered, and the party to have part of it." In the report of the same case in 4 Leo. 99 the objection was taken that though an assignment in satisfaction of a debt due to the assignee was good, this assignment was bad because it did not appear that any such debt was due; for these bills of debt see an article by the present writer, 31 L. Quar. Rev. 377-381.

[11] South and Marsh's case, 3 Leo. 234 (1590)—though it can be assigned to the queen, "it cannot be assigned to a subject, if not for a debt due by the assignor to the assignee, for otherwise it is maintenance." Barrow v. Gray, Cro. Eliza. 551 (1597); Ames, 3 Select Essays in Anglo-American Legal History, 584, and authorities there cited.

[12] "The Lord Keeper Bridgman will not protect the assignment of any chose in action, unless in satisfaction of some debt due to the assignee; but not when the debt or, *chose in action* is assigned to one to whom the assignee owes nothing precedent, so that the assignment is voluntary or for money then given." Freeman Ch. Cas. 145. It was probably decisions like these that caused Bridgman to get the reputation of sticking too closely to common-law rules to be a good judge of the court of Chancery. Lives of the Norths, 198.

[13] Warmstrey v. Tanfield, 1 Ch. Rep. 29 (1628-29); Squib v. Wyn, 1 P. Wms. 378, 381 (1717).

[14] 36 & 37 Vict., c. 66, § 25 (6).

[15] "I think the words 'debt or other legal chose in action' mean 'debt or right which the common law looks on as not assignable by reason of its being a

to show a special relationship between the assignor and the assignee in order to rebut the presumption of maintenance. During the same century the common-law courts, probably in consequence of the attitude of equity, soon adopted the same attitude with respect to the assignment of debts. The objection of maintenance was, it is true, a valid objection, both at law and in equity, if it could be proved;[16] but the courts now took the view that it was absurd to suppose that an assignment *per se* involved a presumption of maintenance.[17] Blackstone makes it quite clear that any such presumption was obsolete when he wrote.[18] But this involved the consequence that it was no longer necessary to look at the relationship between the assignor and the assignee. It was no longer necessary, therefore, that the assignor should be the debtor of the assignee. It followed that a creditor could, by making the assignee his attorney, assign his debt to any one. The appointment of an attorney had come to be a formality—though to the end it was a necessary formality.[19] In this way the common law managed to maintain in theory its doctrine that a *chose* in action was unassignable, while abandoning it in practice in the case of debts. The further inroads upon this theory made by equity and by legislation belong to a later period in the history of the law.

It is fairly clear that the common law was induced to connive at the introduction and extension of this evasion of its principle that a *chose* in action is not assignable by considerations of mercantile convenience or necessity. But this exception only applied to debts; and even equity did not go the length of permitting all contractual rights to be assigned in this manner. Some were too personal in their character to permit of any kind of assignment and others were too uncertain. But these limitations upon the power to assign can be better explained when the rights of action of a purely delictual kind have been dealt with.

chose in action, but which a Court of Equity deals with as being assignable.'" Torkington v. Magee, [1902] 2 K. B. 427, 430-431, per Channell, J.; but the phrase "legal chose in action" is not a very happy one to express "a thing regarded by the common law as a chose in action."

[16] Prosser v. Edmonds, 1 Y. & C. (Ex.) 481 (1835); Dawson v. Great Northern and City Railway, [1905] 1 K. B. 260, 270-271, per Sterling, L. J.

[17] It would seem from the case of Deering v. Farrington, 3 Keb. 304 (1674), that Hale, C. J., was inclined to take this view at this early date. At the end of the eighteenth century Buller, J. could say that, "It is laid down in our old books, that for avoiding maintenance a *chose in action* cannot be assigned; or granted over to another. The good sense of that rule seems to me to be very questionable; and in early as well as modern times it has been so explained away, that it remains at most only an objection to the form of the action in any case." Master v. Miller, 4 T. R. 320, 340 (1791).

[18] 2 Comm. 442.

[19] 2 Bl. Comm. 442. *Cf.* Mallory v. Lane, Cro. Jac. 342 (1615), where it is recognized that the delivery of statutes merchant without a power of attorney to sue was not an assignment.

## M. P. AND J. B. *v.* J. R.

(In Chancery and in the Exchequer Chamber, 1458. As reported by Choke,[20] of counsel, in J. R. v. M. P. and J. B., 37 Hen. VI, Folio 13, Placitum 3, translated in Ames' Cases on Equity Jurisdiction, I, 1.)

Formerly, on such a day, in the feast of the Holy Trinity, in the year last past [1458], the complainants, M. P. and J. B., citizens and aldermen of London, made a bill to the Chancellor of England against J. R. of London, containing the matter following: that the complainants had purchased of J. R. certain debts due to him, giving their obligation therefor; that these debts being only choses in action could not vest in the complainants so as to give them any action for the recovery of the debts, but the duty remained all the time in J. R., so that the complainants had no *quid pro quo;* that their obligation was, on this account, void and worthless, but that the common law gave them no relief against their obligation; wherefore they prayed for a writ against J. R. to appear under a certain penalty, before the King in Chancery, to answer to this matter. A subpoena issued. The parties appeared, and because the matter was doubtful in law, the Chancellor [Waynflete] adjourned them to the Exchequer Chamber. There the matter was rehearsed and well debated before him and the justices of both benches. And it was the opinion of all the justices that, as no duty was vested in the complainants by the bargain, the obligation ought in conscience to be surrendered to them or the defendant ought to release the complainants. The chancellor ordered him to give up the obligation to be cancelled in the Chancery, or to make an acquittance or release. The defendant refusing to do either, was committed for contempt to the Fleet prison until he should obey and still [1459] remains there.[21]

[20] The report is varied by making the necessary transposition and description of parties. Otherwise the language of Choke is retained.

[21] In Jenkins, 108, this case is stated as follows: "Several persons were in debt to A. B buys their debts from A and upon this B enters into an obligation of £1,000, to pay A £500 at a certain date; B sues A in chancery to be discharged from his bond, because the debts assigned to him can only be released by A and only be sued in A's name, being things in action; and so the bond was given without any valuable consideration; a decree was made by advice of the judges that this bond of B should be discharged."

Professor W. T. Barbour examined various of the early petitions in Chancery, preserved in the English Public Record Office. The petitions are divided into 377 bundles containing an estimated total of 300,000 cases. W. T. Barbour, The History of Contract in Early English Equity, p. 67. At page 69, n. 3, he stated the bundles which he examined and his method of getting representative petitions. On pages 108-109, he set out petitions presented by assignees who sought to recover in their own names debts which had been assigned to them. To one he ascribed the date 1413, two are dated 1432 and two more have that probable date, and one is dated 1450. Professor Barbour pointed out with reference to the petitions examined that "the word 'cases' has been used in referring to this material, but such a description is scarcely appropriate. For the most part we have only the complainant's petition; the answers and other

## FORTH ET AL. *v.* STANTON, WIDOW.

(Court of King's Bench, 1669-1670. 1 Saunders 210.)[22]

Assumpsit. The plaintiffs declare, that one Robert Stanton, the late husband of the defendant, was indebted to John Neve and Timothy Alsopp in £100 for beer sold by them to him, and being so indebted, the said Robert Stanton died; after whose death the defendant took into her hands goods and chattels of the said Robert Stanton, of the value of £100 and administered those goods and chattels, as executor of the will of the said Robert, and that afterwards the defendant had paid £40 parcel of the said £100 to the said Neve and Alsopp. And whereas the

pleadings do not often appear. * * * While this dearth of answers is unfortunate the petitions suffer from a defect much more lamentable. Very few of them are endorsed with judgment. * * * If a petition is unendorsed, we cannot determine whether or no relief was granted in that particular case. * * * Where there are numerous petitions based on the same or a similar state of facts, it is submitted that it may be reasonably inferred that relief sought was granted." (Id., page 70.) But that the last conclusion is by no means justified, so far as assignments are concerned, the principal case, decided in 1458, would seem to show.

The traditional point of view as to the history of assignments of choses in action is that stated by Spence (George Spence, Equitable Jurisdiction of the Court of Chancery, II, 852) that "it has always been held in the Court of Chancery, as far back as its records reach, that the assignment of a chose in action, founded on a valuable consideration, ought to be enforced." That point of view is also favored by the courts. See Fitzroy v. Cave, [1905] 2 K. B. 364, 372; Sullivan v. Visconti, 68 N. J. L. 543, 548-550 (1902). But the case of M. P. & J. B. v. J. R., the principal case, demonstrates its untruth and prepares the way for the doctrine of Professor Ames. His view was that the law courts recognized early an express power of attorney of the assignee to sue at law in the name of the assignor where the chose was legal, but that, because those courts recognized payment to the assignor or a release by him as a valid discharge of the obligor despite the assignment and notice of it, and even allowed the assignee to dismiss the action brought in his name, courts of equity took jurisdiction to remedy the injustice which resulted. Then gradually the law courts adopted so much of the equity view that equity jurisdiction as to assignments of legal choses in action had seldom to be exercised. See James Barr Ames, Lectures on Legal History, 258-259. For a summary of Professor Ames' views, see George P. Costigan, Jr., Gifts Inter Vivos of Choses in Action, 27 Law Quar. Rev. 326, 327-331.

On whether assignments of choses in action are legal or equitable, see opposing articles, by Professors Walter Wheeler Cook and Samuel Williston, in 29 Harv. L. Rev. 816, 30 Harv. L. Rev. 97, 449 and 31 Harv. L. Rev. 822.

On what constitute choses in action, see Howard W. Elphinstone, What is a Chose in Action? 9 Law Quar. Rev. 311, and Charles Sweet, Choses in Action, 10 Law Quar. Rev. 303. See also, Sir Frederick Pollock, Assignment of a Chose in Action, 1 Law. Mag. & Rev. (N. S.) 553.

The case of J. R. v. M. P. et al., in which counsel reported the case of M. P. et al. v. J. R., *supra*, presented a problem as to the effect at law of a decree in chancery. For a discussion of that case and that question, see Walter Wheeler Cook, Powers of Courts of Equity, 15 Col. L. Rev. at pp. 246-252.

[22] Parts of the case as reported are omitted.

said Neve and Alsopp afterwards had assigned to and appointed the plaintiffs to receive of the defendant £60 residue of the said £100, to the proper use of the plaintiffs, whereof the defendant had notice given to her; whereupon the defendant, in consideration that the plaintiffs at the special instance and request of the defendant, would accept the defendant to be their debtor for the said £60, undertook and promised the plaintiffs to pay them the said £60. And the plaintiffs aver that they had accepted the said defendant to be their debtor. * * * Yet the said defendant had not paid the several sums, to the damage of the plaintiffs. * * *

And now after verdict for the defendant, the plaintiffs moved the matter in law upon the defendant's special plea, which was agreed by all to be bad; but the defendant's counsel [Saunders] insisted, that the declaration was insufficient, because here is no sufficient consideration to found the promise. For the defendant, before the promise did not owe anything to the plaintiffs, but to Neve and Alsopp; and by their assignment they did not transfer any property or interest in the debt, being a chose in action, but only gave an authority to the plaintiffs to receive it, if the defendant would pay it. But if the defendant will not pay it, the plaintiffs cannot bring any action against her, but Neve and Alsopp must sue for it. It is true, indeed, that if the defendant had paid the £60 to the plaintiff, she would be discharged against the said Neve and Alsopp; but in this case the defendant refused to pay; therefore Neve and Alsopp ought to bring the action against her, and not the plaintiffs, who have not any interest in the debt. And this case is no more, than if I promise a stranger to whom I do not owe anything, that if he will accept me to be his debtor for £60 I will pay it to him, yet this is but a *nudum pactum*, because I was not indebted to him before. And my promise to pay, if the other will receive it, is nothing but a mere voluntary promise, which does not bind me at all. And in the present case, if the promise should be good, the defendant would be charged *de bonis propriis*, where she was chargeable to Neve and Alsopp only *de bonis testatoris;* and yet here is no consideration at all so to charge her; and of this opinion was the whole Court. And judgment * * * was given for the defendant, that plaintiffs should take nothing by their bill.[23]

[23] However, "The King was an early exception to the rule against the assignability of choses in action. In fact, much of the earlier reported litigation in connection with the topic was on this exception. * * * The reason for the exception, it has been suggested, was the universal succession accruing to the 'crown on forfeiture' in those times. (Pollock, cont. (ed. 8), App. [illegible]., p. 748.) Choses in action would fall under the property forfeited, and freedom of alienation by the crown followed, as a natural consequence (Hil. 3 Hen. IV f. 8), 'for the courts did not feel themselves bold enough to tie up the property of the crown, or to prevent that from being transferred.' Per Buller, J. in Master v. Miller (1791), 4 T. R. 320, at p. 340. * * *

"It has been held that the King's assignee cannot in turn assign, for there

## ANONYMOUS.

(Court of Chancery, 1667-1672. 2 Freeman Ch. 145.)

The Lord Keeper Bridgeman will not protect the assignment of any chose in action unless in satisfaction of some debt due to the assignee; but not when the debt or chose in action is assigned to one to whom the assignee owes nothing precedent, so that the assignment is voluntary or for money then given.

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## GERARD *v.* LEWIS.

(Court of Common Pleas, 1867. L. R. 2 C. P. 305.)

Action by an assignee of a debt of £250 owed by one Hullman to Bromham and Lewis and assigned by the latter to the plaintiff. The action is brought because after plaintiff in an action against Hullman in the names of Bromham and Lewis had had Hullman arrested, the defendant Lewis caused the sheriff to discharge Hullman, who thereupon went beyond seas. Plea that Hullman was arrested for a much larger amount than £250 and therefore defendant ordered him discharged. Demurrer and joinder.

WILLES, J.[24] I am of the opinion that our judgment ought to be for the plaintiff. The defendant appears to have joined his partner in assigning certain debts to the plaintiff, giving the plaintiff the ordinary power of attorney to sue in the name of the firm. The rule against assigning a chose in action stood in the way of an actual transfer of the debt, so as to enable the plaintiff to sue in his own name; and, therefore, it became necessary to give the power of attorney.[25] But the intention of the parties in giving that power was to give the assignee the conduct

cannot by law be any assignment made by a common person of this debt' (R. v. Twine (3 Jac. I) Cro. Jac. 179), but it does not follow that such an assignment could not be made in equity, nor is it reasonable that the King's assignee should at the present day be in a worse position than any other assignee.

"The rule is well settled that the King's assignee can sue in his own name (Mich. 39 Hen. VI, f. 26; Breverton's case (Hil. 28 Hen. VIII), 1 Dyer 30 b; R. v. Wendman (3 Jac. I) Cro. Jac. 82 (Exch. Ch.); Lambert v. Taylor (1825), 4 B. & C. 138). If he prefer it, he can sue in the King's name. York v. Allen (36 Eliz.) Sav. 133 (Exch.)." Percy H. Winfield, Assignment of Choses in Action in Relation to Maintenance and Champerty, 35 Law. Quar. Rev. 143, 144-147. See U. S. v. Buford, 3 Peters 12, 30 (1830).

[24] The statement of facts is abbreviated and the opinion of Keating, J. is omitted.

[25] "If a man owe me money on an obligation, or the like, I cannot grant this debt to another; but I may grant a letter of attorney to another man to sue for it and receive it, or I may grant the writing itself to another, and he may cancel it or give it to the obligor." Sheppard's Touchstone, 240.

and control of the litigation necessary for enforcing payment of the debts assigned. The defendant, therefore, who interfered to thwart or impede the remedy of the assignee under this deed, unquestionably broke the covenant implied from the words "with full power and authority in the name or names of Bromham and Lewis, or either of them, their or either of their executors, &c., to ask, demand, sue for, recover, &c. the said debts or any of them." The declaration, therefore, is a good declaration. It states that, in accordance with the provisions of the deed, the plaintiff commenced an action against Hullman in the names of Bromham and Lewis, and obtained an order under the statute 1 & 2 Victoria c. 110, s. to hold Hullman to bail, and that the now defendant stepped in, and ordered the sheriff to discharge him from custody, whereby the benefit of the assignment was lost. To this the defendant pleads that Hullman was arrested as in the declaration mentioned, and by the procurement of the plaintiff, and without the knowledge or consent of the defendant (which was unnecessary, inasmuch as the plaintiff was acting under a power of attorney), was wrongfully and unlawfully (which are mere words of vituperation, and amount to nothing, unless they show a cause of action) held to bail for a much larger (how much larger is not stated) amount than the sum of £250 mentioned in the schedule to the deed as due from him, and therefore the defendant discharged him. We may strike out the last averment, because the schedule is not referred to as a limitation. It simply stands, therefore, that the defendant discharged Hullman from custody because the plaintiff had arrested him for too much. Mr. Macnamara [defendant's counsel] has cited no authority, nor am I aware of any, to show that because wrong has been done in this respect the debtor is entitled to be discharged. A judge at chambers would probably order his discharge on giving bail for the lesser amount really due. The mere mistake of the plaintiff, it may be to a small and inappreciable amount, clearly would not entitle the party to an absolute discharge. Authorities are not wanting as to writs of execution; but it is hardly necessary to refer to them. Where the writ is indorsed for too large an amount, the court or a judge will not discharge the defendant or direct the sheriff to withdraw from possession, but will correct it as to the excess. Upon the whole, it appears to me that the defendant has been guilty of the breach of an implied covenant in the deed,[86] and the plea shows no excuse.

*Judgment for the plaintiff.*

[86] See Deering v. Farrington, 1 Modern 113 (1674).

In Hinkle Iron Co. v. Cohn (N. Y.) 128 N. E. 113 (1920), where a contractor corporation had assigned to the plaintiff, by the hand of the defendant, its and as its president, the sum of $4,500 out and a part of a designated payment to become due the corporation under a contract between it and the city of New York, but later the defendant, with knowledge of the facts, had fraudulently drawn and signed the checks of the corporation, whereby all of the balance of said designated payment was drawn out and applied to the use and benefit of

## CARTER & MOORE *v.* THE UNITED INSURANCE CO. OF N. Y.

(Court of Chancery of New York, 1815. 1 Johns. Ch. 463.)

The bill was filed by the plaintiffs, as assignees of a policy of insurance, underwritten by the defendants, for William Titus and George Gibbs, on which the plaintiffs claimed payment for a total loss. The insurance was on 500 barrels of flour from Newport to St. Jago de Cuba, on board the Spanish brig Patriota, which was captured by a Carthagena privateer. On the 21st of December, 1814, the policy was assigned by Titus and Gibbs to the plaintiffs, in trust, for themselves and other creditors of Titus & Gibbs. The bill charged that the defendant refused to pay the loss, alleging, among other things, that the plaintiffs had no title to the property insured, which, in fact, belonged to one J. a Spaniard, and not to Titus & Gibbs. The bill prayed that the defendants might answer the matter charged in the bill, and be compelled to pay the plaintiffs the amount insured as for a total loss.

To this bill the defendants demurred on the following grounds: that it appeared by the bill that the plaintiffs' demand, or cause of action, was properly cognizable in a court of law; as it is not alleged that

said defendant and the said corporation, which later was adjudged a bankrupt, the court held the defendant liable for the amount assigned. Collin, J. said:

"The corporation received and deposited the assigned sum in a trust capacity, because the sum was equitably the property of the plaintiff, which the corporation, as the owner of the legal title, was authorized to receive and hold only for the purpose of delivery to the plaintiff. After payment the sum was in the possession of the corporation as a special deposit or bailment for the benefit of the plaintiff. The corporation could not lawfully appropriate it to another purpose. It had not the right to convert or misappropriate it. The conversion or misappropriation by it made it personally liable to the plaintiff for the amount converted. The violation by a trustee of the trust relation subjects the trustee to a personal liability therefor by way of compensation or indemnification, which the beneficiary may enforce. The defendant, with knowledge of all the facts, participated in and accomplished the conversion and misappropriation. He therefore is liable to the plaintiff for the amount converted. Bischoff v. Yorkville Bank, 218 N. Y. 106, 112 N. E. 759, L. R. A. 1916F, 1059."

It has been said by W. W. C. [Professor Walter Wheeler Cook] in 28 Yale L. J. 395-396, that "It seems clear that partial assignment fairly implies an agreement in fact by the assignor to refrain from collecting from the debtor the portion assigned. If so, obviously the common law may attach to this agreement a contractual duty. The cases so hold. Eaton v. Mellus (1856, Mass.), 7 Gray 567; Hubbard v. Prather (1808, Ky.), 1 Bibb 178; 5 C. J. 968, n. 56. As against the assignor, therefore, the partial assignee acquires at least this one right which is recognized by the common law court."

In addition to the implied covenants above, an assignment for value carries with it today an implied warranty that the assigned claim is a valid, genuine claim unless there is an express warranty or something else to negative an implied warranty. Galbreath v. Wallrich, 45 Colo. 537 (1909); Miners' Bank v. Burress, 164 Mo. App. 690, 147 S. W. 1110 (1912); Trustees v. Siers, 68 W. Va. 125 (1910). There is of course no implied warranty that the obligor of the chose will perform. Galbraith v. Wallrich, *supra*.

Titus & Gibbs refused to let the plaintiff make use of their names, in a suit at law; or that they are, in any way, hindered from prosecuting at law; or that they stood in need of any discovery to aid them in such action.

THE CHANCELLOR [Kent]. The demand is properly cognizable at law, and there is no good reason for coming into this court to recover on a contract of insurance. The plaintiffs are entitled to make use of the names of Gibbs & Titus, the original assured, in the suit at law; and the nominal plaintiffs would not be permitted to defeat or prejudice the right of action. It may be said here, as was said by the chancellor, in the analogous case of Dhegetoft v. The London Assurance Company, (Mosely, 83) that, at this rate, all policies of insurance would be tried in this Court. In that case the policy stood in the name of a nominal trustee; but that was not deemed sufficient to change the jurisdiction; and the demurrer to the bill was allowed, and the decree was afterwards affirmed in parliament. (3 Bro. P. C. 525.) The bill, in this case, states no special ground for equitable relief, nor is any discovery sought which requires an answer.

*Bill dismissed, with costs.*[87]

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## LEGH *v.* LEGH.

(Court of Common Pleas, 1799. 1 Bosanquet & Puller, 447.)

ON a former day Shepherd showed cause against a rule *nisi* obtained by Le Blanc, for setting aside a plea of release in an action on a bond, and ordering the release to be cancelled.

The case as disclosed by the affidavits in support of the rule appeared to be this. Frances Legh having given a bond to Sarah Legh to secure £75, Sarah assigned it to John Legh as a security for the payment of a lesser sum, of which Frances had notice. John having brought an action on the bond against Frances in the name of Sarah, Sarah gave a release to Frances by whom she had been satisfied her debt, and this release was pleaded.

EYRE, C. J. The conduct of this defendant has been against good faith, and the only question is whether the plaintiff must not seek relief in a court of equity. The defendant ought either to have paid the person

[87] See Walter v. Brooks, 125 Mass. 241 (1878); Hayward v. Andrews, 106 U. S. 672 (1882); Chicago Co. v. Nichols, 57 Ill. 464 (1870); Cater v. Burkes, 1 Brown's Ch. Cas. 434 (1785).

"An assignee of a chose in action, who has the right to proceed at law upon it in the name of the assignor, has the right to proceed upon it in equity in his own name, in cases proper to be proceeded with in courts of equity." Wheeler, J. in Hagar v. Buck, 44 Vt. 285, 290 (1872).

to whom the bond was assigned, or have waited till an action was commenced against him, and then have applied to the court. Most clearly it was in breach of good faith to pay the money to the assignor of the bond and take a release, and I rather think the court ought not to allow the defendant to avail himself of this plea, since a court of equity would order the defendant to pay the plaintiff the amount of his lien on the bond, and probably all the costs of the application.

BULLER, J. There are many cases in which the court has set aside a release given to prejudice the real plaintiff. All these cases depend on circumstances. If the release be fraudulent, the court will attend to the application.

The court recommended the parties to go before the prothonotary in order to ascertain what sum was really due to the plaintiff on the bond.

*Shepherd* on this day stated that the defendant objected to going before the prothonotary, upon which the court said that the rule must be made absolute. He then applied for leave to plead payment of the bond, and contended that as this was not an application under the statute to plead several pleas, the court had no discretion.

EYRE, C. J. The court has in many cases refused to allow a party to take his legal advantage where it has appeared to be against good faith. Thus we prevent a man from signing judgment who has a right by law to do so if it would be in breach of his own agreement. In order to defeat the real plaintiff, this defendant has colluded with the nominal plaintiff to obtain a release, and I think therefore the plea of release may be set aside consistently with the general rules of the court. And if so, the defendant cannot be permitted to plead payment of the bond, as that would amount to the same thing.

BULLER, J. The court proceeds on the ground that the defendant has in effect agreed not to plead payment against the nominal obligee.

Upon this the defendant consented to go before the prothonotary.

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## ROW *v.* DAWSON.

(Court of Chancery, 1749. 1 Vesey, Senior, 331.)

TONSON and Cowdery lent money to Gibson, who made a draft on Swinburn, the deputy of Horace Walpole, viz. "Out of the money due from Horace Walpole out of the Exchequer, and what will be due at Michaelmas pay to Tonson 400*l.*, and to Cowdery 200*l.* value received."

Gibson became bankrupt: and the question was, whether the defendants Tonson and the executors of Cowdery were first entitled by a specific lien upon this sum due to the estate of Gibson; or whether the plaintiffs, the assignees under the commission, are entitled to have the whole

sum paid to them; it being insisted for them, that this draft was in the nature of a bill of exchange, and that the property was not divested out of the bankrupt at the time of the bankruptcy in law or equity.

LORD CHANCELLOR [Hardwicke]. At first I a little doubted about my own jurisdiction: and whether the plaintiffs ought not to have gone into the Exchequer, as being a court of revenue; for this is not a personal credit given to, or demand upon the officer, but to be paid out of that money issued out of the Exchequer to the officer; and this is on warrant, to be paid out of the revenue of the crown for public services. But there is something in the present case delivering it from that; the officer admits, he has received a sum of money applicable to this demand, which brings it to the old case of a liberate, which a person has under the great seal for the payment of money; upon admission that the officer had money in his hands applicable to the payment, and proof thereof, that would give courts of law a jurisdiction, so that an action of debt might be maintained on the liberate.

This demand, and the instrument under which the defendants claim, is not a bill of exchange, but a draft; not to pay generally, but out of his particular fund, which creates no personal demand; therefore not a draft on personal credit to go in the common course of negotiation, which is necessary to bills of exchange, by draft on the general credit of the person drawing, the drawee, and the indorser, without reference to any particular fund. The first case of which kind, I remember to have been determined in B. R. not to be a bill of exchange, was a draft by an officer on the agent of his regiment to be paid out of his growing subsistence. Then what is it, for it must amount to something? It is an agreement for valuable consideration beforehand to lend money on the faith of being satisfied out of this fund; which makes it a very strong case. If this is not a bill of exchange, nor a proceeding on the personal credit of Swinburn or Gibson, it is a credit on this fund, and must amount to an assignment of so much of the debt, and though the law does not admit an assignment of a chose in action, this court does; and any words will do; no particular words being necessary thereto.[28] In the case of a bond it may be assigned in equity for valuable consideration, and good although no special form used. Suppose an obligee receives the money on the bond, and there is wrote on the back of it "Whereas I have received the principal and interest from such a one, do you the obligor pay the money to him;" this is just that case; only it is not a debt arising from specialty: therefore like an assignment of rent to a third person. The case of Ryal v. Rowles [1 Ves. Sen. 348], now under the

[28] In Ormond v. Insurance Co., 145 N. C. 140 (1907), the court said:
"No particular form of words is essential to effect an assignment. * * * An assignment is substantially a transfer, actual or constructive, with clear intent at the time to part with all interest in the thing transferred, and with a full knowledge of the rights so transferred."

consideration of the court, occurred to me. There the assignment of debts, of which no possession, came in question; but those are debts depending on partnership, and mentioned there how far the assignment of a bond should be supported against the assignees under the commission: and it is clear, that they have been supported where the bond has been delivered over; but if not, some doubt has been, whether it should be supported on the foot of the clause in the statute, J. 1. But this is clear of that doubt, because this was a debt due to Gibson without any specialty. This draft, which amounts to an assignment, is deposited with the officer Swinburn, and therefore is attached immediately upon it: so that Swinburn could not have paid this money to Gibson, supposing he had not been bankrupt, without making himself liable to the defendants; because he would have paid it with full notice of this assignment, for valuable consideration.[29] * * *

[29] "There can be no doubt as to the rule that when, for a valuable consideration from the payee, an order is drawn upon a third party and made payable out of a particular fund, then due or to become due from him to the drawer, the delivery of the order to the payee operates as an assignment *pro tanto* of the fund, and the drawee is bound, after notice of such assignment, to apply the fund, as it accrues, to the payment of the order, and to no other purpose, and the payee may, by action, compel such application. It is equally well established that if a draft be drawn generally upon the drawee, to be paid by him in the first instance, on the credit of the drawer and without regard to the source from which the money used for its payment is obtained, the designation by the drawer of a particular fund, out of which the drawee is to subsequently reimburse himself for such payment, or a particular account to which it is to be charged, will not convert the draft into an assignment of the fund, and the payee of the draft can have no action thereon against the drawee unless he duly accepts. In all cases, therefore, in which a particular fund, to accrue *in futuro* is designated in the draft, and the language is ambiguous, the turning-point is whether it was the intention of the parties that the payment should be made only out of the designated fund, when or as it should accrue, or whether the direction to the drawee to pay was intended to be absolute, and the fund was mentioned only as a source of reimbursement or an instruction as to bookkeeping.

"The order in this case was in the following words:

"'Mohawk, August 31, 1876.

"'Jerome Tuttle:

"'Pay Brill & Russell $300, and charge the same to our account for labor and materials performed and furnished in the repairs and alterations of the house in which you reside in the village of Mohawk.

"'J. P. Ackerman & Son.'

"If at the time this order was drawn the drawers had to their credit on the designated account the sum of $300 or more, and this fact was understood by the parties, there would be no difficulty in holding that the intention was to transfer that credit or balance *pro tanto* to the plaintiffs, by substituting them in place of the drawers as the recipients thereof. It would be fair to presume in that case that it was intended that the payment should be made out of the balance of account in the hands of the drawee, and not on the general credit of the drawer and that the direction to charge the payment to that account was an appropriation of such balance to the extent necessary to meet

## MILLER *v.* THAREL.

(Supreme Court of North Carolina, 1876. 75 N. C. 148.)

Civil action upon a bond [a sealed note].

In May, 1872, the defendant sold to one Houston a tract of land, for the price of $1,600, of which $300 was paid in cash and Houston gave his note for the balance. A few days thereafter the defendant, becoming dissatisfied, re-purchased the land from Houston for the sum of $1,800, and gave the note sued on to secure the purchase money. At this time defendant surrendered to Houston the note for $1,300 aforesaid and had the amount thereof credited upon the note for $1,800 and took from Houston a bond for title. Some two weeks afterwards, the defendant and Houston rescinded this contract, the defendant surrendering to Houston the bond for title and Houston surrendering to defendant, as he supposed, the note sued on. This transaction took place about dark. Houston went into his house, got a pocket book and took therefrom a paper and handed it to the defendant, saying, "now tear it up." The defendant, thinking it was his note, did tear it up. Before the maturity of the note sued on it was transferred by Houston to the plaintiff [for full value but without endorsement]. * * *

It is agreed * * * that the plaintiff took the note before maturity and without notice of any equity as between the defendant and Houston, or that Houston was withholding the note fraudulently from Tharel. * * * It is admitted that Houston is in bankruptcy.

His honor, being of the opinion that the plaintiff was entitled to recover the balance due upon the note after deducting the credit of $1,300 gave judgment accordingly. From this judgment the defendant appeals.

RODMAN, J.[30] When the contract for the sale of the land by Houston to Tharel was rescinded, and Tharel gave up to Houston the bond for title, which Houston had made to him, and received from Houston a paper which Houston said and Tharel believed was the note now sued

the order. The complaint alleges, and when the plaintiff rested the allegation was sustained by proof, that when the order was drawn, August 31st, and when it was presented, September 1st, there was a sufficient amount due and admitted to be due from the drawee on the account mentioned in the order to pay it. The motion for a nonsuit was therefore properly denied." Rapallo, J. in Brill v. Tuttle, 81 N. Y. 454, 457-458 (1880).

"It is only where there is an actual appropriation of the fund that an equitable assignment arises. It does not arise from a promise to pay out of a certain fund when such shall be created. Story v. Hull, 143 M. 506; Cameron v. Boeger, 200 Ill. 84." Stone, J. in Hibernian Banking Ass'n v. Davis, 295 Ill. 537, 545 (1921).

Where a contract does not constitute an equitable assignment, being a promise to pay out of a fund, it may create an equitable lien on the fund. See Rinehart v. Victor Talking Mach. Co., 261 Fed. 646, 649 (1917). But usually it does not. See 1 Williston on Contracts § 429

[30] The statement of facts is abbreviated and part of the opinion is omitted.

on, and Tharel destroyed that paper, the liability of Tharel on the note was as much discharged as if he had paid the money. The case is the same in effect as if he had received the note and put it in his pocket, from which it was afterwards stolen, and the same as if he had received and torn it in pieces and thrown them away and the pieces had been picked up and so artfully put together that the tearing could not be detected. It must be concluded that at that time he was under no legal or equitable liability by virtue of the note to any one.

It then only remains to consider whether such liability subsequently arose, by reason of the transfer of the note by Houston to the plaintiff under the circumstances stated in the case. The note was under seal and was payable to Houston or bearer. Notwithstanding this, it is to be regarded [under the state statute applicable,] so far as its negotiability is concerned, and its liability to be governed by the commercial law applicable to promissory notes, as if it were a promissory note not under a seal, and payable to a payee or order. * * *

It is conceded that Houston transferred the note to the plaintiff for a valuable consideration before its maturity, in the usual course of business, and without actual notice or anything from which notice could be implied, or any defense to it. If Houston had endorsed the note to the plaintiff at the time of such transfer, he would thereby have passed the legal title according to the law merchant, and the plaintiff's right would probably have been good against the maker by whose misfortune or negligence it had been permitted to remain in the hands of the payee after it had been paid. We say, *probably,* because it is not necessary to decide this question. The note sued on was not endorsed to the plaintiff, but was assigned to him by an oral contract. It is true that under this assignment, by virtue of our recent legislation (C. C. P. § 55) the assignee may sue in our courts in his own name as an equitable assignee, or *cestui que trust* could formerly have done in equity; but he does not acquire by such an assignment the peculiar rights which by the law merchant, founded on the policy of promoting the circulation of promissory notes, attach to an endorsee of each paper. All the authorities from Parsons on Bills and Notes, cited by the learned counsel for the plaintiff. to sustain the proposition that a holder of a promissory note, taken under the circumstances stated, can recover against the maker, notwithstanding any equitable or other defense, such as payment before maturity, he may have, apply only to holders who hold by an assignment recognized by the law merchant, viz. an endorsee. The distinction between a title by assignment and by endorsement is stated, but not as clearly as it might be, in 2 Pars. Notes & Bills, 52. It is also made in Thigby v. Horne, 1 Ired. Eq. 20; Lindsay v. Wilson, 2 Dev. & Bat. Eq. 85.

The case of Whistler v. Forster, 14 C. B. 248 (108 E. C. L. R.) which probably escaped the attention of Mr. Parsons, is in point and is decisive of the question. The defendant drew the check sued on before the

3rd of October, and handed it to Griffiths without any other consideration than a promise to furnish funds to take it up, which he failed to perform. On the 3rd of October Griffiths gave the check to the plaintiff for value, but did not then endorse it. Afterwards he did. At the time the plaintiff received the check he had no notice of the way in which Griffiths had obtained it, but at the time of the endorsement he had. The judgment was for the defendant. The observations of Willis, J., are so clear that I extract from them:

"The general rule of law is undoubted that no one can transfer a better title than he himself possesses. *Nemo dat quod non habet.* To this there are some exceptions; one of which arises out of the law merchant as to negotiable instruments. * * * This rule, however, is only intended to favor transfers in the ordinary and usual manner, whereby a title is acquired according to the law merchant, and not a transfer which is valid in equity according to the doctrine respecting the assignment of choses in action, now indeed recognized, and in many instances enforced by courts of law; and it is, therefore, clear that in order to acquire the benefit of this rule the holder of the bill must, if it be payable to order, obtain an endorsement, and that he is affected by notice of fraud received before he does so. Until he does so he is merely in the position of the assignee of an ordinary chose in action, and has no better right than his assignor." To the same effect is Haskill v. Mitchell, 53 Me. 468.

The right of the plaintiff to recover if it has any foundation at all, must stand not on his having the legal title, or any principle of mercantile law, but on his having some equity which makes it unconscientious in the defendant to refuse payment. It is said that such an equity arises out of the fact that the defendant by his negligence, permitted the note to exist and to remain in the hands of Houston after it had been discharged by payment, and thus enabled Houston to commit the fraud. The rule is not disputed, but probably it will be found confined in its application to cases in which the defendant is guilty of some complicity in the fraud, or where, by his negligence, he has enabled the person committing the fraud to pass a legal right to the plaintiff. In this last case the maxim would apply that where equities are equal the legal title would prevail. But where no legal title passed, the case would come under the maxim that where the equities are equal the prior equity prevails. The authorities to this effect are very numerous. In Turton v. Benson, 1 P. Wms. 496, the payee of an unnegotiable note assigned it to one of his creditors as a security, and it was held that the maker could avail himself of an equitable defense. The Master of the Rolls said: "Supposing a man should assign over a satisfied bond, the assignee could not set up this bond in equity, which being satisfied before, could receive no new force from the assignment." On appeal Lord Chancellor Parker considered all the arguments which could be used by the plaintiff

in this case, considering him as a mere assignee, and confirmed the decree.

See 2 Vol., 2 part of Leading Cases in Eq.; Note to Royall v. Rowles, 218-36; Mordy v. Sutton, 2 Ired. Eq. 382; King v. Lindsay, 3 Ired. Eq. 77; 7 Ired. Eq. 79.

We think there was error in the judgment below.

PER CURIAM. Judgment reversed and judgment that defendant go without day and recover his costs in this court.[81]

[81] "It is too well settled by authority, both in England and in this country, to permit of questioning, that the purchaser of a draft, or check, who obtains title without an endorsement by the payee, holds it subject to all equities and defenses existing between the original parties, even though he has paid full consideration, without notice of the existence of such equities and defenses. Harrop v. Fisher, 30 L. J. (C. L., N. S.) 283; Whistler v. Forster, 14 C. B. (N. S.) 246; Savage v. King, 17 Me. 301; Clark v. Callison, 7 Ill. 263; Haskell v. Mitchell, 53 Me. 468; Clark v. Whitaker, 50 N. H. 474; Calder v. Billington, 15 Me. 398; Lancaster Nat. Bank v. Taylor, 100 Mass. 18; Gilbert v. Sharp, 2 Lans. 412; Hedges v. Sealy, 9 Barb. 214-218; Franklin Bank v. Raymond, 3 Wend. 69; Raynor v. Hoagland, 7 J. & S. 11; Muller v. Pondir, 55 N. Y. 325; Freund v. Importers' & Traders' Bank, 76 N. Y. 352; Trust Co. v. Nat. Bank, 101 U. S. 68; Osgood v. Artt, 17 Fed. 575.

"The reasoning on which this doctrine is founded may be briefly stated as follows: The general rule is that no one can transfer a better title than he possesses. An exception arises out of the rule of the law merchant, as to negotiable instruments. It is founded on the commercial policy of sustaining the credit of commercial paper. Being treated as currency in commercial transactions, such instruments are subject to the same rule as money. If transferred by endorsement, for value, in good faith and before maturity, they become available in the hands of the holder, notwithstanding the existence of equities and defenses, which would have rendered them unavailable in the hands of a prior holder.

"This rule is only applicable to negotiable instruments which are negotiated according to the law merchant.

"When, as in this case, such an instrument is transferred but without an endorsement, it is treated as a chose in action assigned to the purchaser. The assignee acquires all the title of the assignor, and may maintain an action thereon in his own name. And, like other choses in action, it is subject to all the equities and defenses existing in favor of the maker or acceptor against the previous holder." Parker, J. in Goshen National Bank v. Bingham, 118 N. Y. 349, 354-355 (1890).

"In truth, the assignee of a chose in action gets no title to it, properly speaking and can not be said to be a purchaser without notice. He gets only the right to use the assignor's name to enforce the claim, and therefore to recover what the assignor might; and the very nature of the subject warns him of the necessity of inquiring respecting the obligor's equity, and, therefore, amounts to notice of such equity. If, upon inquiry, the obligor misinforms him, or if the obligor acquiesce in the assignment, and delay for a long time to bring forward his equity, such conduct might vary the rule, and give the assignee rights, which the assignment itself would not." Ruffin, C. J. in King v. Lindsay, 38 N. C. 77, 80 (1843).

See Clarence D. Ashley, Assignment of Contract, 19 Yale L. J. 180.

In some states by express wording of the statute the title to assigned choses

## WALL *v.* COUNTY OF MONROE.

(Supreme Court of the United States, 1880. 103 U. S. 74, 26 L. Ed. 430.)

Action upon warrants of the county of Monroe, Arkansas, which were drawn by the clerk of the county upon its treasurer, in favor of one Frank Gallagher, and transferred by him to the plaintiff. The county sought to set off against the warrants a judgment for a larger amount obtained by it against Gallagher before his transfer to the plaintiff.

FIELD, J.[32] The warrants in suit are evidences of indebtedness by the county of Monroe, issued by that branch of its government to which is intrusted, by laws of the state, the examination and approval of claims against the county. They are orders upon the treasurer of the county to pay out of its funds for county purposes, not otherwise appropriated, the amounts specified. They establish, *prime facie,* the validity of the claims allowed and authorize their payment. But they have no other effect. Their issue determined nothing as to other demands of the payee against the county or of the county against him. Had there been other claims to be adjusted and settled between the parties, these warrants, if lawfully issued, would have been taken as approved items in the account—nothing more.

The warrants being in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them and to maintain, in his own name, an action upon them. But they are not negotiable instruments in the sense of the law merchant, so that, when held by a *bona fide* purchaser, evidence of their invalidity or defenses available against the original payee would be excluded. The transferee takes them subject to all legal and equitable defenses which existed to them in the hands of such payee. There has been a great number of decisions in the courts of the several states upon instruments of this kind, and there is little diversity of opinion regarding their character. All the courts agree that the instruments are mere *prima facie* and not conclusive evidence of the validity of the allowed claims against the county by which they were issued. The county is not estopped from questioning the legality of the claims; and when this is conceded the instruments conclude nothing as to other demands between the parties.
* * *

may vest in the assignee. "In this state choses in action arising in contract are assignable in writing. The Civil Code of 1895, § 3077, declares, 'All choses in action, arising upon contract may be assigned so as to vest the title in the assignee, but he takes it, except negotiable securities, subject to the equities existing between the assignor and debtor at the time of the assignment, and until notice of the assignment is given to the person liable.' No special form of words is necessary to make an assignment. Any language, however informal, if it shows the intention of the owner of the chose in action to transfer it, will be sufficient to vest the property in the assignee." Lumpkin, J. in Southern Mutual Life Ins. Assoc v. Durdin, 132 Ga. 495, 498 (1909).

[32] The statement of facts and parts of the opinion are omitted.

The case of Crawford County v. Wilson, (7 Ark. 214) in the Supreme Court of Arkansas, is cited as showing that a different rule prevails in that state. The language of the opinion, that county warrants are endowed with the properties of negotiable instruments must be read in connection with the point involved, which was whether county warrants were transferable by mere delivery, so as to vest the legal interest in the holder. To this extent they may be called negotiable, but no court of Arkansas has held that they were negotiable in the sense of the law merchant, so as to shut out, in the hands of a bone fide purchaser, inquiries as to their validity, or preclude defences which could be made to them in the hands of the original parties. The law is not different there from that which obtains in other states.

The cancellation of the warrants originally issued and the substitution of others in their place did not change their character. * * *

*Judgment [for defendant] affirmed.*

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## HENRY E. HOOKER *v.* EAGLE BANK OF ROCHESTER.

**(Court of Appeals of New York, 1864. 30 N. Y. 83, 86 Am. Dec. 351.)**

This was an action by Henry E. Hooker, against the Eagle Bank of Rochester to recover a claim for services rendered by Kauffman and Bissell which had been assigned to the plaintiff by parol. Verdict and judgment for the plaintiff. Defendant appealed.

MULLIN, J.[33] * * * The defendant moved for a nonsuit on several grounds all of which are disposed of by the legal propositions above advanced, except one, and that is, that the assignment from Kauffman & Bissell to the plaintiff, being without writing, was void. A chose in action might, at law, be assigned without writing, so as to enable the assignee to enforce the debt or demand assigned, in the name of the assignor, if there was a valuable consideration, and a delivery of the thing assigned. (Ford v. Stuart, 19 Johns. 342; Briggs v. Dorr, Id. 95; Prescott v. Hall, 17 Id. 284). Such an assignment, in equity, enabled the assignee to sue in his own name. A book-debt is a chose in action, and assignable (Dix v. Cobb, 4 Mass. 508); and may, like any other chose in action, be assigned by parol. (Jones v. Witter, 13 Mass. 304; Briggs v. Dorr, 19 Johns. 95 and cases cited; 2 Cases in Chancery, 7, 37; Dunn v. Snell, 15 Mass. 485). Under the Code, an assignment, valid as an equitable assignment, is equally valid at law. (Code, § 111). * * *

*Judgment affirmed.*[34]

[33] The statement of facts and parts of the opinion are omitted.

[34] "It is as essential to the valid assignment of a bond for title that it be in writing and signed by the party to be charged as it is that the original con-

## AUGUST FISHER *v.* CHRISTOPHER DEERING.

(Supreme Court of Illinois, 1871. 60 Ill. 114.)

WALKER, J. It appears, from an examination of the authorities, that at the ancient common law a lease was not assignable so as to invest the assignee with the legal title to the rent. Such instruments were, in that respect, on a footing with other agreements and choses in action. But the 32 Hen. 8, chapter 34, section 1, declared that the assignee of the reversion should become invested with the rents. But notwithstanding this enactment, the courts held that the assignee of the reversion could not sue for and recover the rent unless the tenant should attorn, when the holder of the reversion might recover subsequently accruing rent in an action of debt. Marle v. Fake, 3 Salk. 118; Robins v. Cox, 1 Levintz, 22; Ards v. Walkins, 2 Croke's Elis, 673; Knowles Case, 1 Dyer, 5 b., 5 Barn. & Cress. 512, and the note.

In Williams v. Haywood, 1 Ellis & Ellis, 1040, after reviewing the old decisions on this question, it was, in substance, held that, under the 32 Hen. 8, an assignee of the rent, without the reversion could recover when there was an attornment, and that such an assignee could, under the 4 of Anne, recover without an attornment.

The courts seem to have proceeded upon the ground that there could be no privity of contract unless the tenant should attorn to the assignee of the reversion; that, whilst the assignment of the reversion created a privity of estate between the assignee and the tenant, privity of contract could only arise by an agreement between them. Some confusion seems to have got into the books from calling the purchaser of the reversion an assignee of the lease, by its passing by the conveyance as appurtenant to the estate. But where the tenant attorned to the assignee of the reversion the assignment became complete, and then there existed both privity of estate and of contract between the assignee and the tenant, and by reason of the privity of contract the assignee might sue in debt, and recover [rent] subsequently accruing, but not rent in arrear at the time he acquired the reversion.

To give the assignee of the reversion a more complete remedy the 4 & 5 Anne, Chapter 16, section 9, was adopted, dispensing with the neces-

tract should be in writing and signed by such party. Thus in 20 Cyc. 219, upon this precise point, the text says:

" 'The interest of a purchaser under an executory contract of sale is so far realty that it cannot be assigned verbally.'

"If such written contract of purchase could be transferred by delivery only, thus conferring upon it the characteristic of negotiable paper, the statute of frauds would be nullified, and the evils flowing from a nonobservance thereof would flourish without let or hindrance. The equitable estate of the purchaser under such a contract is itself real estate which, under the statute, must be transferred by written contract the same as is required in the conveyance of the legal title." Thomas, J. in Coldwell v. Davidson (Ky.), 219 S. W. 445, 446 (1920).

sity of an attornment which the courts had held to be necessary under the 32 Hen. 8, to create a privity of contract. But this latter act has never been in force in this state, and hence the decisions of the British courts, made under it, are not applicable. In many states of the Union this latter act has been adopted, and the decisions of their courts conform, of course, to its provisions. But we having adopted the common law of England, so far as the same is applicable and of a general nature and all statutes or acts of the British parliament made in aid of, and to supply defects of the common law, prior to the fourth year of James the First, except certain enumerated statutes, and which are of a general nature and not local to that kingdom, they are declared to be the rule of decision, and shall be considered of full force until repealed by legislative authority. Gross, Comp. 1869, 416. It then follows that the 32 Hen. 8, Chap. 34, section 1, is in force in this state, as it is applicable to our condition, and is unrepealed. And we must hold that the construction given to that act by the British courts was intended also to be adopted.

The facts in this case show such a privity of contract as brings it fully within the rule announced in the above cases. Appellee paid to the appellant several installments of rent falling due under the lease after it was assigned to him. By paying the rent, the lessee fully recognized the appellant as his landlord, and created the necessary privity of contract to maintain the action.

The case of Chapman v. McGrew, 20 Ill. 101, announces a contrary doctrine. In that case this question was presented and notwithstanding the lessee had fully recognized the assignee of the lease as his landlord, it was held that the lessor of the premises might maintain an action to recover the rent. In that case, the fact that the lessee had attorned to the assignee, was given no weight, and the fact that such privity was thereby created as authorized the assignee of the lease to sue for, and recover the rent, was overlooked. In that the decision was wrong. The right of action could not be in both the lessor and his assignee, and the privity thus created gave it to the latter.

The subsequent case of Dixon v. Buell, 21 Ill. 203, only holds that such an assignee, whether he holds the legal or equitable title to the lease, may have a claim for rent, growing out of the lease, probated and allowed against the estate of the lessee. That case has no bearing on the case at bar.

The judgment of the court below is reversed and the cause remanded.

*Judgment reversed.*[35]

[35] The necessity of attornment in such cases was ended in Illinois by statute in 1874. See Barnes v. Northern Trust Co., 169 Ill. 112 (1897).

"In consequence of the rule of the common law that a chose in action was not assignable, the assignee of a reversion could not maintain an action upon a covenant contained in a lease, against the lessee, though the covenant might run with the land. There was a distinction made between the assignee of the

## HURXTHAL *v.* BOOM CO.

(Supreme Court of Appeals of West Virginia, 1903. 53 W. Va. 87, 44 S. E. 520, 97 Am. St. Rep. 954.)

Action by Josie M. Hurxthal against the St. Lawrence Boom & Manufacturing Company. Judgment for plaintiff. Defendant brings error. Reversed.

By agreement of the 13th of June, 1894, the defendant company covenanted with Ben Hurxthal to maintain and repair dams to supply water to his flour and grist mill and to keep trash from impeding the flow of water through his mill race, the contract providing that "the obligation to pay the same shall, in addition to being a personal one, be a covenant running with the land and binding upon said Ronceverte Flour Mills. mill race, and water power, into whosesoever hands they may pass." It was expressly provided that the agreement should continue in force for five years from its date and at the option of Ben Hurxthal "his heirs, representatives or assigns," exercised within the five years, should continue ten years. Ben Hurxthal died and in the administration of his estate the grist mill property was sold to his administratrix, Josie M. Hurxthal, to pay his debts and she gave notice to extend the agreement, and later brought this action of covenant against the company for failing to keep up the dams and failing to keep debris out of the mill race. She recovered a verdict and judgment for $4,000, and the company sued out this writ of error.

BRANNON, J.[36] * * * A question going to the very root of the case, because involving the very right of the plaintiff to sue upon the agreement on which her suit is based, arises upon the plaintiff's first instruc-

reversion and the assignee of the lease; and while the latter might maintain, and be liable to, an action upon such a covenant, it was different as to the former. To remedy this, the statute of 32 H. 8, cap. 34, was enacted, which gave, generally, to the assignee of the reversion the same right of action that the lessor had, upon the covenants in the lease. But this statute did not extend to mere personal and collateral covenants; it embraced those only which touched and concerned the thing demised." Gholson, J. in Masury v. Southworth, 9 Oh. St. 340, 346 (1859).

"Covenants which run with the land were always exceptions to the maxim of the common law that choses in action could not be assigned. They cannot be separated from the land and transferred; but with the land they could, as being annexed to the estate in possession, and bound the parties in respect to the privity of estate." Ruffin, C. J. in Markland, Adm'r v. Crump, 18 N. C. (1 Div. & B.) 94, 97 (1834).

In Norman v. Wells, 17 Wend. 136, 148 (1837), Cowen, J. refers to "the negotiable quality of covenants" running with the land under the rules in Spencer's Case, 5 Rep. 16 (1583).

On what covenants run with the land, see 47 Am. Dec. 569, note; 82 Am. St. Rep. 664, note.

[36] The statement of facts is summarized from the opinion and parts of the opinion are omitted.

tion, saying that if she, before June 13, 1899, gave the company written notice that she elected to extend the agreement of June 13, 1894, for five years after June 13, 1899, then the plaintiff had succeeded to the rights of Ben Hurxthal under that agreement. This involves the question whether the covenants in said agreement binding the company to maintain the dams as therein provided, and not to suffer or permit the accumulation of trash in the mill race, are covenants real running with the gristmill property and inuring to the benefit of the plaintiff as its owner derivatively from Ben Hurxthal, and thus entitling her to sue for an infraction of that agreement; or are mere personal covenants binding the company only as such, and not authorizing the plaintiff, as successor in ownership of the gristmill, to sue for the infraction of the agreement. "A covenant is said to run with the land when either the liability to perform it or the right to enforce it passes to the assignee of the land." 8 Am. & Eng. Ency. Law, 134. When the company made those covenants, it passed no estate in the mill property to Hurxthal. The company and he were strangers in estate. To create a covenant real, there must be a privity in estate between the parties; otherwise it is simply a personal obligation, neither binding nor benefiting the land in the hands of heirs, devisees, or assigns. Lydick v. Railroad, 17 W. Va. 427; Trans. Co. v. Pine Line Co., 22 W. Va. 631, 46 Am. Rep. 527; 2 Minor, Inst. 715. "It is not sufficient that the covenant is concerning land, but to make it run with the land there must be a privity of estate between the parties, and the covenant must have relation to an interest created or conveyed, in order that the covenant may pass to the grantee of the covenantee." 8 Am. & Eng. Ency. L. 147. "A covenant does not run with land unless contained in a grant thereof, or of some estate therein." Fresno Canal Co. v. Rowell (Cal.) 22 Pac. 53, 13 Am. St. Rep. 112. It is true that this covenant has one element of covenant real in the fact that it benefits the estate of the covenantee, the mill property; but it lacks another material element—privity in estate—as the company conveyed no interest in the mill, but merely made a personal obligation on the company touching the mill. So this covenant is not, in its inherent nature, a real covenant. But does its language make it such? The agreement makes the obligation of Hurxthal to pay for maintaining the dam one running with the land. It seems, under the law above stated, that this would not, perhaps, make it a covenant real; but it was clearly a lien in its terms as an equitable mortgage. There is no such provision as to the covenants made by the company, and we infer it was not so intended. But there is the clause in the agreement giving the right to the assignees of Hurxthal to continue the agreement for five years. What is the effect of that clause? It seems to be well settled in law that if a covenant is not, in nature and kind, a real covenant, the mere declaration of the parties that it shall run with the land will not make it a real covenant, though so stated in the document. 8 Am. & Eng. Ency. L. 134; 2 Washb. R. Prop. §§ 1203. 1205; Gibson v. Holden, 56 Am. Rep. 146, 149.

Under this authority I do not see how a covenant not one of such nature as to run with land could, by declaration in the agreement, be made such, so as to place an obligation on the land in the hands of subsequent owners; but this covenant is one not placing a burden on the Hurxthal mill, but benefiting it, and the company agreed that benefit should go to the use of the assigns of Hurxthal. The point is not without difficulty, but it does seem to me that under these circumstances this consent of the company, while it would not place a burden on the company property, would give the mill property of Hurxthal the benefit of the covenant, so as to enable the plaintiff as alienee to sue upon it. I do not know that it will add anything to the strength of this position, in a legal point of view, to rely upon the fact that the company accepted from the plaintiff pay for one year's maintenance of the dam. If the covenant does not give her right, it would be doubtful whether an oral agreement would do so under the statute of fraud, as being a contract not performable in one year, though the statute is not pleaded. This is not material, however, because I hold that the plaintiff is entitled to sue for a breach of the covenant occurring during her ownership, by reason of the clause giving the benefit of the agreement to the assignee of Ben Hurxthal. There can be no question but that the plaintiff is a privy in estate with Ben Hurxthal, and an "assign" within the meaning of that word used in said agreement; for she purchased at the judicial sale, which by law cast upon her the entire estate of Ben Hurxthal, and she is as much an assignee of the property from Ben Hurxthal as if he had conveyed it to her. 8 Am. & Eng. Ency. L. 146; Rawle on Cov. § 213; Tiedman, R. Prop. § 860; Mygatt v. Coe (N. Y.) 36 N. E. 870, 24 L. R. A. 850. So the plaintiff can recover if the defendant failed in its covenants after the plaintiff acquired the property March 16, 1899, the date of her purchase at the court sale. Upon these questions of fact, in view of a new trial, we decline to pass. Therefore plaintiff's first instruction is good and defendant's first and second bad, because denying right to sue. * * *

[But for error in instructions given as to the measure of damages and other matters, judgment reversed and new trial granted.]

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## AMERICAN COLORTYPE COMPANY *v.* CONTINENTAL COLOR TYPE COMPANY ET AL.

(Supreme Court of the United States, 1903. 188 U. S. 104, 23 Sup. Ct 265, 47 L. Ed. 404.)

HOLMES, J. This is a bill in equity brought in the circuit court for the northern district of Illinois by a New Jersey corporation against an Illinois corporation and private persons, citizens of Illinois. Upon demurrer the bill was dismissed for want of jurisdiction, on the ground, as is certified, that it was a bill to recover the contents of a chose in

action in favor of an assignee, the assignors being citizens of Illinois.* The case comes here by appeal. The prayers of the bill are for injunctions to prevent the defendants Maas, Fierlein, Freese, and Schulz assisting the defendant company or the defendants Quetsch and Seibert in the three-color printing business, revealing secret processes, etc., until different specified dates. The main ground of the prayers is the contracts to be mentioned, and the question is whether the claim stated by the plaintiff is a claim as assignee.

The plaintiff is the assignee of the assets and good will of the National Colortype Company, the American Three-Color Company, Illinois corporations, and the Osborne Company, a New Jersey corporation, and was formed on March 1, 1902, for the purpose of consolidating the three. Among the more important contracts which purported to be transferred were two between the National Colortype Company and Maas and Fierlein respectively. By the former, Maas was employed as superintendent of the plat-making department, and agreed to remain in the company's employment and not to accept employment from others in the business of three-color printing for five years from December 1, 1901, and not to become interested in any way in that business in the United States, east of the Rocky Mountains, or divulge any secrets or processes relating to that business, for ten years from the day mentioned. By the other contract Fierlein was employed as salesman, and agreed to devote his whole time and attention to the interest and business of the company for two years from the same date. There was a similar contract with the defendant Freese, expiring May 1, 1903, but containing a promise by him never to divulge any of the secrets, methods, or practices of the company, and agreeing that his going to work for any others engaged in similar business should be considered a breach of the promise just set forth.

The bill alleges that Maas, knowing of the transfer, consented to it, announced his intention of holding the plaintiff to the contract with him, remained in its employ in the same capacity, accepted the stipulated salary, and was instructed in valuable secrets, and that the complainant, by the consent of all parties, became substituted as a party to the contract in place of the National Colortype Company. There are shorter but similar allegations concerning Fierlein and Freese. An independent contract with the defendant Schulz is alleged, which has expired, but it is alleged that by virtue of his employment he also has become possessed of trade secrets and processes belonging to plaintiff.

The bill goes on to allege that Maas and Fierlien, while in the plaintiff's

* By section 24(1) of the Federal Judicial Code it is provided that "No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee * * * unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

employment and pay, conspiring with the defendants Quetsch and Seibert, got up the defendant corporation as a rival to the plaintiff, induced the defendants Freese and Schultz to enter its service, have taken over their own special skill and knowledge of the plaintiff's secrets to the hostile camp, and, in short, will ruin the plaintiff if they are permitted to go on.

We are of opinion that a case is stated within the jurisdiction of the court. It is true that the starting point for the relations between the plaintiff and its employees was what purported to be an assignment. It is true that the bill emphasizes this aspect of the case, and states the evidence more accurately than the result. But those circumstances do not change the legal conclusion from the facts set forth. The allegations show that, having the old contract before them, the parties came together under a new agreement, which was determined by reference to the terms of that contract, but which none the less was personal and immediate. Maas, Fierlein, and Freese, who were under contract with the National Colortype Company, agreed to work for the plaintiff instead. The plaintiff accepted their promises and gave a consideration for them by undertaking personally to pay. It does not matter that the bill calls this becoming substituted as the employer and as a party to the old contracts. The plaintiff could not become substituted to a strictly personal relation. All that it could do was to enter into a new one which was exactly like that which had existed before. Service is like marriage, which, in the old law, was a species of it. It may be repeated, but substitution is unknown. Arkansas Valley Smelting Co. v. Belden Min. Co., 127 U. S. 379, 387, 32 L. ed. 246, 248, 8 Sup. Ct. Rep. 1308.

It may be that the form of the allegation was suggested by the hope to get some help from the written documents when the plaintiff comes to the proof, as against difficulties raised by the statute of frauds. We have nothing to do with that. It is quite manifest that the plaintiff, if it prevails, will not do so on the ground that, by virtue of the transfer to it, it can claim the beneficial interest in the original agreements, and thus is an assignee within the definition given in Plant Investment Co. v. Jacksonville, T. & K. W. R. Co., 152 U. S. 71, 77, 38 L. ed. 358, 360, 14 Sup. Ct. Rep. 483; if it recovers it will recover on a promise made directly to it upon a consideration which it has furnished. This test is recognized in Thompson v. Perrine, 106 U. S. 589, 593, 27 L. ed. 298, 300, 1 Sup. Ct. Rep. 564, 568, although the doctrine there quoted from Mr. Justice Story, that the holder of a note payable to bearer recovers on a new promise made directly to himself, has been controverted elsewhere, and, indeed, long has smouldered as a dimly burning question of the law. Holtzendorff, Rechtslexicon, sub v. Inhaberpapiere, ad fin. (3d ed. 365, 371). Compare Abbott v. Hills, 158 Mass. 396, 397, 33 N. E. 592, Story, Confl. L. 8th ed. § 344.

What we have said suggests the answer to the objection that a novation is not set forth. The allegations seem to mean that the old company

was discharged, but this is not a question of novation. We are dealing with a new bilateral contract made up of mutual undertakings to serve and to pay. The implication that the old contract is discharged is material only so far as it shows that the plaintiff's rights can be enforced without unjustly disregarding the rights of a third person.

It is unnecessary to consider whether an independent ground of jurisdiction is shown in the threatened revelation of trade secrets, or to discuss the different position of the defendant Schultz. Whether the obligation not to disclose secrets be independent of the express contract, or not, a case is made out. The question of independence will not arise unless a difficulty is encountered in the evidence because of the statute of frauds, but that is not a matter of pleading. We have not to consider how far the injunction should go in case the plaintiff succeeds, or anything except the objection that the plaintiff is suing as an assignee.

*Decree reversed.*

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## CITIZENS' LOAN ASS'N *v.* BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts, 1907. 196 Mass. 528, 82 N. E. 696, 14 L. R. A. (N. S.) 1025, 124 Am. St. Rep. 584, 13 Ann. Cas. 365.)

Action by the Citizens' Loan Association against the Boston & Maine Railroad. There was a judgment for plaintiff on an agreed statement of facts, and defendant brings exceptions. Affirmed.

Plaintiff and defendant are domestic corporations. On February 27, 1905, and for a long time prior thereto, Steven J. Wescott was in the employ of defendant as a conductor. On that day Wescott, for a valuable consideration, and as security for the payment of a note given by him to plaintiff, and for money loaned, assigned to plaintiff all claims which he might thereafter have against defendant for moneys becoming due between that date and January 1, 1908, for services.

RUGG, J. The single question presented by this appeal is whether an assignment of wages to be earned in an existing employment, given before bankruptcy, without fraud, and upon sufficient consideration, to secure a valid subsisting debt, and duly recorded, can be enforced, after the discharge in bankruptcy of the assignor, as to wages earned in the course of the original employment, by the creditor, who has not proved his debt in bankruptcy. A debt is not extinguished by a discharge in bankruptcy. The remedy upon the debt, and the legal, but not the moral, obligation to pay, is at an end. The obligation itself is not canceled. Champion v. Buckingham, 165 Mass. 76, 42 N. E. 498; Heather v. Webb, 2 C. P. D. 1. An assignment of future earnings, which may accrue under an existing employment, is a valid contract and creates rights, which may be enforced both at law and in equity, whichever may in a particular case be the appropriate forum. Tripp v. Brownell, 12

Cush. 376; Weed v. Jewett, 2 Metc. 608, 37 Am. Dec. 115; Brackett v. Blake, 7 Metc. 335, 41 Am. Dec. 442; Hartey v. Tapley, 2 Gray, 565; Gardner v. Hoeg, 18 Pick. 168; Taylor v. Lynch, 5 Gray, 49; Lennan v. Smith, 7 Gray, 150; St. Johns v. Charles, 105 Mass. 262; Lazarus v. Swan, 147 Mass. 330, 333, 17 N. E. 665; James v. Newton, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692. These cases proceed upon the theory that the worker under contract for service, though indefinite as to time and compensation and terminable at will, has an actual and real interest in wages to be earned in the future by virtue of his contract. He may recover for an unjustifiable interference with such an employment, as for an injury to any other vested property right. Moran v. Dunphy, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289; Berry v. Donovan, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499. It is plain that one may sell wool to be grown upon his own sheep, or a crop to be produced upon his own land, but not that to be grown or produced upon the sheep or land of another.[87] No more can one assign wages where there is no contract for service. Jones v. Richardson, 10 Metc. 481; Low v. Pew, 108 Mass. 347, 11 Am. Rep. 357. But profitable employment is a reality. Wages to be earned by virtue of an existing employment are no more shadowy or insubstantial than the fleece of next spring or the crop of the following autumn. Money to accrue from such service is not a bare expectancy or mere possibility, but a substance capable of grasp and delivery. It constitutes a present, existing, right of property, which may be sold or assigned as any other property. Although not in the manual possession of the assignor, it is in his potential possession. The transfer of this potential possession creates the assignee a lienor upon the property right. The holder of such an assignment stands upon a firmer plane than the mortgagee of future acquired property, who has only the right by contract to act betimes in the future for his protection. Wasserman v. McDonnell, 190 Mass. 326, 76 N. E. 959. The assignee of wages to be earned under an existing contract gets a present right, per-

[87] There is, of course, no logic in any such distinction. Its sole justification is that it narrows the scope of the doctrine of the potential possession of personal property. Since an attempted sale which cannot function as one will be deemed to be a contract to sell, and since a contract may be made to sell personal property owned at the time by a third person who has not authorized the contract, it would seem to be only the fact that the potential possession doctrine is anomalous and therefore to be restricted that justified the judicially established doctrine about sales of wool not yet grown and crops not yet produced which is stated in the text. "The English Sale of Goods Act and the American Uniform Law both abolish by implication the doctrine of potential possession, leaving the question of contracts to sell future crops, and the future young of animals, on the same footing as contracts to sell other unspecified or future goods." Samuel Williston, The Progress of the Law, 1919-1920: Sales, 34 Harv. L. Rev. 741, 745.

fect in itself, requiring no future action on his part.[38] Contracts for personal service are of such a character that their breach is in appropriate cases enjoined. Lumly v. Wagner, 1 De G., M. & G. 604; Duff v. Russell, 133 N. Y. 678, 31 N. E. 622; Whitwood Chemical Co. v. Hardman [1891] 2 Ch. 416. See Phila. Base Ball Club v. Lajoie, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. Rep. 627. It may be taken for granted that the right to future wages to be earned under such a contract does not pass to the trustee in bankruptcy. Nor are we dealing here with a contract as to labor in terms or spirit contrary to public policy, as in Parsons v. Trask, 7 Gray, 473, 66 Am. Dec. 502. But on the contrary, assignments of wages are recognized as valid by statute. Rev. Laws, c. 189, §§ 32, 33, 34; Id. c. 102, §§ 51, 57 to 67, both inclusive; Id. c. 106, § 63. The present case is not affected by St. 1905, p. 224, c. 308, or St. 1906, p. 366, c. 390.

Specific performance of contracts to labor like that in question will not be enforced. Arthur v. Oakes, 63 Fed. 310-318, 11 C. C. A. 209, 25 L. R. A. 414; Robertson v. Baldwin, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715. It is only where labor has been voluntarily performed that the question now presented can arise. It is possible that an agreement to execute an assignment, falling short of the creation of a lien, is, when the wages have been actually earned, enforceable in equity, even after a subsequent bankruptcy or insolvency. We do not decide this, however. Edwards v. Peterson, 89 Me. 367, 14 Atl. 936, 6 Am. St. Rep. 207; Stott v. Franey, 20 Or. 410, 26 Pac. 271, 23 Am. St. Rep. 132. At lowest the assignment in question became "a specific equitable lien on the fund" (Triste v. Child, 21 Wall, 441, 22 L. Ed. 623), or was "an independent collateral agreement given by way of guaranty or other security" for the main debt, and there is no reason why such an agreement should not outlive the remedy upon the debt, to secure which it was given (Shaw v. Silloway, 145 Mass. 503, 507, 14 N. E. 783). In either event it was not dissolved by the bankruptcy.[39]

[38] This is clear. But if there is an attempt to assign a claim expected under a contract not yet made, or wages to accrue under an employment not yet arranged, Massachusetts, in the absence of a statute, holds the assignment invalid (Herbert v. Bronson, 125 Mass. 475 (1878); Raulins v. Levi, 232 Mass. 42 (1919)) and that seems the majority view (Shackelford v. Kiser Co., 131 Ala. 224 (1901)); but the minority view that such assignments are valid seems more in accord with the doctrine of equitable assignments. See Edwards v. Peterson, 80 Me. 367 (1888). The minority view has been adopted in Massachusetts by a statute which permits such assignments for a period of two years if the statutory form is used. Gilman v. Raymond (Mass.), 127 N. E. 794 (1920). In Monarch Discount Co. v. C. & O. R. Co., 285 Ill. 233, 239 (1918), the court says that the assignment of wages to be earned under an existing contract may be made "even though the employment is for an indefinite time." On the validity of an assignment of unearned wages, see 5 Ann. Cas. 64, note.

On the somewhat related problem of transfers by heirs of their expectancies, see Costigan's Cases on Wills, Descent and Administration, pp. 486-493.

[39] On the bankruptcy question, see 1 Williston on Contracts, § 414, pp. 772-773.

We have considered the contrary authorities of In re West (D. C.) 128 Fed. 205, In re Home Discount Co. (D. C.) 147 Fed. 538, and Leitch v. Northern Pacific Ry. Co., 95 Minn. 35, 103 N. W. 704, with the deference to which they are entitled. They proceed upon considerations as to the effect of an assignment of wages and the rights vesting thereunder in the assignee, as well as public policy pointed out in the latter case, which are inconsistent with what we conceive to be sound reasoning, and opposed to the numerous decisions of this court above cited concerning rights acquired under assignments of wages. In the absence of a decision to the same effect by the Supreme Court of the United States, we cannot accede to them as authoritative. Nor do we perceive anything inconsistent with the conclusion we have reached, in Clark v. Clark, 17 How. 315, 15 L. Ed. 77, East Lewisbury v. Marsh, 91 Pa. 96, Christian & Craft Grocery Co. v. Michael Lyons, 121 Ala. 84-87, 25 South. 571, 77 Am. St. Rep. 30, Williams v. Chambers, Q. B. 337, and Hanover Nat. Bank v. Moyses, 186 U. S. 192, 22 Sup. Ct. 857, 46 L. ed. 1113, which are cited as generally supporting authorities in Re Home Discount Co., *ubi supra.*

The assignment to the plaintiff is a lien which was preserved by section 67d of the bankruptcy act of July 1, 1898 (30 Stat. 564, c. 541 [U. S. Comp. St. 1901, p. 3450]), and was not affected by the discharge in bankruptcy of the assignor. This conclusion is supported by Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233.

*Judgment affirmed.*[40]

[40] In Bowery National Bank v. Wilson, 122 N. Y. 478, 482-484 (1890); Follett, C. J., said of an assignment by a sheriff of fees to be earned in the future:

"It is settled in this state that an assignment by a public officer of his unearned salary is contrary to public policy and void. Bliss v. Lawrence, 58 N. Y. 442; Billings v. O'Brien, 4 Daly (N. Y.) 556, 45 How. Pr. (N. Y.) 392, and 14 Ab. Pr. (U. S.) (N. Y.) 238. The same rule is established in England, and in some of the United States. Hill v. Paul, 8 Clark & F. 295; Cooper v. Reilly, 2 Sim. 560; Wells v. Foster, 8 Mees. & W. 149; Beal v. McVicker, 8 Mo. App. 202; Bangs v. Dunn, 66 Cal. 72, 4 Pac. 963; Pom. Eq. Jur., § 1276; Story Eq. Jur. (13th ed.), § 1040d; Greenh. Pub. Pol., rule 297.

"In Bliss v. Lawrence, *supra*, it was said: 'Salaries are, by law, payable after work is performed, and not before, and while this remains the law, it must be presumed to be a wise regulation, and necessary, in the view of the lawmakers, to the efficiency of the public service. The contrary rule would permit the public service to be undermined by the assignment to strangers of all the funds appropriated to salaries. * * * If such assignments are allowed, then the assignees, by notice to the government, would on ordinary principles be entitled to receive pay directly, and to take the place of their assignors in respect to the emoluments, leaving the duties as a barren charge to be borne by the assignors. It does not need much reflection or observation to understand that such a condition of things could not fail to produce results disastrous to the efficiency of the public service.' The reasons here given for holding the unearned salaries of public officers to be unassignable apply with greater force to fees payable upon the due performance of public duties which cannot be dis-

## IN RE LETERMAN, BECHER & CO., INC.

(United States Circuit Court of Appeals, Second Circuit, 1919. 260 Fed. 543. 171 C. C. A. 327.)

In the matter of Leterman, Becher & Co., Incorporated, bankrupt. From an order awarding priority to the claim of Coleman & Co., the Tawas Company, Incorporated, appeals. Reversed.

Certiorari denied 250 U. S. 668, 40 Sup. Ct. 14.

ROGERS, J.[41] * * * This controversy arises out of the failure of an assignee of choses in action to give notice to the debtors at the time of the assignment. The result is that a subsequent assignee who claims to have first given notice is seeking priority of payment out of the proceeds of assigned choses in action now in the hands of the trustee of the bankrupt assignor.

It appears that Coleman & Co. were engaged in business as commercial bankers and factors, and that on October 15, 1915, they entered into an agreement with the bankrupt, which it is alleged has ever since continued in force, whereby Coleman & Co. were to acquire certain accounts receivable of the said bankrupt by advancing thereon 80 per cent of the net face value subject to a commission charge of 1¼ per cent, plus 6 per cent interest on sums advanced until paid. At the time of the hearing there was owing to Coleman & Co. the sum of $9,314.48, for which they had held accounts receivable having a face value of $11,720.74. * * *

charged by any other officer. If a sheriff can legally assign the fees which may become due him for services to be performed for the public in any given month, he may make a valid assignment of all of the fees that shall become due him for services during the whole of his term. If he could assign to one he could assign to many, and every purchaser would be entitled to the rights of assignees of claim against individuals; and in the case of conflicting interests or of disputes between the officer and his alleged transferee, the government would have to decide, at its peril, between them, or be subjected, as in the case at bar, to litigation. By a division of the unaudited claims of a public officer among many persons a powerful influence in their support may be brought to bear upon the auditing officers, which would not exist if the demands were held by the officer who rendered the service. The statutes provide for the payment of public servants after the rendition of their services, and make no distinction in this respect between officers compensated by a salary or by fees. An officer, having assigned his interest in a compensation to become due him for future public services, would have less interest in the punctual and efficient performance of his duties, and, in the case of improvident assignments, might be without the ability to discharge them. * * * In England and in some of the states, the assignability of unearned fees has been considered, and so far as our attention has been called to the adjudications, no distinction has been made between unearned fees and unearned salaries. * * *

"Upon principle and authority, we think that an assignment by a sheriff of fees for services to be rendered to the public is contrary to public policy and is void."

See 4 Ann. Cas. 423, note; 10 Ann. Cas. 636, note.

[41] Part of the opinion is omitted.

In November and December, 1917, the Tawas Company advanced to the bankrupt $2,750 in three installments, for which they received the promissory notes of the bankrupt. At the time the Tawas Company made these advances the bankrupt assigned to it various accounts receivable, all of which accounts had been previously assigned to Coleman & Co. But at the time of the assignment of these accounts the Tawas Company had no information or knowledge of the previous assignment of the accounts to Coleman & Co., and it at that time was given an affidavit by the bankrupt, for the purpose of inducing the loans, in which it was recited that the bankrupt was then in a solvent condition and was the sole owner of the accounts, and that the same had not been assigned or transferred.

No notice of the assignment of the accounts was given to the debtors of the bankrupt at the time of the respective assignments by either Coleman & Co. or the Tawas Company. But a few days before the bankruptcy and on January 11, 1918, Coleman & Co. sent letters of notification to all the debtors, informing them that the accounts had been assigned to Coleman & Co. and were payable only to them. The Tawas Company on the same day also sent notices of the assignment and that payment should be made to them. * * *

The accounts assigned apparently were not delivered by the bankrupt either to Coleman & Co. or to the Tawas Company. The intention evidently was that the bankrupt should collect the assigned accounts as agent for the assignee, and as collected from time to time pay over to the assignee the amounts collected, either at the time of collection or when demanded. As between assignor and assignee and the creditors of the assignor, the validity of the assignment is not affected by the fact that the accounts to be collected were allowed to remain in the assignor's possession. It has been held that the Personal Property Law of New York (Consol. Laws, c. 41), declaring sales or mortgages of goods and chattels not followed by an actual and continued change of possession presumptively fraudulent and void as against creditors, does not relate to choses in action. Booth v. Kehoe, 71 N. Y. 341; Young v. Upson (C. C.) 115 Fed. 192. And the Supreme Court of the United States has held it not unlawful to allow the accounts to remain in the possession of the assignor for collection. In making the collection he acts in a fiduciary capacity, and the money, when collected, becomes the specific property of the assignee or pledgee. Clark v. Iselin, 21 Wall. 360, 368, 22 L. Ed. 568.

In Methven v. Staten Island, 66 Fed. 113, 13 C. C. A. 362, this court had before it the question whether an assignee who first gives notice to the debtor has the prior right though the assignment to him is later in date than that to the other assignee. The court held that as between two assignees the one who first gives notice has the better right. In so deciding this court declared that the question is one of general jurisprudence and that the decisions of the highest court of the state

are not controlling. We adhere to that ruling in this case. The clause found in the agreement between Coleman & Co. and the bankrupt, that "this agreement shall be construed according to the law of the state of New York," if binding as between assignor and assignee, is not binding as against a subsequent assignee, who was not a party to it. It is not decisive in this court of the question now presented that the courts of the state of New York have laid down the rule that, as between different assignees of a chose in action by express assignment from the same person, the one prior in point of time will be protected, although he has given no notice of such assignment to either the subsequent assignee or the debtor. Fortunato v. Patten, 147 N. Y. 277, 283, 41 N. E. 572. In this respect the rule in New York differs from the rule in the federal courts, and from that which prevails in England and in the courts in many of the states.

The leading case on this subject is the well-known case of Dearle v. Hall, 3 Rus. 1, which held that a third assignee who had given notice was entitled to priority over a first and second assignee who did not give notice. That case and the cases which have followed it have gone upon the theory that personal property passes by delivery of possession, and that if one who acquires the right to take possession does not take it he is responsible for the consequence. A chose in action does not admit of tangible actual possession, but the assignee who gives notice to the legal holder of the fund does that which is tantamount to obtaining possession by placing the holder of the fund under an obligation to treat it as his property; and if he omits to give that notice he is guilty of the same neglect as he who leaves a personal chattel to which he has acquired a title in the actual possession and under the absolute control of another person. See Leading Cases in Equity, vol. 2, pt. 2, pp. 1581, 1582.[42]

[42] But the opposing rule is based on the maxim that prior in time is prior in right, the subsequent assignee getting only what the assignor has not already assigned.

"In our opinion the rule is sound, which gives priority in rank to equitable assignments in the order of their dates, without regard to notice to the debtor. Brander v. Young, 12 Tex. 335; Harris Co. v. Campbell, 68 Tex. 27, 3 S. W. 243, 2 Am. St. Rep. 467; Bank v. Convery, 8 Tex. Civ. App. 181, 27 S. W. 829; Harris Co. v. Donaldson, 20 Tex. Civ. App. 9, 48 S. W. 791; Henke v. Keller, 50 Tex. Civ. App. 533, 110 S. W. 784.

"The debtor is fully protected because he is not affected by the assignment until notified, and the subsequent assignee, in dealing with a chose in action, is chargeable with knowledge that he can get no better right than that of his assignor.

"It increases uncertainty in the law's administration to substitute the date of notice to the debtor as the test of priority for the date of assignment; and we can see how grave harm would follow for us to now depart from our thoroughly established simple test of priority in right from priority in time of the assignment." Greenwood, J., in Hess & Skinner Engineering Co. v. Turney, (Tex.) 216 S. W. 621, 623 (1919). See also Putnam v. Story, 132 Mass. 205 (1882).

Notice is a fact, the existence of which is to be established by evidence in the same manner as the existence of any other fact is established; and actual notice embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest circumstances from which a jury would be warranted in inferring notice. Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 438, 12 Sup. Ct. 239, 35 L. Ed. 1063.

Notice being necessary that notice must be actual in the absence of a statute providing means for constructive notice. In Burck v. Taylor, 152 U. S. 634, 654, 14 Sup. Ct. 696, 703 (38 L. Ed. 578), the court, in referring to the necessity of notice, said:

"If notice was essential to charge them, actual notice should have been given, at least in the absence of a statute providing some means for constructive notice."

The notice must be actual. Must it also be personal? In Beakes v. Da Cunha, 126 N. Y. 293, 297, 27 N. E. 251, the action was upon a guaranty, and the contract made it necessary to give notice on the 20th day of each month, if payment for the previous month had not been made. The court in construing this agreement said:

"Where any statute or the terms of any contract require notice to be given, and there is nothing in the context of the statute or the contract, or in the circumstances of the case, to show that any other notice was

Even in England, where the rule of Dearle v. Hall applies to assignments of equitable interests in personalty, if the holder of an equitable interest in personalty declares himself trustee of it for one person and then assigns the equitable interest to another who takes the assignment innocently and for value and notifies the original trustee before the *cestui* of the sub trust does, the assignee does not prevail. Hill v. Peters, [1918] 2 Ch. 273. In other words, so far as equitable interests in personalty are concerned—the rule of Dearle v. Hall does not apply to equitable interests in realty in England (Lee v. Howlett, 2 K. & J. 531 (1856); Taylor v. London, etc., Co., [1901] 2 Ch. 231—the rule of Dearle v. Hall applies only between assignees as such and not between *cestuis* and assignees.

The rule of Dearle v. Hall is now, perhaps, the majority rule in the United States. See Edward Q. Keasbey, Notice of Assignments in Equity, 19 Yale L. J. 258; 71 Am. St. Rep. 31, note; 66 L. R. A. 760, note; 17 Ann. Cas. 442, note. See also Ames' Cases on Trusts, 2 ed., 323-328; Scott's Cases on Trusts, 619-623; 1 Williston on Contracts, § 435.

Even in a state where the prior assignee will prevail over the second, though the latter gave notice first, the one prior in time may lose his priority by estoppel, and anyway if the one giving notice first paid value and collects first without notice of the prior assignment, the prior assignee cannot recover from him. Rabinowitz v. People's Nat. Bank (Mass.), 126 N. E. 289 (1920). And the same would be so, it seems, if he did not pay value and the first assignee also paid no value. So also if he effects a novation with the obligor or gets a judgment against the latter, etc. The problem is just suggested here, but is covered in detail in the course on Trusts.

For difficult problems as to the effect of notice to trustees who die or resign and are replaced by others who have no notice, see Maitland's Equity, pp. 145-146.

intended, a personal notice must always be given. But the context or the circumstances of the case may be such as to show that a personal notice was not intended, and in such a case a notice by mail, which is the ordinary mode of giving notices in business transactions, is authorized."

In Rogers v. Burr, 105 Ga. 432, 446, 31 S. E. 438, 70 Am. St. Rep. 50, which was an action on contract the court held, actual notice being required, that the requirement was not met by simply mailing the notice to the defendants, where the defendants denied that they received the notice; it not being shown that the written notice was in fact received. And in Huntley v. Whittier, 105 Mass. 391, 7 Am. Rep. 536, the court held that in the absence of a statute authorizing the service of a notice by mail, a notice so served is ineffective unless it is received. But the courts hold that, where the notice has been properly mailed, its receipt will be presumed, in the absence of evidence to the contrary. Bickerdike v. Allen, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782; Casco National Bank v. Shaw, 79 Me. 376, 10 Atl. 67, 1 Am. St. Rep. 319; Huntley v. Whittier, supra.

In the instant case the evidence shows that notices were mailed both by the Coleman Company and by the Tawas Company. There is no evidence that the notices so mailed were not received. On the contrary, there is affirmative evidence that the notices mailed by the Coleman Company were received; and there is evidence that the notices mailed by the Tawas Company were not returned. So that the conclusion is that the two claimants each gave proper notice to the debtors of the assignment.

The court below stated that in his opinion the referee had committed error in that he had assumed that the priority of "giving notice" depended upon the order of time in which the notices of conflicting parties probably actually reached the person to be notified. The opinion of the court was that the party, whose duty it was to give the notices gave them, and completed them when it put the proper paper in the United States mail. We are unable to agree with that view of this case. The courts hold that, where acceptance by mail of an offer is expressly or impliedly authorized and the answer is duly posted, the acceptance is communicated, and the contract is completed from the moment the letter is mailed. Burton v. United States, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. ed. 1057, 6 Ann. Cas. 392. But they also hold that a letter revoking an offer is not effective until it is actually communicated to the referee. It is operative from the time it is received, and not from the time it is put into the mail. Patrick v. Bowman, 149 U. S. 411, 13 Sup. Ct. 811, 866, 37 L. ed. 790. Whether a communication transmitted by mail is operative from the time it is mailed or from the time it is received clearly depends upon the nature of the transaction. And we think it plain that a notice of an assignment deposited in the mail by an assignee does not become effective as against the holder of the fund assigned or the debtor until it is actually com-

municated to him. If that were not so, and the debtor or the trustee paid the assignor between the time of the mailing of the notice and the time of its receipt, he would be bound to pay twice, which, of course, cannot be the law.

The question, then, is whether the notices Coleman & Co. sent, and which went forward as registered mail, reached the debtors before or after those sent by the Tawas Company, and which were deposited in the post office on the same day and were forwarded as unregistered mail. The evidence, if it is to be believed, shows that the Tawas Company deposited its notices at 6 p. m. All that appears as respects the hour of mailing of the notices of Coleman & Co., is that they must have been mailed some time prior to 8 p. m. The referee, who saw and heard the witness who testified that the notices sent by the Tawas Company were put into the post office at 6 p. m., believed him. The District Judge, who did not see or hear the witness, did not believe him, thinking him too exact and positive as to a matter which happened six months prior to the time of his giving the testimony. It is not incredible, as it seems to us, that the witness should have remembered the hour as well as the day on which he mailed notices of importance; and not having seen and heard the witness we are not disposed to accept his testimony as to the day and reject it as to the hour. The witness for Coleman & Co. remembered the day when he mailed the Coleman notices, but could not fix the hour. It is not, however, important to know the hour when the Coleman registered notices were mailed, for it definitely appears that all mail trains do not carry registered mail, and that there are more mail trains carrying mail not registered than there are trains carrying registered mail, and the authorities of the post office testified that the registered mail was not sent to the Pennsylvania Railroad Terminal to be sent forward by train until 1:10 a. m. of the next day. There was, therefore, not only a delay at the New York post office in dispatching the Coleman notices, but there was also delay at the offices to which the notices were sent, in the delivery of them to the parties for whom they were intended, after they reached their destination. In the ordinary course of business a registered letter is not delivered as promptly as an unregistered one. The inference is irresistible that the Tawas Company's notices were received by the debtors before those sent by Coleman & Co.

*The order of the District Court is reversed.*

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## THOS. D. CAMPBELL & CO. *v.* HOLEHAN ET AL.

**(District Court of Appeal, First District, Division 1, California, 1920. 192 Pac. 121.)**

Action by Thos. D. Campbell & Co. against V. E. Holehan and the Charles A. Turner Company, which filed cross-complaint. Judgment

for plaintiff and cross-complainant, and defendant Holehan appeals. Affirmed.

WASTE, P. J.[43] Plaintiff brought this action to recover $5,000, alleged to be due (less a small credit) as commissions, from defendant Holehan, to Charles A. Turner Company, respondent, a 5/12 interest in which had been assigned to the plaintiff. Because of the declination of Charles A. Turner Company to join as plaintiff, it was made a defendant. * * *

The final contention of appellant is that neither the complaint nor the cross-complaint contains a statement of facts sufficient to constitute a cause of action. His theory is that when the Turner Company assigned an undivided 5/12 interest in the contract to the Campbell Company, it split the demand, imposing an obligation upon appellant without his consent. While an assignment of part only of an entire demand is void, at law, unless done with the consent of the debtor, it is valid in equity. Under the practice at common law, a recovery upon such partial assignment could not be had without averring and proving that it was made with the consent of the defendant. Such an averment was immaterial in equity, and hence, under the Code of this state, the complaint is not demurrable for lack of facts, if it fails to contain such an allegation.

Neither the complaint nor the cross-complaint, in the instant case, was demurrable for want of parties, for the plaintiff made its assignor a party defendant. * * *

*The judgment is affirmed.*[44]

[43] Parts of the opinion are omitted.

[44] "While it is the general rule at law that a debtor will be protected against being harassed by a dividing up of the claim against him, this consideration has no application to equity, which can adjust the rights of all interested in a single suit; and it is the settled doctrine, not only of the federal courts but of the state courts generally, that such partial assignments are enforceable in equity, without regard to the question of acceptance by the debtor, and although made only by way of security. The sole control of the claim thus assigned, as affects its settlement, is not regarded as left with the debtor." Knappen, J., in Escanaba Traction Co. v. Burns, 257 Fed. 898, 904 (1919).

Accordingly, in most jurisdictions the debtor after notice of a partial assignment cannot pay the assignor any of the assigned amount. But in a few jurisdictions he may do so and, if he does not pay, the assignor may sue him and get a judgment for the full amount. In Thiel v. John Week Lumber Co., 137 Wis. 272, 276 (1908), Winslow, C. J., said of partial assignments:

"The debt could not be split up by the creditor against the debtor's consent, even by formal assignments, because the debtor had the right to pay its debt in solido, and to refuse to be subjected to claims or suits by various claimants. In the present case the debtor did so refuse, and could at any time have discharged its debt to the plaintiff by paying him the whole sum due, without regard to the rejected orders or liability to their holders. Skobis v. Ferge, 102 Wis, 122-132, 78 N. W. 426. Hence it seems clear that, the defendant having refused to consent to partial assignments of the debt, the creditor could unquestionably maintain his action to recover the entire debt. Otherwise a situation would be presented where nobody could recover it."

Indeed, in Missouri it seems that the partial assignee has no standing in

## ELLEN G. COOK *v.* CHARLES M. LUM, ADMINISTRATOR.

(Supreme Court of New Jersey, 1893. 55 N. J. L. 373, 26 Atl. 803.)

BEASLEY, C. J. This case stands before the court on a special verdict, and the problem to be solved involves the legal efficacy of a gift of money.

The circumstances were these: The deceased, Ellen G. Green, who is here represented by her administrator, who is the defendant on this record, deposited with one Kase the sum of $2,316, who thereupon gave to the said Ellen a paper containing in column eight several sums in figures, which were footed up and amounted to the sum just specified. The paper was dated "July 26th, 1890," and there was no other writing upon it.

After finding the foregoing facts, the special verdict proceeds as follows: "And the jurors aforesaid further say that except said paper, said John H. Kase never gave to said Ellen Green any evidence of indebtedness from himself to her for said deposit. * * * That said Ellen Green did actually deliver said paper into the hands of said Ellen G. Cook shortly before her, said Ellen Green's, death. That said Ellen Green delivered said paper into the hands of said Ellen G. Cook, with the intention of thereby giving to said Ellen G. Cook, for herself, the

equity in the absence of consent of the debtor to the partial assignment. Burnett v. Crandall, 63 Mo. 410 (1876). The holding seemingly was dictated by the court's fear that it was the only way to prevent creditors from splitting debts up too much by partial assignments. See also Bosworth v. Jacksonville Nat. Bank, 64 Fed. 615 (1894). That cities in Pennsylvania need not recognize partial assignments, see Vetter v. Meadville, 236 Pa. 563 (1912).

In Missouri the partial assignee's only hope is to get the debtor to assent to the partial assignment and split the original debt into two or more debts. Taylor v. Dollins (Mo. App.), 222 S. W. 1040 (1920). See also Friedman v. Griffith (Mo. App.), 196 S. W. 75 (1917), where the debtor's failure to object on notice was given the same effect.

But the sounder doctrine is to protect the partial assignee in equity even against an unwilling debtor. In Todd v. Meding, 56 N. J. Eq. 83, 92 (1897), Pitney, V. C., said:

"It is too late to dispute the proposition that a part of a debt may be effectually assigned in equity. The qualifying rule that such an assignment cannot be enforced by action at law without the acceptance or assent of the debtor does not vary the result. The qualifying rule avails the debtor only to the extent that if he wishes to dispute the existence of the debt he is entitled to make his defense in a single suit, and cannot be subjected to several suits at law. But it does not justify him in ignoring the partial assignment, after he has notice of it, and in paying the whole sum to the original creditor. To so hold would be to nullify the doctrine which sanctions partial assignments. The rule is well settled that the payment of the whole debt to the original creditor, after notice of an assignment of part of it, will not avail the debtor when sued in equity by the assignee. If the debtor is in any doubt as to the right of the person claiming to be assignee, as against the assignor, he has an easy remedy. He can inquire of the original creditor and alleged assignor, and if he denies the assignment the debtor may file a bill of interpleader."

money in the hands of said John H. Kase." It was further found that Kase was not informed of the gift until several weeks after the death of the donor.

The general legal principle regulating the subject of gifts of choses in action has long been established. It is to the effect that with respect to things both tangible and intangible, mere words of donation will not suffice. With regard to the former class—that is, things corporeal—there must be, in addition to the expression of a donative purpose, an actual tradition of the *corpus* of the gift whenever, considering the nature of the property and the circumstances of the actors, such a formality is reasonably practicable. In some instances, when the situation is incompatible with the performance of such ceremony, resort may be had to what has been called a symbolical delivery of the subject.

Touching things in action, as there can be no actual delivery of them, the legal requirement is, that the donor's voucher of right or title must be surrendered to the donee. Such surrender is deemed equivalent to an actual handing over of things corporeal.

To this extent the law of the subject is neither doubtful nor obscure. The difficulty supervenes as soon as the attempt is made to apply these rules to the ever-variant conditions of the cases that are being presented for judicial examination. Even when the thing given has been a personal chattel, whether certain acts show a purpose to give consummated by a delivery of it, has often been, and doubtless will be, a vexed question. The uncertainty in construing the circumstances is even greater when we have rights of action to deal with. There are a multitude of decisions which demonstrate the embarrassment inherent in this class of cases; but as these decisions, while all acknowledging the rules just indicated, are in truth nothing more than interpretations, respectively, of the facts of the particular case, and as such facts are unlike the juncture now present, it would serve no useful purpose to review or cite them in detail. There is no observed precedent, so far as circumstances are concerned, for the matter now before us. Many of these decisions may be found in the Encyclopædia of English and American Law, tit. "Gifts," and any person who will examine this long train of cases will at once perceive that the principal difficulty has been to decide whether the evidence in hand in the given case showed a delivery of the subject of the gift in a legal point of view.

But this was a maze not without its clue, for the cardinal principle as to what constituted a delivery that would legalize a gift was on all sides admitted and was generally applied. The test was this, that the transfer was such that, in conjunction with the donative intention, it completely stripped the donor of his dominion of the thing given, whether that thing was a tangible chattel or a chose in action. The rule does not require that the title of the donee should be formally perfect, although in the earliest decisions this appears to have been indispensable,

but now the law is otherwise settled. Thus, the delivery, with donative intention, of non-negotiable notes or bonds affords an apt illustration of the rule in both of its aspects. Such gifts are admittedly valid, although the title of the donee is not ceremoniously perfect, as it wants the finishing touch of a written assignment; but the transaction is validated on the ground that it is possessed of the all-important quality of depriving the donor of all control over the property. After the delivery of such bond or note, the donor can exercise not a single act of ownership with respect to it; he cannot sue upon it nor collect it, nor regain its possession. And it is this absolute abnegation of power that, in a legal point of view, makes the transaction enforceable.

This is the crucial test, and if it be applied to the case in hand this donation is not to be sustained. The reason is that the donor parted with nothing that was essential to his own dominion over the moneys in question. After she had transferred the slip of paper in question her dominion over her deposits remained plainly intact. The paper was in no sense a voucher of the receipt of the moneys; they could have been collected without its production; nor was it necessary to a suit for their recovery. It is impossible to believe that the parties intended this slip of paper, which contained nothing but a line of figures and an addition of them, as a testimonial showing the transaction to which it immediately appertained. It does not appear how the donor became possessed of this paper, but construed intrinsically it has the appearance of having been used for the temporary purpose of showing the aggregate of the several sums on deposit, and it carries on its face no indication whatever that it was drawn or given as a voucher of the indebtedness of the person making it. The delivery of so insignificant a paper as this cannot, in our opinion, operate to legalize the transaction in question.

*The defendant is entitled to judgment.*[45]

[45] But see Claytor v. Pierson, 55 W. Va. 167 (1904), where a good gift causa mortis was held to exist where the paper handed over read "Sewell, W. Va., August 26th, 1899. $1100. Eleven hundred dollars. Received of William Claytor for safe keeping. L. C. Claytor."

In the principal case of Cook v. Lum the requirement as to gifts that there must be delivery was not met by handing over anything which the court thought sufficiently representative of the chose to serve as a symbol of it for delivery purposes. Where the chose has written embodiment, the great weight of authority upholds a gift by delivery of the writing.

In Commonwealth v. Crompton, 137 Pa. St. 138, 147-148 (1890) where the question was as to the validity of an attempted gift of a bond and various railroad stocks through the delivery of a box containing the bond and certificates, McCollum, J., said:

"It is now settled that a valid gift of non-negotiable securities may be made by delivery of them to the donee without assignment or indorsement in writing. This principle has been applied to notes, bonds, stock and deposit certificates, and life insurance policies. * * * In Walsh's App., 122 Pa. 177, we refused to extend it to a depositor's bank-book, but acknowledged 'that, in the case of

## LEE *v.* MAGRATH.

(High Court of Justice in Ireland, Common Pleas Division, 1882. L. R. 10 (Ireland) 45.)

Special case. Question reserved for the decision of the court whether the indorsement and delivery of the note sued on vested in plaintiff the right to maintain this action.

notes and other instruments payable to order, a delivery accompanied by words importing a present absolute gift would invest the donee with the ownership of the fund.' The bankbook was regarded as on the same footing as a book of original entries, and the mere delivery of it to the donee as insufficient to pass any title to the accounts appearing upon it. But 'a certificate of deposit is a subsisting chose in action, and represents the fund it describes, as in case of notes, bonds, and other securities, so that delivery of it as a gift constitutes an equitable assignment of the money for which it calls.' Baskett v. Hassel, 107 U. S. 602. * * *

"The shares of stock are choses in action, and the certificates evidence of the title to them. Slaymaker v. Bank, 10 Pa. 373. Why may not a delivery of the certificates, coupled with words of absolute and present gift, invest the donee with an equitable title to the stock, which the donor or a volunteer cannot successfully assail? A stockholder may clothe another with the complete equitable title to his stock without compliance with the forms printed by the corporation: United States v. Vaughan, 3 Binn. 394; Commonwealth v. Watmough, 6 Wh. 117; Building Assn. v. Sendmeyer, 50 Pa. 67; Finney's App., 59 Pa. 398; Water-Pipe Co. v. Kitchenman, 108 Pa. 630."

See also Herbert v. Simson, 220 Mass. 480 (1915) holding that there was a good gift of shares of stock by delivery of the unindorsed certificate of stock to the donee, although there was printed on the certificate the statement that the shares were "transferable only on the books of the company." The court, by De Courcy, J., said that the donee did not, of course, acquire "the legal title to the shares—the ownership in the sense that no further act was required to perfect her right," but that she did acquire, "as between herself and the donor the equitable title to the shares, and some legal as well as equitable rights. The gift was complete and not inchoate; and a court of equity has jurisdiction to compel a formal assignment by the executor of the donor and a transfer on the books of the corporation." With reference to the provision printed on the certificate that the shares were "transferable only on the books of the company" it was said that it "affects the shareholder's relation to the corporation only, and not her relation to a third party who has become equitably possessed of the stock. See cases cited in Talbot v. Talbot [32 R. I. 72], Ann. Cas. 1912 C, 1235, note."

An occasional dissent is found. For instance, New Jersey's attitude toward gifts of certificates of stock is that:

"A delivery of a certificate of stock without actual transfer or a written assignment or power to transfer, although accompanied with words of gift, does not constitute a valid gift inter vivos. Matthews v. Hoagland, 48 N. J. Eq. 455." Backes, V. C., in Heyes v. Sullivan, 88 N. J. Eq. 165, 167 (1917).

And in England as to assignments not operating under section 25 of the Judicature Act there is a question. See George P. Costigan, Jr., Gifts Inter Vivos of Choses in Action, 27 Law Quar. Rev. 326.

For opposing English views as to the necessity of consideration for a valid assignment of a chose in action, see Edward Jenks, Consideration and the

LAWSON, J.[46] * * * The action was brought by the plaintiffs, alleging they were equitably entitled to recover the amount of a promissory note for 100*l.*; it was made by the defendant to Mary Anne Ma-

Assignment of Choses in Action, 16 Law Quar. Rev. 241, and Sir W. R. Anson, Assignment of Choses in Action, 17 Law Quar. Rev. 90.

With reference to intangible choses not evidenced in writing, as in the case of a chose like that in the principal case of Cook v. Lum, it has been suggested that only delivery of a deed of gift could serve to effectuate an irrevocable gift of the chose. 1 Williston on Contracts, § 440. But there would seem to be no reason today for regarding a sealed assignment as any more representative of the chose for delivery purposes than is an unsealed assignment, and if the delivery requirement is met and the donative intent is operative, there is no need to have consideration, since gifts require none, and no need to have that which makes consideration in bargains unnecessary, namely, a seal.

The general American view is that "a good and effectual equitable assignment of a chose in action may be made by parol" and that "courts of law take notice of and give effect to such assignments." Grover v. Grover, 24 Pick (Mass.) 261 (1837), where a negotiable promissory note was delivered by way of gift without endorsement and the gift upheld. The only questions in the American cases, outside of the few jurisdictions which follow England, is what must be delivered to evidence the gift and whether a gift of a parol chose in action is necessarily revocable at the option of the donor prior to collection by the assignee, novation entered into by him with the debtor, etc. See Oliver S. Rundell, Gifts of Choses in Action, 27 Yale L. J. 643. Despite the assertion that an assignment "sounds in contract and requires for its validity the same requisites as any contract" (1 Williston on Contracts § 440, p. 841), it would seem at this stage of legal history fairer to treat an assignment as a grant of an equitable interest in the chose with a legal power of attorney and as sounding in conveyance, therefore, rather than in contract. Consideration is immaterial if something sufficiently representative of the intangible chose is delivered, and an unsealed written assignment is sufficiently representative or symbolic to answer that purpose. That apparently was Kent's opinion. See 3 Kent Com.* 439, where it is stated that, "If the thing given be a chose in action, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed." An unsealed assignment, aided by the statutes which dispense with the necessity of a seal for a deed, seems to be growing in favor as a means of effectuating an irrevocable gift of a chose in action. See Burkett v. Doty, 176 Cal. 89 (1917); Lipson v. Evans, 133 Md. 370 (1918); McGaric v. Cossum, 76 N. Y. Supp. 305 (1902). Compare In re Cohn, 176 N. Y. Supp. 225 (1919). Cases like Cook v. Lum, the principal case, are not necessarily contra, because it seems fair to say that in them nothing that is really representative of the chose is delivered. It should be added that even if an unsealed assignment will represent the chose for gift delivery purposes in general, some courts will still require a better method of transfer to be resorted to if it is possible to have one. See Allen-West Com. Co. v. Grumble, 129 Fed. 287 (1904). But most courts will doubtless come to agree with Shaw, J., in Adams v. Merced Stone Co., 176 Cal. 415, 418 (1917) that "In the case of a chose in action not evidenced by a written instrument, the only means of obtaining control that is recognized by the authorities is an assignment in writing [whether sealed or unsealed], or some equivalent thereof."

On gifts of debts of third person not evidenced by commercial instrument, see note in 3 A. L. R. 928.

[46] The statement of facts and parts of the opinion are omitted.

grath, for 100*l.*, payable in two years; it did not contain the words or order, and was therefore not a negotiable instrument so as to entitle the indorsee to sue at law. The payee indorsed it thus: "I indorse the within promissory note for £100 to my sister Margaret Lee." She handed over to her the note at the same time, and the case states that the indorsement was made in consideration of natural love and affection, and was made with the intention of vesting in Mrs. Lee the beneficial ownership of the money represented by the said note.

Mary Anne Magrath, the payee, died, and by her will bequeathed all the moneys she was entitled to to the defendants, who obtained probate of her will; they are sued as makers of the note; and the case states that after the death of Mary Anne Magrath, and before action brought, the defendants had express notice in writing of the assignment: and the question for the court is, Whether the indorsement and delivery, under the circumstances above said, after express notice in writing, vested in the plaintiff the right to maintain this action?

The case turns upon the 28th section of the Judicature Act, Sub-section 6, which is in these terms: "Any absolute assignment by writing under the hand of the assignor of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, shall be and be deemed to have been effectual to pass and transfer the legal right to such debt or chose in action from the date of such notice."[47]

*Prima facie*, therefore, this case would seem to fall within the words of this section. There has been an absolute assignment of the debt, and notice has been given to the debtor, and no question arises from any other notice having been given; but it has been very strongly argued for

[47] § 28, sub-sec. 6 of the Supreme Court of Judicature Act of 1877 for Ireland (40 and 41 Vict. C. 57) is word for word the same as § 25, sub-sec. 6 of the English Supreme Court of Judicature Act of 1873 (36 and 37 Vict. C. 66), namely:

"Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt, or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice, under and in conformity with the provisions of the acts for the relief of trustees."

the defendant that this is a voluntary and incomplete gift, and such as before this Act a Court of Equity would not give any assistance to make effectual; and we have been referred to all the authorities in support of that view, with which we are familiar.

These authorities deal with two classes of cases, which, to avoid confusion, must be kept distinct: First, those where the subject matter is capable of being legally transferred or assigned; and secondly, those in which the subject matter cannot be made the subject of legal transfer, but can only be assigned in equity, the legal interest remaining in the assignor. The rule to be drawn from all the authorities is, that in the first class, if the transfer is imperfect and incomplete, and if the assignor has not transferred the legal interest, a Court of Equity will not interfere to aid that imperfect transaction, and, at the instance of a volunteer, compel its completion, unless the assignor has constituted himself a trustee of the legal interest for the donee; and the cases further go on to say that if the gift was intended to be effectuated by a legal transfer which is imperfect and defective the court will not from that circumstance alone hold the intended transfer to amount to a declaration of trust, unless there be something more to indicate that intention on the part of the assignor.

In the second class of cases, those in which the subject matter is incapable of legal transfer, it is not the law that the want of a legal transfer invalidates the transaction, for that would be to lay down that no chose in action could be made the subject of a voluntary gift, but that the assignor must have done everything in his power to complete the transfer, and left nothing material undone. This case falls within the second class, and I therefore asked the counsel who argued very ably for the defendants, what more could Mary Anne Magrath have done in this case, or what remained undone? The instrument was incapable of legal transfer, not being a negotiable instrument. She signs a writing expressing her intention to give it to the plaintiff, and the learned judge states such was her intention, and she delivered over the security. In answer to my question it was said that she might have executed a deed containing a power of attorney; but the cases show that any instrument in writing will pass a chose in action as effectually as an instrument under seal; indeed it might pass by words if the evidence was clear; but this Act very wisely requires the assignment to be in writing. I am unable to see the virtue or necessity of a power of attorney, since, as the case states she intended to give all the beneficial interest in the money to the assignee, she would have been entitled to use her name in suing for it, upon giving an indemnity; and it would be indeed strange to hold that a chose in action could not be assigned voluntarily, save by deed containing a power of attorney.

* * * In the words of Lord Justice Turner [in Milroy v. Lord, 4 De G. F. & J. 264] the settlor must have done everything which, according to the nature of the property comprised in the settlement, was

necessary to be done in order to transfer the property. If this note were negotiable, a mere letter giving it over, unaccompanied by indorsement and delivery, would not be sufficient; but this note was only capable of being equitably assigned; that has been done in writing, and the instrument delivered over to the donee. * * *

[*Judgment for plaintiff.*[48]]

[48] The Court of Appeal in Ireland reversed the judgment (Lee v. Magrath, L. R. 10 (Ireland) 313 (1882)), but on the ground that the appointment of one of the makers of the note as executor of the payee extinguished the debt prior to the service of notice of assignment and prevented a legal assignment under the Judicature Act and that plaintiffs, debarred from suing as assignees, did not prove a declaration of trust entitling them to sue as *cestuis que trust*. This case furnishes another instance of the practical importance to the assignee of the giving of prompt notice of an assignment.

Harding v. Harding, 17 Q. B. D. 442 (1886), is a holding that a voluntary assignment by way of gift is within sec. 25 (6) of the Judicature Act. There the assignment was written at the foot of an account sent by executors to the donor as residuary legatee, and, the account with the written assignment being sent to the donee, the gift of the balance of money shown due by the account was held complete.

In In re Westerton, [1919] 2 Ch. 104, in upholding the testator's assignment by way of gift to Mrs. Gray of a bank deposit receipt for £500 marked "not transferable" as an absolute assignment under section 25 of the Judicature Act, despite the fact that notice of the assignment was not given to the bank until after the assignor's death, Sargent, J. said:

"Another point which I ought to mention is that no notice of the assignment was given to the bank at the time; but it was not disputed by Mr. Paterson [of counsel for the residuary legatees] that the mere omission to give notice was of no consequence so long as notice was given before action brought. That omission in no way affected the efficacy of the assignment as between the donor and the donee, though, if the bank, having had no notice of the assignment, had paid the money to the testator, that payment would have been a good payment as against the donee; and in fact the interest on the deposit note was from time to time, as I gather, credited to the credit of the testator's current account. That was a good credit as against Mrs. Gray, and Mr. Gover [of counsel for Mrs. Gray] does not claim any interest that was so credited." * * *

"Then it was urged by Mr. Paterson that the object of s. 25 sub-s. 6, was only to alter procedure and not to make any difference in the extent or nature of those things that were liable to be equitably assigned. I agree with that argument, though not with the conclusion which he based on it. It does seem to me that the aim of the sub-section was to reform procedure and to make it unnecessary for an assignee who had an out and out assignment to go through the double process that was formerly necessary in the case of an unwilling assignor—that is to say, an assignor who was afterwards unwilling to lend his name—of first proceeding in equity to compel the use of the name of the assignor and then proceeding to sue at law in the name of the assignor. To that extent, as I have said, the position of the assignee as a question of procedure was improved; he could come at once at law, and come not in the name of the assignor but in his own name as assignee. But if that is so and by means of that simplification of procedure the assignee has been relieved from taking preliminary proceedings in equity, there seems to me to be nothing very startling in the further conclusion, that the assignee has also been relieved from the terms which equity imposed as a condition of assisting him in obtaining the legal right, if at law the question of consideration was regarded

## EBEL *v.* PIEHL.

(Supreme Court of Michigan, 1903. 134 Mich. 64, 95 N. W. 1004.)

CARPENTER, J.[49] Defendant is plaintiff's brother. In 1895 their father, who lived in Hanover, Canada, transferred the defendant property consisting of a house, two lots, notes, and cash, of the aggregate value of $1,500. According to plaintiff's testimony, defendant, on his return, said he would pay her $400 at their father's death. Subsequently the three—the father, the plaintiff, and defendant—had a conversation about the matter at plaintiff's residence. At this time defendant asked his father: "What do you want me to give Kate [the plaintiff] when you are dead?" The father replied: "I told you you were to give her $400 at my death. That was understood. * * * I want you to give her writings." The defendant thereupon said: "I didn't think you told me, but I should have done it anyway. * * * That will be all right, father. I will see to that"—and, turning to plaintiff, said in English (the former conversation having been in German): "I don't see what you want to bother father about that money for. I am good for it; I am worth the money; and I told you I would pay it." After the father's death, defendant discharged a mortgage of $196 which he held against plaintiff's property, and refused to pay the balance. Plaintiff brought this suit, on the common counts in assumpsit, to recover the balance claimed to be her due. Defendant testified that neither he nor his father ever agreed that plaintiff should be paid as she claims. The case was submitted to the jury, who found for the plaintiff. Defendant contends

as wholly immaterial; and I think that it must have been so regarded for this reason, that at law the action was brought in the name of the assignor, so that there was no question at all of any transaction between the assignor and the assignee under which the question of consideration could arise. If that be so and if since the Judicature Act 1873, the assignee can come directly in his own name and sue as effectually as he could have done in the name of the assignor, it appears to me that there is no reason for continuing against the assignee those terms which were imposed by equity as a condition of granting relief. The position of the assignee has in that respect been improved once and for all by the sub-section of the Judicature Act in question, which has conferred on him a legal right to sue, and in my judgment I ought not to consider that legal right as being in any way dependent upon the question whether the assignment was made for valuable consideration or not, provided it complied with the express conditions of that sub-section. In my judgment, therefore, Mrs. Gray is entitled to the sum of £500 in question with interest from the date of the death of the testator."

What is ruled in In re Westerton, *supra*, as to assignments under the Judicature Act seemingly may possibly be adopted as the law as to assignments which do not come under the Act, in tacit disregard of the decisions of Edwards v. Jones, 1 My. & Cr. 226 (1836) and Milroy v. Lord, 4 De G. F. & J. 264 (1862) and in the reaffirmation and extension of Fortescue v. Barnett, 3 My. & K. 36 (1834). See George P. Costigan, Jr., Gifts Inter Vivos of Choses in Action, 27 Law Quar. Rev. 326, 337-340.

[49] Part of the opinion is omitted.

that, on the case made by the plaintiff, a verdict should have been directed in his favor, and that the court erred in charging the jury as hereinafter stated.

We think plaintiff made a case for the consideration of the jury. If it is true that, when the defendant made the promise testified to by plaintiff, he had already received the property under an agreement which imposed no other obligation upon him than to "furnish his father with money for his own personal use as long as he lived," there was no consideration for defendant's promise, and it could not, for that reason, be enforced. But if the testimony of plaintiff is credited, defendant received the property upon a promise that on his father's death $400 should be paid to plaintiff. This created a chose in action—a chose in action which, it is true, belonged to the father. Though intended for plaintiff's benefit, it could not be enforced by her. Pipp v. Reynolds, 20 Mich. 88. The father might, however, transfer it to her; and, if so transferred, she could, as his assignee, enforce it. In our judgment, a fair construction of the conversation which occurred between the parties to this suit and the father after the property was received by defendant warrants, if it does not compel, the conclusion that the father did transfer to plaintiff this cause of action. This is not the case of a gift *in futuro,* and therefore is not subject to the law governing such gifts. Between the defendant and his father, it was an existing cause of action. Between the father and the plaintiff it was a gift—a gift of a promise to pay money in the future—of an existing cause of action; but the gift itself was a gift *in præsenti.* When the defendant, who had promised to pay the money (a promise evidenced by no writing), at the request of the father, to whom the promise was made, agreed with the sister, for whose benefit the money was to be paid, that it should be paid to her, there was all the delivery possible under the circumstances, and a delivery sufficient to answer the requirements of law. See article on "Novation," by Prof. J. B. Ames, 6 Harv. Law Rev., at page 189; McFadden v. Jenkyns, 1 Phillips, 153; Meert v. Moessard, 1 Moore & Payne, 8. It is true that the learned circuit judge, in charging the jury, treated the gift as a gift *in futuro,* and said that it was revocable by the father. This, we think, was error; but it was prejudicial to the plaintiff, and not to the defendant.

We think, however, the court erred in charging the jury as follows: "Was the property turned over to Dan with the express understanding between Dan and his father that at the old man's death Dan should pay the plaintiff $400? * * * If you find that there was such an understanding as is claimed by the plaintiff, and old Mr. Piehl, until his death, continued of that mind—that is, the desire to provide and give $400 to Catherine at his death—your verdict will be for $204 * * * and interest." According to this charge, plaintiff is entitled to a verdict even if her father did not assign to her the cause of action against defendant. This, as we have already shown, was error. The error in

this part of the charge is not corrected elsewhere. We cannot assume that this error was not prejudicial, for, if defendant's testimony was believed, the assignment did not take place as plaintiff claimed. * * *

For the error pointed out, the judgment of the court below will be reversed, and a new trial granted.[50]

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## BRICE *v.* BANNISTER.

(Court of Appeal, 1878. L. R., 3 Q. B. D. 569.)

Action on an order for £100 given plaintiff by one Gough and drawn on defendant.

The plaintiff is a solicitor at Bridgwater, and the defendant is a shipowner residing at Barrow-in-Furness. The defendant had entered into a contract with John Gough, dated May 17th, 1876, by which Gough agreed to build for the defendant a vessel on certain terms. The material part of the contract is as follows: "The vessel to be completed by December 30th, 1876, for the sum of £1375. Payments to be made as follows:

| | |
|---|---|
| When keel and stern post up and floors across . | £250 |
| When in frame . . . . . | 250 |
| When planked . . . . . | 400 |

and the remainder when completed and handed over with Lloyd's, Board of Trade, and builder's certificates."

The contract was in the course of being performed by John Gough between the date of the contract, May 17th, 1876, and the completion of the vessel, February 11th, 1877. The first instalment under the contract became due on June 22d, 1876, the second instalment became due on October 11th, 1876, and the third instalment became due on November 23d, 1876, and the remainder was due on the completion of the vessel, February 11th, 1877.

[50] To the same effect, see Dinslage v. Stratman (Neb.), 180 N. W. 81 (1920). With these cases should be considered those where the destruction of a note with intent to discharge the maker does discharge him. See, for instance, Darland v. Taylor, 52 Ia. 503 (1876), where the court treated the destruction as a gift of the chose with symbolical delivery. In other words, the court treated the happening as an assignment by way of gift with constructive delivery, though the court spoke of gifts and not of assignments. Day, J., said: "The authorities hold that the delivery [to establish a gift] may be actual or symbolical. * * * The destruction of the notes, together with the repeated declarations of the deceased that she did not intend the defendant to pay the debt constitute a sufficient delivery under the authorities cited." The reasoning is, of course, artificial. The doctrine probably came over from sealed obligations, which being obligations in themselves were ended by intentional destruction, as originally they were by unintentional, and can be defended only as a desirable departure from principle. See also Denunzio's Receiver v. Scholtz, 117 Ky. 182 (1903).

Gough was unable to finish the vessel without assistance from the defendant, and therefore during the progress of the building the latter advanced to him sums of money, which were necessary to enable him to pay the wages of his workmen employed in building the vessel and to pay for the materials used in constructing her. The total amount of these advances upon October 27th, 1876, was £1015. That sum was in excess of the amount then due pursuant to the contract.

On the 27th of October, 1876, Gough, being indebted to the plaintiff to an amount exceeding £2000, gave the plaintiff an order addressed to the defendant in the following terms:

"I do hereby order, authorize, and request you to pay to Mr. William Brice, Solicitor, Bridgwater, the sum of 100*l.* out of moneys due or to become due from you to me, and his receipt for same shall be a good discharge.

On the same day, the 27th of October, 1876, the plaintiff gave the defendant written notice of the order in the following terms:

"I hereby give you notice that by a memorandum in writing dated October 27th, 1876, John Gough, of this place, authorized and requested you to pay me the sum of £100 out of money due or to become due from you to him, and my receipt for the same shall be a good discharge."

The defendant acknowledged the receipt of the notice, but declined to be bound by it as an authority to pay £100 to the plaintiff.

Subsequently to the receipt of the notice, the defendant paid to Gough on account of the building of the vessel, pursuant to the contract, sums far exceeding £100; and unless the defendant had made such payments to Gough, he would not have been able to complete the vessel.

On these facts it was contended by the defendant's counsel that the judgment ought to be entered for the defendant, on the following grounds:

1. That at the time of giving the order there was nothing due to Gough, and therefore there was nothing which could be assigned by him to the plaintiff by virtue of the Judicature Act, 1873, § 25, sub-sec. 6.[51]

2. That there was no binding acceptance of the order by the defendant.

3. That had not the defendant made advances to Gough or to his creditors, other than the plaintiff, Gough would never have been in a position to become a creditor of the defendant. Lord Coleridge, C. J., directed that judgment be entered for the plaintiff for £100. The defendant appealed.

COTTON, L. J.[52] The letter of October 27th is a good equitable assignment by Gough to the plaintiff of money to the extent of £100, which

[51] For that provision, see note 47, *ante*, this chapter.

[52] The statement of facts is slightly abbreviated and the opinion of Lord Coleridge, C. J., in the court below is omitted. Lord Coleridge decided that § 25 of the Judicature Act applied.

"The decision of Lord Coleridge, C. J., in Brice v. Bannister, 3 Q. B. D. 569,

might become due under his contract with the defendant. To this extent he thereby anticipated the moneys payable from the defendant to him, and Gough became incompetent to deal with these moneys to plaintiff Brice's prejudice, and the defendant, after notice of the letter, could not come to any agreement with Gough dealing with or anticipating these moneys to the prejudice of the plaintiff. At the time when notice of the letter of October 27th was given to the defendant, the balance of the contract price which remained unpaid exceeded £100, and the ship has been completed under the contract. The question is whether in substance what has been done by Bannister and Gough was not a dealing with the moneys payable under the contract; I think it was. The contention of the defendant was that though, after notice of the assignment to the plaintiff he had paid moneys exceeding £100 to Gough, he did so not in payment of the price or under the contract, but that the advances were necessary in order to secure the completion of the ship. But this is not a case where the builder having failed in his contract the person for whom he was building put an end to the contract and completed the work. In such a case, the builder, if he in fact completed the work, would be employed as agent or servant doing the work for the owner of the vessel. Here the builder completed the work as contractor building under a contract with the defendant, and this is the distinction between this case and Tooth v. Hallett, L. R. 4 Ch. App. 242, where the work was completed after the bankruptcy of the builder by his trustee out of his own moneys, and the person for whom the work was done had power to take possession and employ any one to complete the building, and in effect he did so, and the court allowed the expenditure against the equitable assignee. It is probable that Gough would not, unless he had obtained the advances made by the defendant either from him or from some other person, have been able to complete the vessel; but a charge for the money lent after October 27th, by any other person for the purpose of paying wages or buying material necessary for the completion of the ship, and in that sense necessary to enable the money to become due to Gough, could not be preferred to the plaintiff's claim. Moneys paid for the same purpose to Gough by the

that the case fell within the 25th section, appears to me to be open to question. The assignment purported to be by way of charge only. It was a direction to pay the 100 *l.* out of money due or to become due. No doubt, it purported to be a charge of an unredeemable sum of 100 *l.*; but still it was a charge. The section speaks of an absolute assignment of any debt or other chose in action. It does not say, 'or any part of a debt or chose in action.' It appears to me as at present advised to be questionable whether an assignment of part of an entire debt is within the enactment. If it be, it would seem to leave it in the power of the original creditor to split up the single legal cause of action for the debt into as many separate legal causes of action as he might think fit. However, it is not necessary to decide the point in the present case, and I leave it open for future consideration." Chitty, L. J., in Durham Bros. v. Robertson, [1898] 1 Q. B. 765, 774.

defendant cannot, in my opinion, stand in a better position. It was urged that the assignee of a chose in action takes subject to all equities. But these must be equities existing or arising out of circumstances existing before notice is given of the assignment; the advances made by the defendant were in no way sanctioned by the contract, and in no sense an equity between Gough and the defendant existing or arising from circumstances existing at the date of the notice to the defendant of the assignment to the plaintiff. The plaintiff was assignee for value of the moneys payable under the contract, without any deduction for cost of materials or other costs of construction. The defendant, for his own purposes, determined not to complete the ship himself, but to let Gough do so under the contract. To enable him to do so he, after notice of the assignment to the plaintiff, paid money to Gough so as to exhaust the contract price. By so doing, he could not, in my opinion, defeat or prejudice the plaintiff's right, and the judgment appealed from must in my opinion be affirmed.

BRETT, L. J. I am sorry to say that, with great hesitation, I differ from the judgment which has been read. I consider the principle involved in this case to be of the highest importance. The defendant and Gough were parties to a contract for building a ship, the price of which was to be paid by installments at different stages of the building, and the ship was to become the property of the purchaser according to the different times of the payments. Before the ship was finished the builder, through want of funds, became unable to proceed with the work. I do not mean to say that there is any finding that the defendant as purchaser was compelled to take possession of the ship if he did not advance money; but practically if he did not advance money the ship must have been thrown upon his hands, and he must have completed the building of the ship, a most onerous charge upon him. It is an ordinary mode of meeting a difficulty of this kind, an ordinary mode of transacting business, either that the purchaser shall take the ship into his own hands, or that he and the builder shall agree to modify the contract, so that he, instead of paying the purchase-money after a stage of work is completed, should advance the money beforehand; or, as it may be put in another way, the purchaser, when the builder is in difficulties, before the time of payment fixed by the contract has arrived, advances money upon the terms that he is to repay himself out of the money which he would have to pay when a particular stage is completed. It is true that the builder, in consideration of money previously advanced by the plaintiff, made an equitable assignment to him of the money which would become due to him at a following stage, and he afterward did procure an advance before the appointed time from the defendant, in order to enable him to complete the ship. It is true that the defendant had notice of this so-called equitable assignment; but it was a matter between the builder of the ship and a third person, over which the defendant, the purchaser of the ship, had no

control; and the question is whether we are to allow an equitable doctrine to hamper and impede an ordinary business transaction. I cannot bring myself to agree that, either by virtue of the Judicature Act or otherwise, business transactions are to be hampered by any doctrine which will prevent a man from doing what he otherwise might do, merely because something has happened between other parties. I would therefore confine this remedy to a case where a debt has actually accrued due from one person to another, or at least I certainly would confine it simply to the case where nothing remains to be done by the person who is the assignor. In that case nothing remains to be done by him but to receive money from the person who is to pay him, and that money he makes over to the equitable assignee. But I cannot bring my mind to think that this doctrine should be extended, so as to prevent the parties to an unfulfilled contract from either cancelling or modifying, or dealing with regard to it in the ordinary course of business. I quite agree that they ought not to be allowed to act *malâ fide* for the purpose of defeating an equitable assignee; but if what they do is done *bona fide* and in the ordinary course of business, I cannot think their dealings ought to be impeded or imperilled by this doctrine, and it seems to me the purchaser of a ship and the builder might have cancelled the contract even after this assignment. Why may they not modify it? If they cannot modify it, it seems to me to denote a state of slavery in business that ought not to be suffered; but I apprehend the parties to the contract can modify it. If they can modify it, why may they not act so that no money shall be due from the defendant in this case to the plaintiff? It seems to me there never was any money due to the assignor of the plaintiff. Before that money became due, it was absorbed either by an advance made *bona fide* by the present defendant to the builder, or by a modification of the contract. The builder never could have sued this defendant for money due to him as for a debt; and therefore it seems to me no equitable assignment ought to be allowed to charge the defendant and make him practically pay twice over.

In what cases has this equitable doctrine been applied? Suppose a man writes upon paper, "I promise to pay A. B. the sum of £100 on demand:" the document, not being payable to bearer or to order, is not a promissory note, assignable or negotiable by statute or the law merchant. Has any Court of Equity ever held, that if a person received such a paper it could be sued upon after being handed over to a third person? But this equitable doctrine would make a promissory note not payable to bearer an order transferable to a third party, without any writing upon it, and I apprehend that is directly contrary to all practice, custom, and law, and shows that this doctrine is not to be allowed to control or hamper ordinary business transactions.

I am, therefore, of opinion in this case the doctrine ought not to be allowed to hamper and impede the ordinary transactions which oc-

curred between the defendant and the builder. The defendant had a right, with the consent of the builder, to modify this contract, and he modified it so far and to such a degree that no money was ever due from the defendant to the builder, and therefore the equitable assignment by the builder to the plaintiff had no legal or binding effect whatever. Therefore I am of opinion that the defendant in this case is entitled to succeed.

BRAMWELL, L. J. I have reluctantly come to the conclusion that this judgment should be affirmed. I say reluctantly, because I feel the great force of my brother Brett's observations; it does seem to me a strange thing and hard on a man, that he should enter into a contract with another and then find that because that other has entered into some contract with a third, he, the first man, is unable to do that which it is reasonable and just he should do for his own good. But the law seems to be so; and any one who enters into a contract with A. must do so with the understanding that B. may be the person with whom he will have to reckon. Whether this can be avoided, I know not; maybe, if in the contract with A. it was expressly stipulated that an assignment to B. should give no rights to him, such a stipulation would be binding. I hope it would be. But as there is no such clause in the contract here, the plaintiff has undoubtedly certain rights—to what? If it were only to money payable according to the terms of the contract, the plaintiff would fail, for no money ever became due according to the terms of the contract It was paid in advance before the work was finished; so that an amendment of the statement of claim is necessary; and in strictness the plaintiff's case is this: "You, the defendant, had no right to pay in advance; you were bound to wait till the work was finished; you would then owe Gough money, and would then be bound to pay me." This seems to be the law, and certainly if Gough and the defendant had agreed to anticipate the time of payment to defeat the plaintiff, such a scheme ought not to succeed. On the other hand, if Gough had broken his engagement, or threatened to break his engagement to finish the vessel, or to finish it in a reasonable time, and the defendant to remedy and avert such breach, reasonably and *bona fide,* not to defeat the plaintiff but to protect himself, advanced money to Gough before it was due, so that it never became due according to the contract, I should have hesitated long before holding that the defendant was liable in this action. But in reading the correspondence I cannot see that this was the case. That the defendant acted *bona fide* I doubt not, but I think his advancing of the money as he did was quite voluntary and in no sense compulsory. I concur, therefore, in affirming the judgment.

*Judgment affirmed.*[58]

[58] In American Bridge Co. of New York et al. v. City of Boston, 202 Mass. 374 (1909), it was held that an assignee of architect's certificates for money due for work done by the assignor under building contracts with a city took them subject to the city's right to recoup for damages from a possible breach

## THE BRITISH WAGGON CO. AND THE PARKGATE WAGGON CO. *v.* LEA & CO.

**(High Court of Justice, Queen's Bench Division, 1880. 5 Q. B. D. 149.)**

COCKBURN, C. J. This was an action brought by the plaintiffs to recover rent for the hire of certain railway waggons, alleged to be pay-

by the assignor of his contracts, which right existed at the making of the contracts, and of which the assignee had notice, though no default of the assignor had occurred when notice of the assignment was given to the city. The default did occur through the abandonment of the contract by the assignor a few days after the assignment. Hammond, J., for the court, said:

"It is contended by the plaintiffs that these sums were due and payable at the time the defendant received notice thereof, that the plaintiffs' rights were fixed at the time of notice and could not be changed by the act of the assignor or of the defendant after notice, and consequently that the damages caused to the defendant by the default of the assignor in leaving his contract unperformed, although without any fault or collusion on the part of the defendant, cannot be recouped in this action. It is contended that the only remedy open to the defendant is by way of an action against the assignor.

"Even if it be conceded in favor of the plaintiffs that the sums were due and payable at the time of the notice, and that the rights of the plaintiffs were fixed at that time, still the conclusion which the plaintiffs seek to draw by no means necessarily follows.

"We are dealing, not with the right of set-off, but with that of recoupment—an entirely different right. The one is a creation of statute; the other exists at common law and not by statute. The one is applicable even where there are different contracts; the other arises only out of the same contract as that under which the claim of the plaintiffs arises. Confusion sometimes has been caused by a neglect to note the distinction between these two rights. The principles applicable to a case of set-off are in many respects different from those applicable to a case of recoupment, and some care is required not to be misled by apparent analogies.

"The assignment of a chose in action conveys, as between the assignor and assignee, merely the right which the assignor then possesses to that thing; but as between the assignee and the debtor it does not become operative until the time of notice to the latter, and does not change the rights of the debtor against the assignor as they exist at the time of the notice.

"It becomes necessary to consider the exact relation between the defendant and Coburn, the assignor, at the time of the notice. * * * At that time there does not seem to have been any default on the part of Coburn. At the time of the notice what were the rights between him and the defendant, so far as respects this contract? He was entitled to receive these sums, but he was also under an obligation to complete his contract. This right of the defendant to claim damages for the nonperformance of the contract existed at the making of the contract and at the time of assignment and of notice, and the assignees knew it, and they also knew that it would become available to the defendant the moment the assignor should commit a breach. Under these circumstances it must be held that the assignees took subject to that right. * * * The defendant is simply trying to enforce a right existing under the contract at the time of the notice, a right of which the assignees had knowledge, and since they have delayed suit for these sums, until after default, the defendant may recoup against them as it could have recouped against the assignor. It cannot without its own fault or consent be deprived of rights under the contract,

able by the defendants to the plaintiffs, or one of them, under the following circumstances:

By an agreement in writing of February 10th, 1874, the Parkgate Waggon Company let to the defendants, who are coal merchants, fifty railway waggons for a term of seven years, at a yearly rent of £600 a year, payable by equal quarterly payments. By a second agreement of June 13th, 1874, the company in like manner let to the defendants fifty other waggons, at a yearly rent of £625, payable quarterly like the former.

Each of these agreements contained the following clause: "The owners, their executors, or administrators, will at all times during the said term, except as herein provided, keep the said waggons in good and substantial repair and working order, and, on receiving notice from the tenant of any want of repairs, and the number or numbers of the waggons requiring to be repaired, and the place or places where it or they then is or are, will, with all reasonable despatch, cause the same to be repaired and put into good working order."

On October 24th, 1874, the Parkgate Company passed a resolution, under the 129th section of the Companies Act, 1862, for the voluntary winding up of the company. Liquidators were appointed, and by an order of the Chancery Division of the High Court of Justice, it was ordered that the winding up of the company should be continued under the supervison of the Court.

By an indenture of April 1st, 1878, the Parkgate Company assigned and transferred, and the liquidators confirmed to the British Company and their assigns, among other things, all sums of money, whether payable by way of rent, hire, interest, penalty, or damage, then due, or thereafter to become due, to the Parkgate Company, by virtue of the two contracts, and all the interest of the Parkgate Company and the said liquidators therein; the British Company, on the other hand covenanting with the Parkgate Company "to observe and perform such of the stipulations, conditions, provisions, and agreements contained in the said contracts as, according to the terms thereof were stipulated to be observed and performed by the Parkgate Company." On the execution of this assignment the British Company took over from the Parkgate Company the repairing stations, which had previously been used by the Parkgate Company for the repair of the waggons let to the defendants, and also the staff of workmen employed by the latter company in executing such repairs. It was expressly found that the British Company have ever since been ready and willing to execute, and have, with all due diligence, executed all necessary repairs to the said waggons. This, however, they have done under a special agreement

Any other conclusion would make the contract different from that into which the defendant entered. The case is very similar to Rockwell v. Daniels, 4 Wis. 432, in the reasoning of which we fully concur."

come to between the parties since the present dispute has arisen, without prejudice to their respective rights.

In this state of things the defendants asserted their right to treat the contract as at an end, on the ground that the Parkgate Company had incapacitated themselves from performing the contract, first, by going into voluntary liquidation; secondly, by assigning the contracts, and giving up the repairing stations to the British Company, between whom and the defendants there was no privity of contract, and whose services, in substitution for those to be performed by the Parkgate Company under the contract, they the defendants were not bound to accept. The Parkgate Company not acquiescing in this view, it was agreed that the facts should be stated in a special case for the opinion of this court, the use of the waggons by the defendants being in the meanwhile continued at a rate agreed on between the parties, without prejudice to either, with reference to their respective rights.

The first ground taken by the defendants is in our opinion altogether untenable in the present state of things, whatever it may be when the affairs of the company shall have been wound up, and the company itself shall have been dissolved under the 111th section of the Act. Pending the winding-up, the company is by the effect of §§ 95 and 131 kept alive, the liquidator having power to carry on the business, "so far as may be necessary for the beneficial winding-up of the company," which the continued letting of these waggons, and the receipt of the rent payable in respect of them, would, we presume, be.

What would be the position of the parties on the dissolution of the company it is unnecessary for the present purpose to consider.

The main contention on the part of the defendants, however, was that, as the Parkgate Company had, by assigning the contracts, and by making over their repairing stations to the British Company, incapacitated themselves to fulfil their obligation to keep the waggons in repair, that company had no right, as between themselves and the defendants, to substitute a third party to do the work they had engaged to perform, nor were the defendants bound to accept the party so substituted as the one to whom they were to look for performance of the contract; the contract was therefore at an end.

The authority principally relied on in support of this contention was the case of Robson v. Drummond, 2 B. & Ad. 303, approved of by this court in Humble v. Hunter, 12 Q. B. 310. In Robson v. Drummond a carriage having been hired by the defendant of one Sharp, a coachmaker, for five years, at a yearly rent, payable in advance each year, the carriage to be kept in repair and painted once a year by the maker—Robson being then a partner in the business, but unknown to the defendant—on Sharp retiring from the business after three years had expired, and making over all interest in the business and property in the goods to Robson, it was held, that the defendant could not be sued on the contract—by Lord Tenterden on the ground that "the de-

fendant might have been induced to enter into the contract by reason of the personal confidence which he reposed in Sharp, and therefore have agreed to pay money in advance, for which reason the defendant had a right to object to its being performed by any other person;" and by Littledale and Parke, JJ., on the additional ground that the defendant had a right to the personal services of Sharp, and to the benefit of his judgment and taste, to the end of the contract.

In like manner, where goods are ordered of a particular manufacturer, another, who has succeeded to his business, cannot execute the order, so as to bind the customer, who has not been made aware of the transfer of the business, to accept the goods. The latter is entitled to refuse to deal with any other than the manufacturer whose goods he intended to buy. For this Boulton v. Jones, 2 H. & N. 564, is a sufficient authority. The case of Robson v. Drummond comes nearer to the present case, but is, we think, distinguishable from it. We entirely concur in the principle on which the decision in Robson v. Drummond rests, namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency, or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract, which, consequently, cannot in its absence be enforced against an unwilling party. But this principle appears to us inapplicable in the present instance, inasmuch as we cannot suppose that in stipulating for the repair of these waggons by the company—a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute—the defendants attached any importance to whether the repairs were done by the company, or by any one with whom the company might enter into a subsidiary contract to do the work. All that the hirers, the defendants, cared for in this stipulation was that the waggons should be kept in repair; it was indifferent to them by whom the repairs should be done. Thus if, without going into liquidation, or assigning these contracts, the company had entered into a contract with any competent party to do the repairs, and so had procured them to be done, we cannot think that this would have been a departure from the terms of the contract to keep the waggons in repair. While fully acquiescing in the general principle just referred to, we must take care not to push it beyond reasonable limits. And we cannot but think that, in applying the principle, the Court of Queen's Bench in Robson v. Drummond went to the utmost length to which it can be carried, as it is difficult to see how

in repairing a carriage when necessary, or painting it once a year, preference would be given to one coachmaker over another. Much work is contracted for, which it is known can only be executed by means of sub-contracts; much is contracted for as to which it is indifferent to the party for whom it is to be done, whether it is done by the immediate party to the contract, or by some one on his behalf. In all these cases the maxim *Qui facit per alium facit per se* applies.

In the view we take of the case, therefore, the repair of the waggons, undertaken and done by the British Company under their contract with the Parkgate Company, is a sufficient performance by the latter of their engagement to repair under their contract with the defendants. Consequently, so long as the Parkgate Company continues to exist, and, through the British Company, continues to fulfil its obligation to keep the waggons in repair, the defendants cannot, in our opinion, be heard to say that the former company is not entitled to the performance of the contract by them, on the ground that the company have incapacitated themselves from performing their obligations under it, or that, by transferring the performance thereof to others, they have absolved the defendants from further performance on their part.[54]

That a debt accruing due under a contract can, since the passing of the Judicature Acts, be assigned at law as well as equity, cannot since the decision in Brice v. Bannister, 3 Q. B. D. 569, be disputed.

We are therefore of opinion that our judgment must be for the plaintiffs for the amount claimed.[55]

[54] In the trial court's opinion in Cole v. C. H. Handasyde & Co., [1910] S. C. 68, 70-71, note, Lord Ordinary Mackenzie referred to the case of British Waggon Co. v. Lea, L. R., 5 Q. B. D. 149, as one "in which the original contracting party was tendered to fulfil the contract" as distinguished from the case before him where the assignee was offering to perform.

In Kansas City Soap Co. v. Illinois Cudahy Packing Co., 265 Fed. 108 (1920), it was held that the plaintiff corporation, which after making a contract with the defendant for the purchase of merchandise on credit, pursuant to a plan of reorganization, conveyed all of its property to a new corporation, subject to all its debts, undertakings, liabilities, and obligations, which were assumed by the new company, was not deprived of the right to enforce performance of the contract or to recover damages for its breach, especially where it tendered to defendant the contract price.

In Asphaltic Limestone Concrete Co., Ltd. v. Glasgow, [1907] S. C. 463, 475, Lord McLaren said of the contention that the execution of a contract to pave certain streets and maintain the surface in good condition for a term of years could not be delegated by assignment, that he agreed with the Lord Ordinary "that there is no *delectus personae* in such a contract, the execution of which consists chiefly in manual labor."

[55] In the case of an assignment of rights under a contract with a delegation of duties, the assignor, if there is no novation, remains liable on the contract. Crane v. Kildorf, 91 Ill. 567 (1879); Pulaski Stave Co. v. Miller's Creek Lumber Co., 138 Ky. 372 (1910); Pioneer Loan & Land Co. v. Cowden, 128 Minn. 307 (1915). The assignee, if he has not expressly or impliedly assumed the contract obligation, is not liable to the other party to the contract. Gross v. Estate of

STEWART COLE (Knowles Spencer & Son's Assignee), PURSUER (Reclaimer) *v.* C. H. HANDASYDE & COMPANY, DEFENDERS, (Respondents).

(Court of Session, First Division. [1910] S. C. 68.)

On 17th June 1907 Knowles Spencer & Son, oil and seed merchants and commission agents, London, entered into a contract with C. H. Handasyde & Company, Dean Oil Works, Dalkeith, to supply them with two hundred and fifty to three hundred (250/300) tons of black grease from cotton oil mucilage of usual good merchantable quality, at a price specified, etc. "The goods to be sampled by an independent sampler prior to shipment. Analysis to be made by Mr. Watson Gray of Liverpool, whose decision shall be final." In accepting the contract note Messrs. Handasyde wrote: "Please note, however, that all grease is to be soft and seedy as sample in our possession."

Mr. Knowles Spencer, the senior partner of Knowles Spencer & Son, had at one time been a manufacturer of black grease, and had an expert knowledge of the qualities of the article, but at the date when he first commenced to have dealings with Messrs. Handasyde, in 1905, he had ceased to be a manufacturer. Knowles Spencer & Son dealt only as merchants, purchasing from the makers the grease which they contracted to deliver. These facts were all known to Messrs. Handasyde.

On 25th January 1908 the partners of Knowles Spencer & Son granted a deed of assignment for behoof of creditors in favor of the pursuer, Stewart Cole, chartered accountant, London, who admittedly had no knowledge of the nature of black grease. The deed of assignment, as was ultimately conceded, conveyed to Cole, *inter alia,* the whole rights and liabilities under the contract in question, so far as the same were capable of being assigned.

On 18th February 1908 Cole wrote Messrs. Handasyde tendering delivery of 10 tons under the contract, but Messrs. Handasyde replied on the following day declining to take delivery and repudiating the contract. Subsequently Cole made a further tender of 25 tons, which was refused and he accordingly raised the present action, concluding, *inter alia,* for 2500*l.* as damages for breach of the contract in question, and averring that he had incurred serious liabilities to the manufacturers, and had been compelled to resell a considerable quantity of black grease at a heavy loss, besides incurring charges for storage and analysis.

Thornson, 286 Ill. 185 (1919); Beazley v. Embree, 29 Cal. App. 15, 183 Pac. 298 (1919). There is a growing feeling, however, that an implied assumption by the assignee of the duties of the contract which the other party as beneficiary may recover upon should normally be found. See A. M. K. [Professor A. M. Kidd] in 8 Calif. L. Rev. 119; 1 Williston on Contracts, § 412. See also, Grover C. Grismore, Is the Assignee of a Contract Liable for the Non-Performance of Delegated Duties? 18 Mich. L. Rev. 284.

On 20th July 1909, the Lord Ordinary [Lord Mackenzie] pronounced an interlocutor finding that the pursuer had no title to sue and dismissing the action so far as relating to the contract in question. The pursuer reclaimed.

LORD PRESIDENT [The Lord Dunedin].[56] The pursuer in this case is one Stewart Cole, who is the assignee in England of Knowles Spencer & Son. It does not matter for the moment whether he is assignee in bankruptcy or assignee under a voluntary assignment, because there is no question that he is suing here as the assignee of Knowles Spencer. He is suing upon a contract which he says was assigned to him, and the contract was entered into between Knowles Spencer and the defenders, Handasyde & Company, who are distillers of an article known as black grease. Knowles Spencer was a person who used to enter into contracts with Handasyde for the supply of the black grease He was not a manufacturer of black grease and that was perfectly well known to Handasyde; he therefore was in one sense of the word a broker, although as a matter of fact the contracts entered into were not upon the face of them broking contracts—that is to say, they were contracts in which Knowles Spencer assumed the place of principal and became bound to deliver the goods which he therein contracted to deliver,—but nevertheless it was quite well known that the black grease was an article which Knowles Spencer would have to procure elsewhere. I will look at the contract in a moment; but the defence which is made to the action at the instance of Cole, who proposes to tender black grease and to get paid for it, is that Handasyde is no longer bound by contract because the contract itself is unassignable. The Lord Ordinary has held that it is unassignable and that is the only question brought up by the reclaiming note before your Lordships.

I have not been able to follow the reasoning of the Lord Ordinary, but for myself it seems to be a very clear case. Nobody doubts that the law as to whether a contract is assignable or not depends upon whether, as the expression goes, there is the element of *delectus personae* in it or not. Now, I think by way of illustration there are three stages to be taken. The highest and easiest example of a contract in which there is *delectus personae* is where the contract is one for a personal service of a peculiar nature. Nobody supposes that in a contract with A or B to paint a picture or write a book it is possible for A or B to say, "I will get somebody else to paint you the picture or write you the book and that must satisfy you, and you must pay me the price." Next you have another class where the *delectus personae* is not so clear. I mean the case of manufactured articles. It may quite well be that an article is of such a character and quality and the reputation of the manufacturer such that, when you contract for a thing from so-and-so,

[56] The statement of facts is abbreviated and the opinion of Lord Johnston is omitted.

you really imply that the article is to be made by so-and-so. For instance, a contract for a gun from Purdie would not be well implemented by giving you a gun bought in the ordinary market in Birmingham. There are of course cases where it is not very easy to determine on which side the matter falls, but these are cases where the difficulty lies in the application of the law to the particular circumstances. But when we come away from manufacturers, and that is the case here, and when you come to a contract with a person who does not himself manufacture and does not profess to—a contract for goods of a certain description (it really does not matter whether at this present moment these goods have been made or not)—then it seems to me that you may go on and contract in one form or another. You may either say,—"I contract with you that you shall supply me with goods as to which you shall do something, or as to which you shall satisfy yourself in such and such a way," and then you really incorporate into your contract for the goods a contract also for the personal services of the person with whom you contract. Or, on the other hand you may contract for an article, and then stipulate that the article is to be of a certain standard which is specified in the contract, and say no more. It seems to me that in the latter case the whole element of *delectus personae* is gone.

Now, I turn to the contract in question. It was made upon the 17th of June 1907, and is in this form,—"We confirm having sold to you this day," the quantity of goods, the designation of them, the quality "usual good merchantable." Then follows a stipulation as to the amount of fatty matter that is to be in the grease, and then it is provided that the goods are to be sampled by an independent sampler, and that analysis is to be made by Dr. Watson Gray. There is nothing left after that for the party supplying the goods to do except to supply the goods. If they come up to these terms, then it is good delivery; if they do not, then it is bad. It was said that that contract was added to so far by another stipulation which was contained in the letter accepting that proposal, which said,—"Please note, however, that all grease is to be soft and seedy as sample in our possession." There may be a question as to whether that was an adjected term which was agreed to or whether it was merely a recommendation as to which the other party said he would do his best. I will assume for the purpose of this argument that it is a firm term of the contract, but in my view that makes no difference, because if it is a firm term of the contract and if the grease when proffered is not soft and seedy, then it is not good delivery. If it is soft and seedy it is good delivery, and there again there is nothing left for Knowles Spencer & Son to do as affecting the contract. It is said that they were very good judges, and they would be sure to select grease that would be soft and seedy. Probably they would do so for their own protection, for if they did not select it they would know that it would be rejected; but what they did would not alter the contract. If, as a matter of fact, the grease when delivered was not, in the view

of the buyer, soft and seedy, he would be entitled to raise that question whatever Spencer & Son said.

Accordingly I am unable to see how in this there is any question of *delectus personae,* at all. It seems to me that the contract is assignable, and as that is the only question raised at this stage, I think the Lord Ordinary's judgment on that matter must be recalled.

LORD KINNEAR. I agree. The principle which we call *delectus personae* as I understand it applies when a person is employed to do work or to perform services requiring some degree of skill or experience. And it is therefore to be inferred that he is selected for the employment in consequence of his own personal qualifications. Such a contract is not assignable by him to a third person who may or may not be competent for the work. But this is not a contract of that nature at all. It is a contract for the purchase of a certain commodity, and although we are told that the seller was specially skilled to judge of the qualities of the commodity in question, the contract refers nothing to his skill or experience, but, on the contrary, provides for inspection and lays down a totally different standard according to which the goods are to be delivered and accepted. I quite agree with your Lordship that it makes no difference whether we assume that the proviso in the letter of 18th June expresses an additional term of the contract or whether it does not. If it does, then the standard to which the letter refers, like that provided by the original contract, excludes the idea of reliance on the special skill of the sellers in the selection of goods, since it provides for the correspondence of the goods supplied with a sample in the possession of the buyers. I agree that there is no room for the principle of *delectus personae,* and therefore the objection the pursuer's title cannot be sustained.

The Court recalled the interlocutor reclaimed against and, * * * remitted the cause to the Lord Ordinary for further procedure.

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## TOLHURST, APPELLANT, *v.* THE ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LIMITED, RESPONDENTS.

## TOLHURST, APPELLANT, *v.* THE ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LIMITED AND THE IMPERIAL PORTLAND CEMENT COMPANY, LIMITED, RESPONDENTS.

**(House of Lords. [1903] A. C. 414.)**

In January, 1898, the appellant made a contract with the Imperial Company, the effect of which is stated in the opinion.

In 1900 the Imperial Company assigned the contract and sold its undertaking, land, works, and business to the Associated Company, gave

the appellant notice thereof, went into voluntary liquidation, and ceased to carry on business. After correspondence, the appellant brought an action against the Associated Company claiming a declaration that the appellant was not bound to carry out the contract of January, 1898, with that Company in substitution for the Imperial Company. Then the Associated Company and the Imperial Company jointly brought an action against Tolhurst claiming a declaration that the contract of January, 1898, was valid, subsisting, and binding upon him, and that the Imperial Company was entitled to be supplied by him with chalk in accordance with the contract. Mathew J., who tried both actions, gave judgment in both for Tolhurst. [1901] 2 K. B. 811. The Court of Appeal (Collins, M. R., Sir. F. Jeune and Cozens-Hardy L. J.) reversed these decisions and gave judgment for the Associated Company in the action brought by Tolhurst. In the action in which Tolhurst was defendant the Court of Appeal entered judgment for the plaintiffs for a declaration that the contract of January, 1898, was a subsisting, valid, and binding agreement between the Imperial Company and the defendant. [1902] 2 K. B. 660. Against both these decisions Tolhurst brought the present appeals.

EARL OF HALSBURY, L. C.[57] My Lords, in this case I confess that during a very considerable period of the argument I was of opinion that the judgment originally given by Mathew J. as he then was, was right, and that this contract was not assignable. The circumstances which have induced me to change the view I originally entertained are the length of duration of the contemplated contract, the persons engaged in it, and the nature of the contract itself. I quite agree that the fact of the word "assigns" not being in the contract is immaterial if it is ascertained that the intention of the contract is that it should be assigned. Under these circumstances I acquiesce in the judgment which is intended to be moved by my noble and learned friend Lord Macnaghten,[58] but it is with very great hesitation.

LORD LINDLEY: My Lords, in January, 1898, Mr. Tolhurst, who was the owner of some chalk land in Northfleet, sold part of that land to the Imperial Portland Cement Company, and by an agreement dated January 5, 1898, he agreed that they should have for fifty years from his adjoining chalk quarries all such chalk as they should require for their cement works on the land they had bought. They were to pay 1s. 3d. a ton for all they wanted, and they bound themselves to take at least 750 tons a week. The company were not to come on to Tolhurst's land and get the chalk themselves. He was to get it and deliver it to them, and they were to pay him monthly for what was so

[57] The opinions of Lord Macnaghten and Lord Robertson, and part of the opinion of Lord Lindley are omitted.

[58] See note 59, next.

delivered. Mr. Tolhurst was at liberty to sell chalk to other persons, and provision was made for the possible event of all his chalk being worked out before the expiration of the fifty years.

The nature of the agreement and the time it was to last negatived the idea that it was confined to the parties to it. The word "assigns" does not occur in the agreement. But this does not show that the benefit of the contract is not assignable. An agreement for a lease, and even an option to require a lease or a renewal of a lease, is assignable in equity even though there is no mention of executors, administrators or assigns: See Buckland v. Papillon, (1866) L. R. 1 Eq. 477; 2 Ch. 67.

My Lords, if the above agreement had been with an ordinary individual, his interest would, on his death, have passed to his executors or administrators; or if he had become bankrupt, his trustees could have claimed it and have sold it for the benefit of his creditors. It follows that on the same supposition he could have assigned such interest in his lifetime. The Imperial Company could, in my opinion, have done the same thing; they could have assigned their interest themselves, before winding up proceedings commenced, and their liquidators could have assigned it as part of their assets afterwards.

But it is necessary to look a little further, and see what limit is set to the right conferred by the agreement. The Imperial Company were not entitled to an unlimited supply of chalk, but only to so much as they might want for making cement on their own piece of land. I do not think their right to have chalk from Tolhurst's quarries could be assigned apart from their own land and cement works. The Imperial Company could not by alienation or otherwise increase the burdens which Mr. Tolhurst undertook to bear. But this is the only limit which I can find in the present case. * * *

There is no question here of any personal confidence or personal skill. There is no reason whatever for supposing that any personal element entered into the mind of either of the parties to the agreement, and I cannot find anything in it to prevent the Imperial Company from assigning the benefit of it to any other company or to any individual. By so assigning it the Imperial Company would not get rid of their obligation to Mr. Tolhurst; but the contract is one the benefit of which is assignable in equity quite independently of the Judicature Acts. The Judicature Act, 1873, s. 25, clause 6, has not made contracts assignable which were not assignable in equity before, but it has enabled assigns of assignable contracts to sue upon them in their own names without joining the assignor.

I cannot agree with the Court of Appeal in thinking that the Associated Company could not sue Mr. Tolhurst on this contract without joining the Imperial Company as co-plaintiffs. The supposed necessity of making them parties or of postponing their dissolution to enable the Associated Company to sue as their assignees has, I think, obscured the true position of the parties. I see no such necessity. But the

joinder of the Imperial Company, although unnecessary, has not increased the costs and need not be further noticed.

If Mr. Tolhurst has any provable claim against the Imperial Company, and if he is not too late, he can prove against it, and the liquidators can, if necessary, obtain the means of paying him from the Associated Company under their indemnity.

In conclusion, I will only add that the British Waggon Co. v. Lea, 5 Q. B. D. 149, was, in my opinion, rightly decided, and is an authority very much in point for the Associated Company. The contract there was held assignable although the word "assigns" did not occur.

The appeal fails, and the order of the Court of Appeal should be affirmed with costs; but the formal order of the Court of Appeal will, I think, be improved, if amended as suggested by Lord Macnaghten.[59]

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## KEMP AND OTHERS *v.* BAERSELMAN.

(Court of Appeal. [1906] 2 K. B. 604, 2 B. R. C. 436.)

Appeal by defendant against a judgment of Channell, J., and cross appeal by plaintiffs.

The plaintiff, George H. Kemp, was previously to the assignment hereinafter mentioned a cake manufacturer, carrying on business at two places in London (Annette Road, Holloway, and Martineau Road) and having a depot at Cardiff. The defendant was a provision merchant. By agreement dated March 24, 1904, made between G. H. Kemp and the defendant it was agreed as follows:

1. "Baerselman agrees to supply and Kemp agrees to accept all the fresh shell eggs Star Wreaths or equal to Star Wreaths that he shall require for manufacturing purposes for one year from April 1, 1904, to April 1, 1905," at certain specified prices.

3. "The said Baerselman agrees to deliver all shell eggs . . . to either of Kemp's London factories free of charge and all goods for Kemp's Cardiff depot free on rail or boat."

[59] Lord Macnaghten's opinion ended:

"The result is that Tolhurst's action fails, because, as regards the chalk which has been supplied to the Associated Company, the company is entitled to have it at the stipulated price of 1s. 3d. per ton. The second action succeeds, but I think the Imperial Company was not a necessary or proper party. If the requirements of ss. 142 and 143 of the Companies' Act, 1862, have been complied with, the company is 'deemed to be dissolved,' and, therefore, I should suggest that in lieu of the declaration in the order pronounced by the Court of Appeal, there should be inserted a declaration to the effect that the Associated Company is entitled to the benefit of the contract of January 5, 1898, they paying, as provided by the contract, for all chalk supplied to them in accordance with the contract. With this variation I think the orders under appeal should be affirmed and the appeal dismissed with costs, and I move your Lordships accordingly."

4. "Every 14 days a statement of account is to be rendered and after being checked and found correct Baerselman to draw for the amount at two months from date of delivery."

5. "During the continuance of this agreement or so long as the said Baerselman shall continue to supply sound fresh eggs satisfactorily to the said Kemp the said Kemp undertakes not to purchase eggs from any other merchant."

In July, 1904, G. H. Kemp purchased the business of a company called the National Bakery Company, carrying on business at Brewery Road, London, N., and at the same time transferred the said business together with his business at Annette Road and at Cardiff, to a new company called George Kemp, Limited, the business at Martineau Road being abandoned. By the terms of the amalgamation of the said businesses the shareholders in the National Bakery Company received as the purchase-money of their business £29,000 of debentures in George Kemp, Limited, and the whole of the ordinary share capital of George Kemp, Limited, consisting of 20,000 shares of £1 each, was, with the exception of seven shares, taken by G. H. Kemp, who acted as the manager of the amalgamated businesses.

On September 7 notice of the amalgamation was given to the defendant, who on September 17 wrote to G. H. Kemp, "As the whole of your business and everything belonging to you is now merged in the limited company by your own admission, George H. Kemp as a trader is dead, and consequently the agreement is at an end;" and he accordingly refused to supply any more eggs under the agreement. Thereupon G. H. Kemp and George Kemp, Limited, joined as co-plaintiffs in bringing this action for breach of the agreement, and claiming damages for non-delivery of eggs at Brewery Road as well as at Annette Road and at Kemp's Cardiff depot.

The question of liability, which was ordered to be tried first, was tried before Channell J. without a jury. The judge held on the construction of the agreement that G. H. Kemp was entitled to a supply of eggs for the purposes of the business that he was carrying on at certain defined places, and that the benefit of that agreement was assignable, and passed by the transfer of the business to the plaintiff company, though the liability to pay for them remained with the plaintiff G. H. Kemp. He held accordingly that the plaintiffs were entitled to recover damages for the refusal to deliver eggs at Annette Road and at the Cardiff depot, but not in respect of the refusal to deliver at Brewery Road. Both parties appealed.

LORD ALVERSTONE, C. J.[60] With regard to the subject of the plaintiffs' cross appeal I think that Channell J. was clearly right and that even if the benefit of the contract was assignable, so far as it related to the supply of eggs to the businesses carried on by G. H. Kemp, still

[60] The opinion of Sir Gorrell Barnes, President, is omitted.

the plaintiff's could not in any event claim to have a supply for the Brewery Road business, for Kemp never carried on business there, and consequently never had any requirements for that business. But, with regard to the defendant's appeal, I regret to have to differ from Channell J., and the reasons why I differ from him are these: He seemed to be of opinion that, because this was a contract for the supply of an ordinary marketable commodity like eggs, the benefit of the contract could be assigned, and that it made no difference to the defendant who the persons were to whom the eggs were to be supplied by him. He did not anywhere in his judgment deal with clause 5—the clause whereby the purchaser bound himself not to buy eggs from any other persons—and did not sufficiently consider the personal element which that clause introduced. I can find nothing in the judgments in Tolhurst's Case, [1903] A. C. 414, in the House of Lords which can be interpreted as laying down the general principle for which Mr. Hamilton [of counsel for the plaintiffs] contended, namely, that the benefit of any contract of this kind can be assigned. What the House of Lords did say in that case was that in that particular case the contract for the supply of chalk for fifty years was to be treated as a contract for the supply to a given cement-making place, and not a personal contract. But there is nothing that I can see in the present contract which enables me to say that it is a contract to supply eggs to a particular place. The first clause provides that Baerselman shall supply, and Kemp shall accept, all the fresh eggs that he, Kemp, shall require for manufacturing purposes for one year. Then, by clause 5, Kemp undertakes not to purchase eggs from any other merchant. That, as I have said, imposes a personal obligation upon the purchaser which may be very material to the contract. It is not seriously contended that Kemp, Limited, or any other assignee would be bound by that obligation unless there was something amounting to a novation; and here there was no evidence of a novation. I think this contract was not one the benefit of which can be assigned simply by a sale of the business, and that when the facts which were proved had become known to Baerselman he was entitled to refuse to continue the supply. I am not altogether satisfied that there is not also an argument in support of the defendant's contention to be based on the terms of payment, though I do not attach so much importance to it, because it may be that, when the authorities come to be examined, it will be found that the courts have treated the question of payment as one which does not prevent the benefit of a contract from being assignable. I only mention it so that in the event of the case going further it may not be thought that it has been overlooked. I base my decision on the ground that clauses 1 and 5 show that the contract was a personal one, the measure of the defendant's obligations as to supply being the extent of Kemp's personal requirements, and the undertaking by Kemp not to buy eggs of other mer-

chants being an undertaking which was purely personal to himself. The defendant's appeal, therefore, must be allowed.

FARWELL, L. J. In my opinion this agreement contains two considerations moving to the defendant, one being the payment of the price, and the other being Kemp's undertaking not to purchase eggs from any other merchant. It is obvious that the value of the latter consideration must in a large measure depend upon the person who gives the undertaking and the business carried on by him, and to that extent the personal element enters into the question. And as regards payment, it is conceded that novation cannot be compulsory so as to make the person supplying the goods accept against his will the liability of another person to pay for them in substitution for the liability of the original purchaser; so that in that respect also the contract is personal. And, thirdly, the contract contains a personal element in that the quantity to be supplied is measured by the requirements of Kemp himself. When he assigned his three businesses to the new company one of them was given up and a much larger business taken in its place. That fact brings into prominence the importance of the provision in clause 1 that the defendant shall supply to Kemp as many fresh eggs as "he shall require for manufacturing purposes." The requirements of Kemp for manufacturing purposes are one thing, and the requirements of anyone to whom Kemp may assign his business are another. In Tolhurst's Case, [1902] 2 K. B. 660, at p. 672, in the Court of Appeal, the Master of the Rolls laid stress on the fact that "The measure of an original contractor's requirements may be very different in a given case from those of a substituted person," and said that when that is the case "the contract would be personal and could only be fulfilled by the contractee himself." That appears to me to apply with great force to clause 1 in the present case. And I do not find here anything to indicate that the supply was to be measured by the requirements of the business at a particular specified place, as was found to be the case in Tolhurst's Case. I cannot read clause 3 as in any way limiting the generality of clause 1. The object of clause 3 was simply to specify the extent to which the cost of carriage of the goods was to be borne by the vendor. In my opinion the benefit of this contract was not assignable, and the appeal of the defendant must consequently be allowed.

*Judgment for the defendant on appeal and cross appeal.*[61]

61 On the assignability of a contract to supply such quantity of goods as purchaser may require in his business, see 2 B. R. C. 444, note.

In Haugen v. Sundseth, 106 Minn. 129 (1908), a contract under which a seller of a business agreed not to engage in a similar business in the same city for five years from the date of the contract was held assignable by the purchaser to buyers of the business from him. On the assignability of such contracts, see 16 Ann. Cas. 261, note.

## ARKANSAS VALLEY SMELTING COMPANY *v.* BELDEN MINING COMPANY.

(Supreme Court of the United States, 1888. 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246.)

This was an action brought by a smelting company, incorporated by the laws of Missouri, against a mining company, incorporated by the laws of Maine, and both doing business in Colorado by virtue of a compliance with its laws, to recover damages for the breach of a contract to deliver ore, made by the defendant with Billing & Eilers, and assigned to the plaintiff. The material allegations of the complaint were as follows:

On July 12th, 1881, a contract in writing was made between the defendant of the first part and Billing & Eilers of the second part, by which it was agreed that the defendant should sell and deliver to Billing & Eilers at their smelting works in Leadville ten thousand tons of carbonate lead ore from its mines at Red Cliff, at the rate of at least fifty tons a day, beginning upon the completion of a railroad from Leadville to Red Cliff, and continuing until the whole should have been delivered, and that "all ore so delivered shall at once upon the delivery thereof become the property of the second party;" and it was further agreed as follows:

"The value of said ore and the price to be paid therefor shall be fixed in lots of about one hundred tons each; that is to say, as soon as such a lot of ore shall have been delivered to said second party, it shall be sampled at the works of said second party, and the sample assayed by either or both of the parties hereto, and the value of such lots of ore shall be fixed by such assay; in case the parties hereto cannot agree as to such assay, they shall agree upon some third disinterested and competent party, whose assay shall be final. The price to be paid by said second party for such lot of ore shall be fixed on the basis hereinafter agreed upon by the closing New York quotations for silver and common lead, on the day of the delivery of sample bottle, and so on until all of said ore shall have been delivered.

"Said second party shall pay said first party at said Leadville for each such lot of ore at once, upon the determination of its assay value, at the following prices," specifying, by reference to the New York quotations, the price to be paid per pound for the lead contained in the ore, and the price to be paid for the silver contained in each ton of ore, varying according to the proportions of silica and of iron in the ore.

The complaint further alleged that the railroad was completed on November 30th, 1881, and thereupon the defendant, under and in compliance with the contract, began to deliver ore to Billing & Eilers at their smelting works, and delivered 167 tons between that date and January 1st, 1882, when "the said firm of Billing & Eilers was

dissolved, and the said contract and the business of said firm, and the smelting works at which said ores were to be delivered, were sold, assigned, and transferred to G. Billing, whereof the defendant had due notice;" that after such transfer and assignment the defendant continued to deliver ore under the contract, and between January 1st and April 21st, 1882, delivered to Billing at said smelting works 894 tons; that on May 1st, 1882, the contract, together with the smelting works, was sold and conveyed by Billing to the plaintiff, whereof the defendant had due notice; that the defendant then ceased to deliver ore under the contract, and afterward refused to perform the contract, and gave notice to the plaintiff that it considered the contract cancelled and annulled; that all the ore so delivered under the contract was paid for according to its terms; that "the plaintiff and its said assignors were at all times during their respective ownerships ready, able, and willing to pay on the like terms for each lot as delivered, when and as the defendant should deliver the same, according to the terms of said contract, and the time of payment was fixed on the day of delivery of the 'sample bottle,' by which expression was, by the custom of the trade, intended the completion of the assay or test by which the value of the ore was definitely fixed;" and that "the said Billing & Eilers, and the said G. Billing, their successor and assignee, at all times since the delivery of said contract, and during the respective periods when it was held by them respectively, were able, ready, and willing to and did comply with and perform all the terms of the same, so far as they were by said contract required; and the said plaintiff has been at all times able, ready, and willing to perform and comply with the terms thereof, and has from time to time, since the said contract was assigned to it, so notified the defendant."

The defendant demurred to the complaint for various reasons, one of which was that the contract therein set forth could not be assigned, but was personal in its nature, and could not, by the pretended assignment thereof to the plaintiff, vest the plaintiff with any power to sue the defendant for the alleged breach of contract.

The Circuit Court sustained the demurrer, and gave judgment for the defendant; and the plaintiff sued out this writ of error.

GRAY, J. If the assignment to the plaintiff of the contract sued on was valid, the plaintiff is the real party in interest, and as such entitled, under the practice in Colorado, to maintain this action in its own name. Rev. Stat., § 914; Colorado Code of Civil Procedure, § 3; Albany & Rensselaer Co. v. Lundberg, 121 U. S. 451. The vital question in the case, therefore, is whether the contract between the defendant and Billing & Eilers was assignable by the latter, under the circumstances stated in the complaint.

At the present day, no doubt, an agreement to pay money, or to

deliver goods, may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterward done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable.

But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, "You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract." Humble v. Hunter, 12 Q. B. 310, 317; Winchester v. Howard, 97 Mass. 303, 305; Boston Ice Co. v. Potter, 123 Mass. 28; King v. Batterson, 13 R. I. 117, 120; Lansden v. McCarthy, 45 Missouri, 106. The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise. "Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." Pollock on Contracts (4th Ed.), 425.

The contract here sued on was one by which the defendant agreed to deliver ten thousand tons of lead ore from its mines to Billing & Eilers at their smelting works. The ore was to be delivered at the rate of fifty tons a day, and it was expressly agreed that it should become the property of Billing & Eilers as soon as delivered. The price was not fixed by the contract, or payable upon the delivery of the ore. But, as often as a hundred tons of ore had been delivered, the ore was to be assayed by the parties or one of them, and, if they could not agree, by an umpire; and it was only after all this had been done, and according to the result of the assay, and the proportions of lead, silver, silica, and iron, thereby proved to be in the ore, that the price was to be ascertained and paid. During the time that must elapse between the delivery of the ore and the ascertainment and payment of the price, the defendant had no security for its payment, except in the character and solvency of Billing & Eilers. The defendant, therefore, could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom it had contracted.

The fact that upon the dissolution of the firm of Billing & Eilers, and the transfer by Eilers to Billing of this contract, together with the smelting works and business of the partnership, the defendant continued to deliver ore to Billing according to the contract, did not oblige the defendant to deliver ore to a stranger, to whom Billing had undertaken, without the defendant's consent, to assign the contract. The change in a partnership by the coming in or the withdrawal of a partner might perhaps be held to be within the contemplation of the

parties originally contracting; but, however that may be, an assent to such a change in the one party cannot estop the other to deny the validity of a subsequent assignment of the whole contract to a stranger. The technical rule of law, recognized in Murray v. Harway, 56 N. Y. 337, cited for the plaintiff, by which a lessee's express covenant not to assign has been held to be wholly determined by one assignment with the lessor's consent, has no application to this case.

The cause of action set forth in the complaint is not for any failure to deliver ore to Billing before his assignment to the plaintiff (which might perhaps be an assignable chose in action), but it is for a refusal to deliver ore to the plaintiff since this assignment. Performance and readiness to perform by the plaintiff and its assignors, during the periods for which they respectively held the contract, is all that is alleged; there is no allegation that Billing is ready to pay for any ore delivered to the plaintiff. In short, the plaintiff undertakes to step into the shoes of Billing, and to substitute its liability for his. The defendant had a perfect right to decline to assent to this, and to refuse to recognize a party, with whom it had never contracted, as entitled to demand further deliveries of ore.[62]

The cases cited in the careful brief of the plaintiff's counsel, as tending to support this action, are distinguishable from the case at bar, and the principal ones may be classified as follows:

First. Cases of agreements to sell and deliver goods for a fixed price, payable in cash on delivery, in which the owner would receive the price at the time of parting with his property, nothing further would remain to be done by the purchaser, and the rights of the seller could not be affected by the question whether the price was paid by the person with whom he originally contracted or by an assignee. Sears v. Conover, 3 Keyes, 113, and 4 Abbott (N. Y. App.), 179; Tyler v. Barrows, 6 Robertson (N. Y.), 104.

Second. Cases upon the question how far executors succeed to rights and liabilities under a contract of their testator. Hambly v.

[62] "Attention must again be called to Arkansas Smelting Co. v. Belden Min. Co., 127 U. S. 379. Here the contract was assigned twice—first by Billing and Eilers, upon their dissolution, to Billing, and subsequently by Billing to the plaintiff. It may not be unreasonable to infer from the fact of dissolution of the partnership that the intention of the original buyers, Billing & Eilers, was to renounce liability for further performance. As to the first assignment, therefore, the defendant might well have claimed to be absolved by such renunciation. * * * As a matter of fact, however, the defendant chose to accept the liability of Billing, the assignee under the first assignment, and refused to perform only upon the assignment by Billing to the plaintiff. Moreover, there was no circumstance attending this second assignment which indicated an intent on the part of the assignor to renounce. It is submitted, therefore, that such an intent should not have been inferred, and that the assignment should not, upon that ground, have been condemned." Frederic C. Woodward, Assignability of Contract, 18 Harv. L. Rev., 23, 34-35.

Trott, Cowper, 371, 375; Wentworth v. Cock, 10 Ad. & El. 42, and 2 Per. & Dav. 251; Williams on Executors (7th Ed.), 1723-25. Assignment by operation of law, as in the case of an executor, is quite different from assignment by act of the party; and the one might be held to have been in the contemplation of the parties to this contract although the other was not. A lease, for instance, even if containing an express covenant against assignment by the lessee, passes to his executor. And it is by no means clear that an executor would be bound to perform, or would be entitled to the benefit of, such a contract as that now in question. Dickinson v. Calahan, 19 Penn. St. 227.

Third. Cases of assignments by contractors for public works, in which the contracts, and the statutes under which they were made, were held to permit all persons to bid for the contracts, and to execute them through third persons. Taylor v. Palmer, 31 California, Lockhardt, 73 Penn. St. 211; Devlin v. New York, 63 N. Y. 8.

Fourth. Other cases of contracts assigned by the party who was to do certain work, not by the party who was to pay for it, and in which the question was whether the work was of such a nature that it was intended to be performed by the original contractor only. Robson v. Drummond, 2 B. & Ad. 303; British Wagon Co. v. Lea, 5 Q. B. D. 149; Parsons v. Woodward, 2 Zabriskie, 196.

Without considering whether all the cases cited were well decided, it is sufficient to say that none of them can control the decision of the present case.

*Judgment affirmed.*[63]

[63] On the assignability of an executory contract as affected by the element of personal trust and confidence, see 1 Ann. Cas. 853, note; 15 Ann. Cas. 370, note. If the relation between the parties to the contract involves a relationship of special trust and confidence above the extension of credit for money payments, the contract as in the principal case, may well be deemed unassignable without the consent of the other party to the contract. And an assent to one assignment should not be deemed to waive objection to subsequent assignments. But where the extension of credit for money payments is all that stands in the way of assignment, then assignment should be permitted if made in such a way as not to make the other party's recognition of the assignee, relieve the assignor of the financial responsibility for the contract's performance by the assignee. This is true despite the fact that where the assignee expressly assumes liability under the contract, the assignor by the assignment may become only secondarily liable. See Hudson River, etc., Co. v. Cement Co., 41 Misc. (N. Y.) 254, 260 (1903), where Kellogg, J., said that while the other party as a result of an assignment, whereby the assignee assumed and agreed to pay the liability to the other party would have the responsibility of two parties instead of one, the assignor would be "liable simply as a surety, which liability might be lessened or destroyed by slight circumstances." See also Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574 (1890).

In Eastern Advertising Co. v. McGaw, 89 Md. 72 (1899), a contract by the advertising company to carry the advertising cards of the defendant in the street railway cars in Baltimore was held unassignable by the company because the contract contemplated the skill, judgment and taste of the company in

## BOSTON ICE COMPANY *v.* POTTER.

**(Supreme Judicial Court of Massachusetts, 1877. 123 Mass. 28, 25 Am. Rep. 9.)**

CONTRACT on an account annexed, for ice sold and delivered between April 1st, 1874, and April 1st, 1875. Answer, a general denial.

At the trial in the Superior Court, before Wilkinson, J., without a jury, the plaintiff offered evidence to show the delivery of the ice and its acceptance and use by the defendant from April 1st, 1874, to April 1st, 1875, and that the price claimed in the declaration was the market price. It appeared that the ice was delivered and used at the defendant's residence in Boston, and the amount left daily was regulated by the orders received there from the defendant's servants; that the defendant, in 1873, was supplied with ice by the plaintiff, but, on account of some dissatisfaction with the manner of supply, terminated his contract with it; that the defendant then made a contract with the Citizen's Ice Company to furnish him with ice; that some time before April, 1874, the Citizens' Ice Company sold its business to the plaintiff, with the privilege of supplying ice to its customers. There was some evidence tending to show that the plaintiff gave notice of this change of business to the defendant, and informed him of its intended supply of ice to him; but this was contradicted on the part of the defendant.

The judge found that the defendant received no notice from the plaintiff until after all the ice had been delivered by it, and that there was no contract of sale between the parties to this action except what was to be implied from the delivery of the ice by the plaintiff to the defendant and its use by him; and ruled that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and that the plaintiff could not maintain this action. The plaintiff alleged exceptions.

ENDICOTT, J. To entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and upon the facts stated no contract is to be implied. The defendant

**designing the cards, selecting the type in which they were to be printed, and in the arrangement of the cards in the cars. The court said, that "The contract was one where the *delectus personæ* was most material" (p. 88).**

**In Rease v. Kittle, 56 W. Va. 269 (1904), it was held that a paid-for option on coal lands, not running to the optionee and assigns, was not assignable. The court said that it was no different from an ordinary offer except that it was not revocable, because based upon a valuable consideration, and that "the authorities say that an offer made to a particular person can be turned into a contract by him alone" (Poffenbarger, P., at p. 279). If the option runs to one "and his assigns," he may assign it, but it may not be reassignable by the assignee. Wheeling Creek Gas, Coal & Coke Co. v. Elder, 170 Fed. 215 (1909). These are minority cases and have been criticised because they subordinated the contract phase of the option to its offer phase. See 1 Williston on Contracts, § 415.**

had taken ice from the plaintiff in 1873, but, on account of some dissatisfaction with the manner of supply, he terminated his contract, and made a contract for his supply with the Citizens' Ice Company. The plaintiff afterward delivered ice to the defendant for one year without notifying the defendant, as the presiding judge has found, that it had bought out the business of the Citizens' Ice Company, until after the delivery and consumption of the ice.

The presiding judge has decided that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and has thereby necessarily found that the defendant's contract with that company covered the time of the delivery of the ice.

There was no privity of contract established between the plaintiff and defendant, and without such privity the possession and use of the property will not support an implied assumpsit. Hills v. Snell, 104 Mass. 173, 177. And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed that he received it under the contract made with the Citizens' Ice Company. Of this change he was entitled to be informed.

A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into.[64] If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizens' Ice Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. Orcutt v. Nelson, 1 Gray, 536, 542; Winchester v. Howard, 97 Mass. 303; Hardman v. Booth, 1 H. & C. 803; Humble v. Hunter, 12 Q. B. 310; Robson v. Drummond, 2 B. & Ad. 303. If he had received notice and continued to take the ice as delivered, a contract would be implied. Mudge v. Oliver, 1 Allen, 74; Orcutt v. Nelson, *ubi supra;* Mitchell p. Lapage, Holt N. P. 253.

There are two English cases very similar to the case at bar. In Schmaling v. Thomlinson, 6 Taunt. 147, a firm was employed by the defendants to transport goods to a foreign market, and transferred

[64] See language on undisclosed principal situation to same effect in Coast Fisheries Co. v. Linen Thread Co., 269 Fed. 841, 844 (1921).

the entire employment to the plaintiff, who performed it without the privity of the defendants, and it was held that he could not recover compensation for his services from the defendants.

The case of Boulton v. Jones, 2 H. & N. 564, was cited by both parties at the argument. There the defendant, who had been in the habit of dealing with one Brocklehurst, sent a written order to him for goods. The plaintiff, who had on the same day bought out the business of Brocklehurst, executed the order without giving the defendant notice that the goods were supplied by him and not by Brocklehurst. And it was held that the plaintiff could not maintain an action for the price of the goods against the defendant. It is said in that case that the defendant had a right of set-off against Brocklehurst, with whom he had a running account, and that is alluded to in the opinion of Baron Bramwell, though the other judges do not mention it.

The fact that a defendant in a particular case has a claim in set-off against the original contracting party shows clearly the injustice of forcing another person upon him to execute the contract without his consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied assumpsit or privity between the parties. Nor can the non-existence of a set-off raise an implied assumpsit. If there is such a set-off, it is sufficient to state that, as a reason why the defendant should prevail; but it by no means follows that because it does not exist the plaintiff can maintain his action. The right to maintain an action can never depend upon whether the defendant has or has not a defence to it.

The implied assumpsit arises upon the dealings between the parties to the action, and cannot arise upon the dealings between the defendant and the original contractor, to which the plaintiff was not a party. At the same time, the fact that the right of set-off against the original contractor could not, under any circumstances, be availed of in an action brought upon the contract by the person to whom it was transferred and who executed it, shows that there is no privity between the parties in regard to the subject-matter of this action.

It is, therefore, immaterial that the defendant had no claim in set-off against the Citizens' Ice Company.

We are not called upon to determine what other remedy the plaintiff has, or what would be the rights of the parties if the ice were now in existence.

*Exceptions overruled.*[65]

[65] See George P. Costigan, Jr., The Doctrine of Boston Ice Co. v. Potter, 7 Columbia L. Rev. 32.

An assignee of a mortgage may enforce it even though he bought and the assignor sold with malice against the mortgagor and solely with a view to bring a suit to foreclose the mortgage. Morris v. Tuthill, 72 N. Y. 575 (1878).

## PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, APPT., *v.* PAUL I. WELLES ET AL.

(Supreme Court of the United States, 1916. 242 U. S. 7, 37 Sup. Ct. 3, 61 L. Ed. 116, Ann. Cas. 1918 D, 643.)

HOLMES, J. This is a suit brought by the appellee Welles to establish a lien upon a debt of $6,830.85, due under a construction contract from the city of San Francisco, represented by the appellee Boyle, to the bankrupt, Metropolis Construction Company. The district court approved the report of the referee against the claim and in favor of the appellant, but this decree was reversed by the circuit court of appeals. 128 C. C. A. 161, 211 Fed. 561; 131 C. C. A. 389, 215 Fed. 81. The subject-matter is the fourth progress payment, which, on December 5, 1910, had been authorized by the board of public works of the city. On that day the Construction Company applied to the appellant bank for a loan of $30,000, secured by an order on the auditor of the city, authorizing the bank to draw from the city for the above and other amounts not in controversy here. The bank declined until the order should be accepted by the auditor, whereupon, on the next day, the order was presented to the auditor's office and stamped as received on

So a state assignee of bonds of another state may enforce them, although the assignor was remediless and simply assigned by way of gift to a state because the latter would have a remedy to make the obligor state perform. South Dakota v. North Carolina, 192 U. S. 286 (1903).

In La Rue v. Groezinger, 84 Cal. 281, 284 (1890), where the question was whether a contract whereby one party was to sell and the other to buy all the grapes of a certain grade which the seller might raise in a certain vineyard during a certain period, could be assigned by the seller, Hayne, C., said of Boston Ice Co. v. Potter: "And it would seem from one of the cases cited by the appellant that if an intention not to deal with a particular person appears from circumstances outside of the contract, it cannot be assigned to such person." The contract before the court in La Rue v. Groezinger was held assignable by the seller.

The law governing undisclosed principals has a problem similar to the foregoing. In Rice & Bullen Melting Co. v. International Bank, 86 Ill. App. 136 (1899) and in Kelley Asphalt Block Co. v. Barber Asphalt & Paving Co., 120 N. Y. Supp. 163 (1909), the analogy of the doctrine of Boston Ice Co. v. Potter was rejected in the undisclosed principal situation. But see Winchester v. Howard, 97 Mass. 303 (1867).

In Said v. Butt, [1920] 3 K. B. 497, the plaintiff, knowing a theater would not sell him a seat because of personal resentment at unfounded charges which he had made, got a friend to buy him a ticket without disclosing for whom it was bought. On being refused admission by the managing director's orders, plaintiff sued him for maliciously procuring the proprietors to break their contract with the plaintiff. It was held that the plaintiff had no such contract.

McCardie, J., said: "I hold that by the mere device of utilizing the name and services of Mr. Pollock [the friend] the plaintiff could not constitute himself a contractor with the Palace Theater against their knowledge and contrary to their express refusal. He is disabled from asserting that he was the undisclosed principal of Mr. Pollock" (p. 503).

December 6. The order was intended and taken as an assignment, and, after it had been stamped, was accepted by the bank as security and the money was advanced. The next day $5,000 more was advanced on the same security, notes being given for each sum. The appellee Welles was a subcontractor, and on December 12 and 16 served notice on the city to withhold payment, as permitted by § 1184 of the Code of Civil Procedure of the state of California. It is admitted by Welles that if the assignment was valid, his rights are subordinate to it (Newport Wharf & Lumber Co. v. Drew, 125 Cal. 585, 58 Pac. 187); and the only question argued on his behalf is whether the terms of the contract between the bankrupt and the city made the assignment void.

The contract provided that the contractor should keep the work under his personal control, and should not assign or sublet the whole or any part thereof without the consent of the board of public works. It further declared that no subcontract should relieve the contractor of any of his obligations, and that he should not, "either legally or equitably, assign any of the moneys payable under the contract or his claim thereto unless with the like consent." The city has made no objection to the assignment to the bank, and the money now awaits the decision of this court as between the claimant of the lien and the prior assignee.

There is a logical difficulty in putting another man into the relation of the covenantee to the covenantor, because the facts that give rise to the obligation are true only of the covenantee,—a difficulty that has been met by the fiction of identity of person and in other ways not material here. Of course, a covenantor is not to be held beyond his undertaking, and he may make that as narrow as he likes. Arkansas Valley Smelting Co. v. Belden Min. Co., 127 U. S. 379, 32 L. Ed. 246, 8 Sup. Ct. Rep. 1308. But when he has incurred a debt, which is property in the hands of the creditor, it is a different thing to say that, as between the creditor and a third person, the debtor can restrain his alienation of that, although he could not forbid the sale or pledge of other chattels. When a man sells a horse, what he does, from the point of view of the law, is to transfer a right, and a right being regarded by the law as a thing, even though a *res incorporalis*, it is not illogical to apply the same rule to a debt that would be applied to a horse. It is not illogical to say that the debt is as liable to sale as it is to the acquisition of a lien. To be sure, the lien is allowed by a statute subject to which the contract was made, but the contract was made subject also to the common law, and if the common law applies the principle recognized by the statute of California that a debt is to be regarded as a thing and therefore subjects it to the ordinary rules in determining the relative rights of an assignee and the claimant of a lien, it does nothing of which the debtor can complain. See further, Cal. Civ. Code, §§ 954, 711. The debtor does not complain, but stands indifferent, willing that the common law should take its course.

The circuit court of appeals relied largely upon Burck v. Taylor, 152

U. S. 634, 38 L. Ed. 578, 14 Sup. Ct. Rep. 696, some expressions in which, at least, seem to warrant the conclusion reached. But that case, as understood by the majority of the court, was quite different from this. A contract for the building of the Capitol of Texas was made not assignable without the consent of the governor and certain others. The contractor assigned an undivided three-fourths interest to Taylor, Babcock, & Company, with the required assent, and then three-sixteenths without assent to three others severally, one of whom conveyed one thirty-second to the plaintiff. The contractor made another conveyance of all his rights under the contract to Taylor, Babcock, & Company, and Taylor, Babcock, & Company made what purported to be a transfer of the entire contract to Abner Taylor, the defendant. Both of these transfers were assented to. In the latter, Taylor purported to bind himself to the state to perform the original contract, and, in the assent to the same, the governor and other authorities stated that they recognized Taylor as the contractor, bound as the original contractor was bound. The court held that there was a novation (p. 650), and that Taylor acted without notice of the plaintiff's claim (p. 653). Upon those facts it would be hard to make out any right of the plaintiff to proceeds of the new contract that Taylor had performed.

The assignability of a debt incurred under a contract like the present sometimes is sustained on the ground that the provision against assignment is inserted only for the benefit of the city. Whether that form of expression is accurate or merely is an indirect recognition of the principle that we have stated hardly is material here. It is enough to say that we are of opinion that, upon the facts stated, the assignment was not absolutely void, that therefore the bank got a title prior to that of Welles, and consequently that the decree must be reversed. See Hobbs v. McLean, 117 U. S. 567, 29 L. Ed. 940, 6 Sup. Ct. Rep. 870; Burnett v. Jersey City, 31 N. J. Eq. 341; Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572.

*Decree reversed.*[66]

Mr. Justice McKenna dissents for the reasons stated by the circuit court of appeals.

[66] "A stipulation of non-assignability in a contract will not prevent its transfer to an assignee, subject, of course, to all defenses which would have been available in the hands of the assignor." Weaver, J., in Thomassen v. DeGoey, 133 Ia. 278, 280-281 (1907).

There are cases which give the stipulation such full effect that any assignment forbidden by the stipulation is absolutely void except that it may give the assignee a cause of action against the assignor. Bonds-Foster Lumber Co. v. Northern Pac. R. Co., 53 Wash. 302, 307 (1909). See Mueller v. Northwestern University, 195 Ill. 236 (1902); Omaha v. Standard Oil Co., 55 Neb. 337 (1898); Lockerby v. Amon, 64 Wash. 24 (1911). But it is believed that the rule of public policy which forbids unreasonable restraints on alienation of property forbids any restraint on assignment greater than a liberal interpretation of the

## JOHNSON ET AL. v. VICKERS.

(Supreme Court of Wisconsin, 1909. 139 Wis. 145, 120 N. W. 887, 21 L. R. A. (N. S.) 359.)

Action by Rasmus Johnson and others against Alvin Vickers. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

The action was brought to recover a sum alleged to be due on a sub-

other party's reasonable needs shows to be advisable. In the conflict between the public policy in favor of permitting the parties to make that contract which they see fit and this other rule of public policy, it should be remembered that:

"The creation of an obligation is no part of the law of property; but the transfer of such obligation when created is as much part of the law of property as the transfer of a house or of a table." Gray's Rule Against Perpetuities, 3 ed., § 829, n. 3.

In Inter-Southern Line Life Ins. Co. v. Humphrey (Miss.), 84 So. 625, 626-7 (1920), Holden, J., for the court, said of an assignment by insurance agents of their claims against the company to secure the payment of a note to the assignee, where the contract provided that "no assignment of commissions accruing hereunder shall be valid unless authorized in writing by the company in advance," that:

"Prohibition in a contract against assignment is legal and valid. The right to make a personal contract or to agree for the performance of a contract by a certain party to the exclusion of all others is obviously legitimate. Such contracts are often made with a view of retaining the personal interest and action of the payee, which purpose might be defeated should the contract or the fruits of it be unconditionally assigned to some stranger. But where the assignment of the proceeds in a nonassignable contract is made merely as collateral security for the payment of a debt, and the real ownership remains in the assignor, he still retains the personal interest and obligation of performance as the real owner, and the reason urged against the validity of such assignment disappears, and the rights of the debtor are not prejudiced by the collateral assignment which inures to the benefit of the assignor.

"Restrictions against assignment of contracts are not looked upon by the courts with full favor, because they prohibit the alienation of such property rights, thus depriving the owner of the full enjoyment and control thereof; especially is this true when such deprivation results in no benefit to the debtor.

"It is held by good authority that the prohibition against assignment in a contract intends that the owner of the property right cannot voluntarily assign it, but that when the right passes to another by court sale or foreclosure against the right assigned as collateral security, it is valid, because the transfer of full title in such case is involuntary on the part of the owner in the contract. Crouse v. Michell, 130 Mich. 347, 90 N. W. 32, 79 Am. St. Rep. 479.

"However, we rest the decision in this case upon the ground that there is a clear distinction between an unconditional assignment and a collateral assignment, and that the prohibition in the contract against assignment does not contemplate a collateral assignment, but means that only a complete assignment by the owner of his whole interest in the property right shall be invalid."

Mueller v. Northwestern University, 195 Ill. 236 (1902), takes the extreme position that the parties may prohibit an assignment of the contract so that the assignee cannot succeed to any rights under it.

In In re Turcan, 40 Ch. D. 5 (1888), it was said by Cotton, L. J., for the court, that it would be a sufficient compliance with a condition in an insurance policy

scription contract. The subscriptions were obtained on a contract dated Dec. 4, 1906, for the Industrial Construction Company, a Chicago corporation, to erect and equip a canning factory, according to specifications attached to the proposed contract, for $14,000, and after the factory was in operation, it was agreed that the subscribing parties should form a corporation, each subscriber to receive stock to the amount of his subscription. On December 8th, the Industrial Construction Company assigned the contract in question, without recourse, to Rasmus Johnson, Christ Johnson, and T. H. Pardoe, the plaintiffs in this action. The assignees proceeded to erect the factory. The subscribers were not advised of the alleged assignment of the contract to the plaintiffs before it is claimed that the job was accepted. Defendant declined to pay his subscription, on the ground, among others, that the contract was not assignable.

BARNES, J.[67] The disposition of this appeal necessitates the consideration of the following questions: (1) Was the contract sued on assignable? (2) Was the question of its nonassignability raised by the pleadings? (3) Was the defendant precluded from insisting upon the defense of nonassignability?

1. It is established that the Industrial Construction Company attempted to make an absolute assignment of its contract two days after its execution, and before any work was done thereunder. The assignment is unqualified in its terms and is made without recourse, and the plaintiffs are suing as assignees claiming to have performed the work and furnished the materials used in the construction of the factory by virtue of the assignment, and not as subcontractors. This contract obligated the Industrial Construction Company to build and equip a canning factory according to specifications attached to the contract that seem to be complete as to details. The performance of the work undoubtedly required skill and experience, and, upon its proper execution the success of the enterprise might well depend. The assignees were wholly inexperienced in constructing plants of this character, while the assignor apparently followed the business of so doing. This contract manifestly imposed a liability upon the assignor of the plaintiffs, and involved a relation of personal confidence which the subscribers must have intended would be exercised by the party in whom they confided. In the construction of a complex plant, subscribers having no knowledge themselves as to how such a plant should be constructed, would naturally prefer to make their contract with a party having the requisite knowl-

that it "shall not be assignable in any case whatever" if the insured should execute a declaration of trust in favor of the persons to whom he wished to give the benefit of the money to come due on the policy.

On the power of parties to an assignable contract to restrict its assignability, see 88 Am. St. Rep. 812, note; Ann. Cas. 1918 D. 613 note.

[67] The statement of facts is abbreviated and part of the opinion is omitted.

edge and experience rather than with persons having neither. Good business judgment would dictate that such a course should be pursued. They had the right to select the party with whom they would deal, and, when the selection was made and the contract was executed, there could be no substitution of contractors in the case before us without the assent of the subscribers. The authorities are quite uniform in holding that such a contract is not assignable by the contractor without the consent of the other party thereto. Ark. Valley S. Co. v. Belden Mining Co., 127 U. S. 379, 387, 8 Sup. Ct. 1308, 32 L. Ed. 246; Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9; Swarts v. Electric Lighting Co., 26 R. I. 388, 59 Atl. 77; Campbell v. Board of Com'rs, 64 Kan. 376, 67 Pac. 866; Edison v. Babka, 111 Mich. 235, 69 N. W. 499; Winchester v. Davis Pyrites Co., 67 Fed. 45, 14 C. C. A. 300; Worden v. Railway Co., 82 Iowa, 735, 48 N. W. 71; Craig v. Miller, 6 Ky. 440; 4 Cyc. 22, 23.

* * *

The judgment of the circuit court is reversed, and the cause is remanded, with directions to set aside the order directing a verdict in plaintiffs' favor, and to grant the defendant's motion for a directed verdict in his favor, and for judgment dismissing the complaint.[68]

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## CHARLES WOODLEY *v.* W. E. BOND, EXECUTOR OF A. W. MEBANE, DECEASED.

(Supreme Court of North Carolina, 1872. 66 N. C. 396.)

DICK, J.[69] The plaintiff contracted to serve the testator of the defendant as an overseer on a farm for one year. Before the term of service had expired, the said testator, without the knowledge or consent of the plaintiff, sold and delivered possession of said farm to Augustus Holley, and left the farm a few days after the sale.

The agreement between the plaintiff and testator was a personal contract, and its benefits and obligations did not in any respect pass with the land to Holley. Various considerations, besides the wages agreed upon, may have induced the plaintiff to enter into the contract. It may be that he would not serve Holley at any price. The contract consisted of mutual engagements between the parties, which established the relation of employer and overseer, and as this relation was ended by the action of the testator, the plaintiff was at liberty to regard the

[68] Where a contract is so personal as to be unassignable in nature, the fact that it contains a provision that "This agreement shall bind and benefit the respective successors and assigns of the parties hereto" will not make it assignable for "The intention of parties to a contract must be ascertained, not from one provision, but from the entire instrument." Paige v. Faure (N. Y.), 127 N. E. 898, 899 (1920).

[69] The statement of facts is omitted.

contract as rescinded, leave the farm, and bring suit upon a *quantum meruit* for services rendered at the instance and request of testator.

2 Parsons on Cont. 32, 523, 678; Robeson v. Drummond, 2 B. & Ad. 303; Planche v. Colborn, 8 Bing. 14; 2 Smith L. E., 18, 19 (note on Cutler v. Powell).

The principles involved in this case are so well founded in natural justice, that they need no further discussion or citation of authority.

There is no error.

PER CURIAM. *Judgment [for plaintiff] affirmed.*

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MACDONALD ET AL. *v.* O'SHEA ET AL.

**(Supreme Court of Washington, 1910. 58 Wash. 169, 108 Pac. 436, Ann. Cas. 1912 A, 417.)**

Action by E. C. MacDonald, trustee, and another, against Edward O'Shea, administrator of John J. Walsh, deceased, and others. From a judgment for plaintiffs, certain of the defendants appeal. Affirmed.

PARKER, J.[70] This is an action to foreclose an indemnity mortgage. A trial resulted in findings and judgment in favor of the plaintiffs, and certain of the defendants have appealed.

The material facts are in substance as follows: The National Surety Company is a corporation authorized to transact the business of surety in this state. On April 27, 1905, John J. Walsh executed and delivered to E. C. MacDonald as trustee for the National Surety Company a mortgage upon real property in Spokane, which mortgage by its terms was given to secure the sum of $3,500. This mortgage was intended to indemnify the surety company against any damage or loss which it might incur upon any bond thereafter executed by it at the request or for the benefit of John J. Walsh. On May 25, 1906, at the instance and request of John J. Walsh, the surety company executed and delivered its bond as surety in his behalf in favor of the Standard Furniture House, incorporated, in the sum of $7,500, whereby the surety company guaranteed that he would well and truly perform a certain building contract for the construction of a building, entered into on that day by him with the Standard Furniture House. By the terms of the building contract he was to furnish all material and labor for the erection and completion of the building according to certain plans and specifications at an agreed compensation of $15,050.75, and was to protect the property against all claims and liens occurring by reason of the construction of the building. It was provided in the contract that "the said parties for themselves, their heirs, successors, executors, administrators and as-

[70] Part of the opinion is omitted.

signs, do hereby agree to the full performance of the covenants herein contained." On July 21, 1906, John J. Walsh died. At that time a comparatively small part of the contract had been performed. Soon thereafter Edward O'Shea was appointed and duly qualified as administrator of the estate of John J. Walsh. The administrator under the sanction of the court proceeded with the construction of the building under the contract made by the deceased. Thereafter the administrator defaulted in the performance of the contract, in that he suffered and permitted liens to be filed against the property, and neglected to pay certain bills for material and labor used in its construction amounting in the aggregate to $3,492.40. These claims were all lienable claims against the property, though not all of the claimants had actually filed liens. Thereupon the Standard Furniture House demanded that the surety company save it harmless from these claims. Thereupon the surety company, after investigating the claims and being satisfied of their validity, and that it was liable as surety upon the bond for their payment, complied with the demand of the Standard Furniture House and paid the claims on February 14, 1907. The appellants are heirs of John J. Walsh, and as such are interested in the mortgaged property. The court concluded that the claims paid by the surety company were valid claims against John J. Walsh, and the surety company as surety, upon the contract and bond; and that the surety company by virtue of its indemnity mortgage was entitled to have the sums so paid by it declared a lien upon the property described in the mortgage, and to have the mortgage foreclosed.

Learned counsel for appellants contend that the contract for the construction of the building constituted such a personal relation between Walsh and the Standard Furniture House that this obligation under the contract to construct the building did not survive, but died with him, and that there was no obligation cast upon his personal representative, or his estate, requiring the completion of the building; and hence the surety company was under no obligation to pay lien claims accruing after the death of Walsh in the construction of the building. The general rule governing the survival of contractual obligations as against the personal representative and the estates of deceased persons is stated in 2 Parsons on Contracts (9th Ed.) 685, as follows: "It is a presumption of law that parties to a simple contract intended to bind not only themselves, but their personal representatives; and such parties may sue on a contract, although not named therein. Hence, as we have seen, executors, though not named in a contract are liable, so far as they have assets, for the breach of a contract which was broken in the lifetime of their testator. And, if the contract was not broken in his lifetime, they must not break it, but will be held to its performance, unless this presumption is overcome by the nature of the contract, as where the thing to be done required the personal skill of the testator himself." 18 Cyc. 239. This rule is elementary. The difficulty in

applying it arises when the facts of the particular case are such as to render it doubtful as to whether or not the thing to be done requires the personal skill of the deceased himself. The Supreme Court of Pennsylvania in Billings's Appeal, 106 Pa. 558, 560, said: "Where a party agrees to do that which does not necessarily require him to perform in person, that which he may, by assignment of his contract or otherwise, employ others to do, we may fairly infer, unless otherwise expressed, that a mere personal relation was not contemplated. It is true also, perhaps, that a contract may involve matters of such a nature as to render the performance of them so incompatible with the settlement of a decedent's estate, and so inconsistent with the general duties of an administrator or executor that, in the absence of any express provision to the contrary, the parties may be presumed, as in the case of Dickinson v. Calahan's Administrator, [19 Pa.] 227, to have intended its dissolution at death. The whole question in each case is one for construction, and depends upon the intention of the parties, that intention to be found under the rules regulating the construction of contracts in general." [71]

[71] In Dickinson v. Calahan's Adm'rs, 19 Pa. St. 227 (1852), where a lumber manufacturer contracted with a lumber merchant to sell him a certain quantity of lumber to be made at his mill during five years, the lumber to be paid for as delivered, where both parties died during the five years, and where the executor of the vendee sought to set off against an action by the administrators of the vendor for the value of lumber delivered damages for breach of the contract through the refusal of the administrators of the vendor to perform it, Lowrie, J., for the court, said (p. 234):

"It would seem absurd to say that the administrator of a physician, or author, or musician could be compelled to perform their professional engagements no matter how the contract might be expressed. The idea is ludicrous. Yet it has been supposed that an administrator might take the place of his intestate in teaching an apprentice to be a surgeon, or saddler, or shoemaker, or mariner, or husbandman, or in demanding services from an ordinary laborer, but the idea was rejected by the Court. On what ground? Most certainly not that no one else could be got to take the place of the decedent, but on the ground that no such substitution was intended by the contract, together perhaps with the feeling of the incompatibility of such a substitution with the duties imposed by law upon administrators. The law trusts people to settle up estates on account of their honesty and general business capacity, and not for any peculiar scientific or artistic skill, and the State does not hold itself bound to furnish such abilities. Some people may suppose that it requires no great skill to manufacture boards if one has the material and machinery, but still we cannot suppose that the deceased was contracting for any kind of skill in his administrators. For these reasons the Court below was right in declaring in substance that the administrators were liable only for breaches committed by the intestate in his lifetime, and the same principle applies to the death of either party."

In Burch v. J. D. Bush & Co. (No. Car.), 106 S. E. 489, 490 (1921), Stacy, J., for the court, said:

"The general rule is that contracts bind the executor or administrator, though not named therein, and that death does not absolve a man from his engagements. There is an exception, however, to this general rule, equally well established, that in contracts requiring the continued existence of a given

In the case before us, there is no doubt of the intent of the parties to make this building contract binding upon the administrator of John J.

person or thing a condition is implied that the impossibilty of fulfillment arising out of the death of the person or destruction of the thing shall excuse the performance. Stagg v. Land Co., 171 N. C. 583, 89 S. E. 47; Yerrington v. Greene, 7 R. I. 589, 84 Am. Dec. 578; Mendenhall v. Davis, 52 Wash. 169, 100 Pac. 336, 21 L. R. A. (N. S.), 914, 17 Ann. Cas. 179, and note.

"The line of demarcation between a personal contract, which is terminated by death, and one which the personal representatives of the deceased are required to fulfill, is not very clearly defined. The reasons for this become obvious and apparent upon a moment's reflection. Two elements which enter into the making of a contract, namely, the intention and understanding of the parties, are not subject to any fixed standard of 'weights and measures.' They are invisible and intangible things, variable with time and place, and undeterminable by any constant or set formula. Hence no hard and fast rule can be established for their ascertainment. To be sure, in the broad outlines certain contracts are not difficult of classification. Those of a strictly personal nature, involving particular personal skill or taste—such as a contract of an author to write a book, an artist to paint a picture, a sculptor to carve a piece of statuary, a singer to give a concert, and a promise to marry—are personal contracts and die with the person. Death makes the performance of such contracts impossible, and, indeed, removes the main object and inducement for the agreement. Executors and administrators are unable to perform such contracts, and the estate of the deceased cannot be held liable in damages by reason of the failure to complete them. Ordinarily contracts not falling under this exception come under the general rule, and death does not excuse performance. 13 C. J. 643 *et seq.*

" 'The true question is whether the contract, properly construed, requires a continuance of the promised action beyond the lifetime of the promisor. It is the same question, and is to be answered in the same way, as if the promisor himself were alive for purposes of being sued, but dead for the purposes of performance.' Drummond v. Crane, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707, 38 Am. St. Rep. 460.

"On the other hand, the parties, by express terms, may exclude substituted performance. But there is a twilight zone in which, by reason of the ambiguity of some contracts, the intention of the parties must become the determining factor. The facts and circumstances of each particular case should be taken into consideration in determining whether the contract is purely personal in its nature, and therefore terminated by death, or one which the personal representatives can complete as well as the deceased could have done, had he lived. As said in Siler v. Gray, 86 N. C. 566:

" 'The general rule unquestionably is that the personal representatives of a party are bound to perform all his contracts, whether specially named in them or not, or else make compensation for their nonperformance out of his estate. But to this there is the exception, as well established as the rule itself, of all such contracts as require something to be done by the party himself in person.'

"Assuming such to be the law, whether a given case falls under the general rule, or the exception, must depend upon the intention of the parties; for, at least, it is in every case purely a question of their understanding and agreement. Steamboat Co. v. Transportation Co., 166 N. C. 582, 82 S. E. 956; Railroad v. Railroad, 147 N. C. 368, 61 S. E. 185, 23 L. R. A. (N. S.) 223, 125 Am. St. Rep. 550, 15 Ann. Cas. 363."

Walsh as his personal representative in the event of his death before the completion of the building, since the contract by its express terms so provides. Therefore the administrator was bound to complete the performance of the contract in so far as the assets of the estate would permit, unless we can say that the building contract imposed upon John J. Walsh such a personal duty as to render it practically impossible of performance by any one but himself. An exhaustive note citing many authorities relating to this subject may be found in 21 L. R. A. (N. S.) 915. See, also, note in 68 Am. Dec. 760. It is clear that the obligation of deceased under this building contract was that of an independent contractor, and was not a matter of rendering personal service. 16 Am. & Eng. Enc. of Law (2d Ed.) 187. There was nothing in the contractual relation existing between the deceased and the Standard Furniture House at all approaching the relation of master and servant; nor was it contemplated that the building or any part thereof when completed should be the product of his own personal labor or skill, either as laborer, mechanic, or artist. He no doubt expected to perform his contract through the labor and skill of others to a very large extent, and he had the right to so perform the whole of his contract if he so desired. We have not had our attention called to any authorities holding that the obligation of an independent contractor under an agreement to build a building does not survive him, if the contract is not performed at the time of his death, while there is eminent authority to the contrary. Judge Woerner in his American Law of Administration (2d Ed.) § 328, says: "If one agrees to build a house before a given time, and dies before that time, his executors are bound to perform the contract; and the completion by an administrator of a decedent's contract to build a house attaches to his work all the liabilities of the original contract, so that a subcontractor is entitled to his lien for materials furnished the intestate." See, also, 3 Williams on Executors (7th Am. Ed.) 224. Both of these eminent text-writers cite in support of their text among other authorities the early English case of Quick v. Ludburrow, reported in 3 Bulstrode's Reports, 30, in the year 1685, in which Coke, Chief Justice, said: "If a man be bound to build a house for another before such a time, and he which is bound dies before the time, his executors are bound to perform this." The following cases relating to building contracts support this view: Kadish v. Lyon, 229 Ill. 35, 82 N. E. 194; Janin v. Browne, 59 Cal. 37; Riblet v. Wallis, 1 Daly (N. Y.) 360, 365; Bambrick v. Webster Presbyterian Church, 53 Mo. App. 225, 238; Russell v. Buckhout, 87 Hun, 46, 34 N. Y. Supp. 271. We are of the opinion that the obligations of John J. Walsh under this contract survived him and were binding upon his estate. It follows that the surety company was as much bound to the performance of this contract after the death of Walsh as it would have been had he lived to perform the contract in person.[72] * * *

[72] "The complaint is that the administrators did not obtain from the probate

We are of the opinion that the judgment should be affirmed, and it is so ordered.[73]

court any order or direction to carry out the contract of their intestate, as contemplated by section 126 of chapter 3, Hurd's Revised Statutes of 1905, which reads: 'All contracts made by the decedent may be performed by the executor or administrator when so directed by the county court.' We think that no case is by the bill made which authorizes the intervention of a court of equity. If an administrator elects to perform a contract entered into by his intestate for the benefit of the estate without obtaining the order or direction contemplated by section 126, *supra*, where the contract is not of a strictly personal nature, he may do so, taking upon himself the risk of being required to make good any loss that may ensue. If he obtains the order or direction contemplated by the statute after having fully disclosed to the court all the facts and circumstances proper for the court's consideration, and carefully and exactly carries out the order or direction he will, no doubt, be thereby relieved from personal liability. If he acts without such order or direction, but in good faith, for the purpose of complying with the contract of the deceased, his acts, so far as the living parties to the contract are concerned, are binding upon the estate." Scott, J., in Kadish v. Lyon, 229 Ill. 35, 41 (1907).

[73] "It is, of course, competent for parties to agree that a contract shall not survive and that all obligation under it should terminate on their death. So a contract may be of such a nature as to admit only of a personal performance, or as to imply that it is to be operative only during the continuance of personal relations, although not so expressed in terms and will be deemed dissolved by death or other disability which renders performance, according to the intention, impossible." Andrews, J., in Kernochan v. Murray, 111 N. Y. 306, 308 (1888).

On the performance of contracts which survive death, see 22 Am. St. Rep. 811, note; 3 A. L. R. 1608, note.

## CHAPTER V.

## BENEFICIARIES OF CONTRACTS.[1]

### DUTTON AND WIFE *v.* POOLE.

(Court of King's Bench, 1677. 2 Levinz, 211.)

Assumpsit, and declares that the father of the plaintiff's wife being seized of a wood which he intended to sell to raise portions for younger children, the defendant being his heir, in consideration the father would forbear to sell it at his request, promised the father to pay his daughter, now the plaintiff's wife, £1000, and avers that the father at his request forbore, but the defendant had not paid the £1000. After verdict for the plaintiff upon *non assumpsit*, it was moved in arrest of judgment, that the action ought not to be brought by the daughter, but by the father; or if the father be dead, by his executors; for the promise was made to the father, and the daughter is neither privy nor interested in the consideration, nothing being due to her. Also the father, notwithstanding this agreement with the son, might have cut down the wood, and then there was no remedy for the son, nor could the daughter have released the promise, and therefore she cannot have an action against him for not performing the promise, and divers cases were cited for the defendant, as Yelv. Rippon v. Norton, Hawes v. Leader, Starky v. Milner, 1 Roll. 31, 32, Sty. 296, and a case lately resolved in Com. Banc. *inter* Norris & Pine, *Intrat.* Hill, 22 and 23 Car. 2, 1538, where the case was, "If you will marry me, I will pay your children so much," and the action being brought by the children, adjudged it lay not. On the other side it was said, if a man deliver goods or money to H. to deliver or pay to B., B. may have an action, because he is to have the benefit of the bailment, so here the daughter is to have the benefit of the promise. So if a man should say, "Give me a horse, I will give your son £10," the son may bring the action, because the gift was upon consideration of a profit to the son; and the father is obliged by natural affection to provide for his children, for which cause affection

1 See Crawford D. Hening, History of Beneficiary's Action in Assumpsit, Essays in Anglo-American Legal History, III, 339. See also Henry O. Taylor, The Right of a Third Person to Sue on a Contract Made in His Favor, 15 Amer. L. Rev. 230; Samuel Williston, Contracts for the Benefit of a Third Person, 15 Harv. L. Rev. 767; Arthur L. Corbin, Contracts for the Benefit of Third Persons, 27 Yale L. J. 1008.

As to the various matters in this chapter, local statutes should be consulted. Some statutes provide for suits by sole (donee or gift) beneficiaries, some by creditor (payment or obligee) beneficiaries, some by beneficiaries of sealed contracts, etc.

to children is sufficient to raise a use to them out of the father's estate; and therefore the daughter had an interest in the consideration and in the promise, and the son had a benefit by this agreement, for by this means he had the wood and the daughter is without a portion, which otherwise in all probability the son would have been left to pay, if the wood had not been cut down, nor this agreement between him and his father, and for authorities of this side were cited 1 Roll. Ab. 31, Oldman v. Bateman, and *ibid.* 32; Starky v. Meade.

Upon the first argument Wylde and Jones, JJ., seemed to think that the action ought to be brought by the father and his executors, though for the benefit of the daughter, and not by the daughter, being not privy to the promise or consideration. Twysden and Rainsford seemed *contra,* and afterward two new judges being made, *scil* Scroggs, C. J., in lieu of Rainsford, and Dolben in lieu of Twysden, the case was argued again upon the reasons aforesaid; and now Scroggs, C. J., said that there was such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children, and he and Jones remembered the case of Norris & Pine, and that it was adjudged as aforesaid. But Scroggs said he was then and still is of opinion contrary to that judgment. Dolben, J., concurred with him that the daughter might bring the action, Jones & Wylde *hæsitabant.* But next day they also agreed to the opinion of the Chief Justice and Dolben, and so judgment was given for the plaintiff, for the son hath the benefit by having of the wood, and the daughter hath lost her portion by this means. And now Jones said he must confess he was never well satisfied with the judgment in Norris & Pine's Case, but being it was resolved, he was loth to give his opinion so suddenly against it. And note upon this judgment error was immediately brought, and Trin. 31 Car. 2 it was affirmed in the Exchequer Chamber.[2]

[2] "At the time [of Dutton v. Poole, etc.] * * * the law was not settled, as it now is, that natural love and affection is not a sufficient consideration for a promise upon which an action may be maintained; nor was it settled that the promisee cannot bring an action unless the consideration for the promise moved from him. The modern cases have, in effect, overruled the old decisions; they show that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued. * * * I am prepared to overrule the old decisions, and to hold that, by reason of the principles which now govern the action of assumpsit, the present action is not maintainable." Crompton, J., in Tweddle v. Atkinson, 1 Best & Smith 393, 398 (1861).

See Cleaver v. Mutual Reserve Fund Life Assoc., [1892] 1 Q. B. 147.

With Dutton v. Poole, compare Lawrence v. Oglesby, 178 Ill. 122 (1899), decided when the Illinois Supreme Court was still under the influence of the moral consideration doctrine. See also Buchanan v. Tilden, 158 N. Y. 109 (1899), and the language in Seaver v. Ransom, reported, *post,* p. 606, approving the rule of Dutton v. Poole.

## BOURNE *v.* MASON AND ANOTHER.

(Court of King's Bench, 1669. 1 Ventris, 6.)

In assumpsit, the plaintiff declares, that, whereas one Parrie was indebted to the plaintiffs and defendants in two several sums of money, and that a stranger was indebted in another sum to Parrie; that there being a communication between them, the defendants, in consideration that Parrie would permit them to sue, in his name, the stranger, for the sum due to him, promised that they would pay the sum which Parrie owed to the plaintiff; and alleged that Parrie permitted them to sue, and that they recovered. After non-assumpsit pleaded, and a verdict for the plaintiff, it was moved in arrest of judgment that the plaintiff could not bring his action, for he was a stranger to the consideration.

But in maintenance thereof, a judgment was cited in 1658, between Sprat and Agar, in the King's Bench, where one promised to the father, in consideration that he would give his daughter in marriage with his son, he would settle so much land. After the marriage the son brought the action; and it was adjudged maintainable. And another case was cited of a promise to a physician, that if he did such a cure he would give such a sum of money to himself and another to his daughter; and it was resolved the daughter might bring an assumpsit. Which cases the court agreed: for in the one case the parties that brought the assumpsit did the meritorious act, though the promise was made to another; and in the other case, the nearness of the relation gives the daughter the benefit of the consideration performed by her father; but here the plaintiff did nothing of trouble to himself or benefit to the defendant, but is a mere stranger to the consideration; wherefore it was adjudged *quod nil capiat per billam.*[3]

In England and Ireland beneficiaries of contracts are occasionally treated as *cestuis que trust*, so as to give them a remedy when otherwise they would not have one. Moore v. Darton, 4 De G. & S. 517 (1851); Walford v. Les Affreteurs Réunis Société Anonyme, [1918] 2 K. B. 498; Kelly v. Larkin, [1910] 2 Ir. R. 550. See also McFadden v. Jenkyns, 1 Phillips 153 (1842). See also note to The Satanita, reported, *ante*, p. 68.

[3] "The question in this case is whether, upon the facts stated in the complaint, the plaintiff [as creditor beneficiary] can maintain an action at law against the defendant for its refusal to pay his debt. It is probably true that in many, perhaps in most, of the state courts he could do so; but, whatever the law in relation to this matter may be elsewhere, it must now be regarded as the settled general rule in this state that where A. simply agrees with B., upon a valid consideration, to assume and pay B.'s debts, and save B. harmless therefrom, C., a creditor of B., cannot maintain an action at law against A. for his refusal to pay the debt due from B. to C. Treat v. Stanton, 14 Conn. 445; Clapp v. Lawton, 31 Conn. 95; Meech v. Ensign, 49 Conn. 191; Baxter v. Camp, 71 Conn. 245, 41 Atl. 803; Lamkin v. Manufacturing Co., 72 Conn. 57, 43 Atl. 593, 1042, 44 L. R. A. 786. This rule is based upon the principle that A., in the case supposed, for a breach of his contract obligation, agreed to be answerable to B. alone, or B.'s assignee, and not to each and all of the creditors of B. who were

## LAWRENCE *v.* FOX.

(Court of Appeals of New York, 1859. 20 N. Y. 268.)

Appeal from the Superior Court of the city of Buffalo. On the trial before Masten, J., it appeared by the evidence of a bystander, that one Holly, in November, 1857, at the request of the defendant, loaned and advanced to him $300, stating at the time that he owed that sum to the plaintiff for money borrowed of him, and had agreed to pay it to him the then next day; that the defendant in consideration thereof, at the time of receiving the money, promised to pay it to the plaintiff the then next day. Upon this state of facts the defendant moved for a nonsuit, upon three several grounds—viz.: That there was no proof tending to show that Holly was indebted to the plaintiff; that the agreement by the defendant with Holly to pay the plaintiff was void for want of consideration, and that there was no privity between the plaintiff and defendant. The court overruled the motion, and the counsel for the defendant excepted. The cause was then submitted to the jury, and they found a verdict for the plaintiff for the amount of the loan and interest, $344.66, upon which judgment was entered; from which the defendant appealed to the Superior Court, at general term, where the judgment was affirmed, and the defendant appealed to this court.

H. GRAY, J.[4] * * * But it is claimed that notwithstanding this promise was established by competent evidence, it was void for the want of consideration. It is now more than a quarter of a century since it was settled by the Supreme Court of this state, in an able and painstaking opinion by the late Savage, C. J., in which the authorities were fully examined and carefully analyzed, that a promise in all material respects like the one under consideration was valid, and the judgment of that Court was unanimously affirmed by the Court for the Correction of Errors. Farley v. Cleaveland, 4 Cow. 432; same case in error, 9 Cow. 639. In that case one Moon owed Farley and sold to Cleaveland a quantity of hay, in consideration of which Cleaveland promised to pay Moon's debt to Farley; and the decision in favor of Farley's right to recover was placed upon the ground that the hay received by Cleaveland from Moon was a valid consideration for Cleaveland's promise to pay Farley, and that the subsisting liability of Moon to pay Farley was no objection to the recovery. The fact that the money

strangers to the contract; and this court has said that "the rule is a salutary one, and should not be departed from except for good reasons." Meech v. Ensign, 49 Conn. 203. In our own state it has been departed from by express legislation in one instance, namely, where the grantee in a deed conveying real estate subject to a mortgage or lien agrees to assume and pay the incumbrance. Gen. St. § 983." Torrance, J., in Morgan v. Randolph & Clowes Co., 73 Conn. 396, 397-398 (1900). Only a few American jurisdictions agree with Connecticut.

[4] Parts of the opinions are omitted.

advanced by Holly to the defendant was a loan to him for a day, and that it thereby became the property of the defendant, seemed to impress the defendant's counsel with the idea that because the defendant's promise was not a trust fund placed by the plaintiff in the defendant's hands, out of which he was to realize money as from the sale of a chattel or the collection of a debt, the promise although made for the benefit of the plaintiff could not inure to his benefit. The hay which Moon delivered to Cleaveland was not to be paid to Farley, but the debt incurred by Cleaveland for the purchase of the hay, like the debt incurred by the defendant for money borrowed, was what was to be paid. That case has been often referred to by the courts of this state, and has never been doubted as sound authority for the principle upheld by it. (Barker v. Bucklin, 2 Denio, 45; Hudson Canal Company v. The WestChester Bank, 4 Id., 97.) It puts to rest the objection that the defendant's promise was void for want of consideration. The report of that case shows that the promise was not only made to Moon, but to the plaintiff Farley. In this case the promise was made to Holly, and not expressly to the plaintiff; and this difference between the two cases presents the question, raised by the defendant's objection, as to the want of privity between the plaintiff and defendant. As early as 1806 it was announced by the Supreme Court of this state, upon what was then regarded as the settled law of England, "that where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it." Schermerhorn v. Vanderheyden, (1 John. R. 140,) has often been reasserted by our courts and never departed from. * * * This question was subsequently, and in a case quite recent, again the subject of consideration by the Supreme Court, when it was held that in declaring upon a promise, made to the debtor by a third party to pay the creditor of the debtor, founded upon a consideration advanced by the debtor, it was unnecessary to avert a promise to the creditor; for the reason that upon proof of a promise made to the debtor to pay the creditor, a promise to the creditor would be implied. And in support of this proposition, in no respect distinguishable from the one now under consideration, the case of Schermerhorn v. Vanderheyden, with many intermediate cases in our courts, were cited, in which the doctrine of that case was not only approved, but affirmed. The Delaware & Hudson Canal Company v. The Westchester County Bank, 4 Denio, 97. * * *

But it is urged that because the defendant was not in any sense a trustee of the property of Holly for the benefit of the plaintiff, the law will not imply a promise. I agree that many of the cases where a promise was implied were cases of trusts, created for the benefit of the promisor. The case of Felton v. Dickinson, 10 Mass. 189-190, and others that might be cited, are of that class, but concede them all to have been cases of trusts, and it proves nothing against the application of the rule to this case. The duty of the trustee to pay the *cestuis que trust,* according to the

terms of the trust, implies his promise to the latter to do so. In this case the defendant, upon ample consideration received from Holly, promised Holly to pay his debt to the plaintiff; the consideration received and the promise to Holly made it as plainly his duty to pay the plaintiff as if the money had been remitted to him for that purpose, and as well implied a promise to do so as if he had been made a trustee of property to be converted into cash with which to pay. The fact that a breach of the duty imposed in the one case may be visited, and justly, with more serious consequences than in the other, by no means disproves the payment to be a duty in both. The principle illustrated by the example so frequently quoted (which concisely states the case in hand) "that a promise made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach," has been applied to trust cases, not because it was exclusively applicable to those cases, but because it was a principle of law, and as such applicable to those cases.

It was also insisted that Holly could have discharged the defendant from his promise, though it was intended by both parties for the benefit of the plaintiff, and therefore the plaintiff was not entitled to maintain this suit for the recovery of a demand over which he had no control. It is enough that the plaintiff [Holly] did not release the defendant from his promise, and whether he could or not is a question not now necessarily involved; but if it was, I think it would be found difficult to maintain the right of Holly to discharge a judgment recovered by the plaintiff upon confession or otherwise, for the breach of the defendant's promise; and if he could not, how could he discharge the suit before judgment, or the promise before suit, made as it was for the plaintiff's benefit and in accordance with legal presumption accepted by him (Berley v. Taylor, 5 Hill, 577-584, et seq.), until his dissent was shown? The cases cited, and especially that of Farley v. Cleaveland, establish the validity of a parol promise; it stands then upon the footing of a written one. Suppose the defendant had given his note in which for value received of Holly he had promised to pay the plaintiff, and the plaintiff had accepted the promise retaining Holly's liability. Very clearly Holly could not have discharged that promise, be the right to release the defendant as it may. No one can doubt that he owes the sum of money demanded of him, or that in accordance with his promise it was his duty to have paid it to the plaintiff; nor can it be doubted that whatever may be the diversity of opinion elsewhere, the adjudications in this state, from a very early period, approved by experience, have established the defendant's liability; if, therefore, it could be shown that a more strict and technically accurate application of the rules applied would lead to a different result (which I by no means concede), the effort should not be made in the face of manifest justice.

The judgment should be affirmed.[5]

[5] "The guaranty agreement being made for the benefit of the bank, the question arises whether the state bank examiner may sue upon it. Under section

JOHNSON, C. J., DENIO, SELDEN, ALLEN and STRONG, JJ., concurred. JOHNSON, C. J., and DENIO, J., were of opinion that the promise was to be regarded as made to the plaintiff through the medium of his agent, whose action he could ratify when it came to his knowledge, though taken without his being privy thereto.

COMSTOCK, J. (Dissenting.) The plaintiff had nothing to do with the promise on which he brought this action. It was not made to him, nor did the consideration proceed from him. If he can maintain the suit, it is because an anomaly has found its way into the law on this subject. In general there must be privity of contract. The party who sues upon a promise must be the promisee, or he must have some legal interest in the undertaking. In this case it is plain that Holly, who loaned the money to the defendant, and to whom the promise in question was made, could at any time have claimed that it should be performed to himself personally. He had lent the money to the defendant, and at the same time directed the latter to pay the sum to the plaintiff. This direction he could countermand, and if he had done so, manifestly the defendant's promise to pay according to the direction would have ceased to exist. The plaintiff would receive a benefit by a complete execution of the arrangement, but the arrangement itself was between other parties, and was under their exclusive control. If the defendant had paid the money to Holly, his debt would have been dicharged thereby. So Holly might have released the demand or assigned it to another person, or the parties might have annulled the promise now in question, and designated some other creditor of Holly as the party to whom the money should be paid. It has never been claimed, that in a case thus situated, the right of a third person to sue upon the promise rested on any sound principle of law. We are to inquire whether the rule has been so established by positive authority.

The cases which have sometimes been supposed to have a bearing on

179 of Remington's Code it is provided that every action shall be prosecuted in the name of 'the real party in interest,' except as is otherwise provided by law.

"By a long line of decisions, which will be found collected in Hart v. Bogle, 88 Wash. 125, 152 Pac. 1010, this court is committed to the doctrine that, where one person for a valuable consideration makes a promise to another to pay the debt of a third person, such third person may maintain an action in his own name upon the promise and against the promisor alone. The bank, being the direct beneficiary of the guaranty agreement, must be held to be the real party in interest. If the bank be the real party in interest, there can be no question that, after insolvency and the bank being taken over by the state bank examiner, that official may maintain an action upon the agreement. Hanson v. Soderberg, 105 Wash. 255, 177 Pac. 827; Briscoe v. Hamer, 50 Okl. 281, 150 Pac. 1101; Montgomery Bank & Trust Co. v. Walker, 181 Ala. 368, 61 South. 951." Main, J., in Moore v. Bausch (Wash), 187 Pac. 388, 394 (1920).

The great weight of authority in the United States favors the rule of Lawrence v. Fox. See 25 L. R. A. 257, note; L. R. A. 1916 C, 161, note. See also 39 Am. St. Rep. 531, note; 71 Am. St. Rep. 176, note.

this question are quite numerous. In some of them the dicta of judges, delivered upon very slight consideration, have been referred to as the decisions of the courts. Thus in Schermerhorn v. Vanderheyden, 1 John. 140, the court is reported as saying: "We are of opinion that where one person makes a promise to another, for the benefit of a third person, that third person may maintain an action on such promise." This remark was made on the authority of Dutton v. Poole, Vent. 318, 332, decided in England nearly two hundred years ago. It was, however, but a mere remark, as the case was determined against the plaintiff on another ground. Yet this decision has often been referred to as authority for similar observations in later cases.

In another class of cases, which have been sometimes supposed to favor the doctrine, the promise was made to the person who brought the suit while the consideration proceeded from another, the question considered being whether the promise was void by the Statute of Frauds. Thus in Gold v. Phillips, 10 Johns. 412, one Wood was indebted to the plaintiffs for services as attorneys and counsel, and he conveyed a farm to the defendants who, as part of the consideration, were to pay that debt. Accordingly the defendants wrote to the plaintiffs, informing them that an arrangement had been made by which they were to pay the demand. The defence was that the promise was void within the statute, because, although in writing, it did not express the consideration. But the action was sustained on the ground that the undertaking was original and not collateral. So in the case of Farley v. Cleaveland, 4 Cow. 432; 9 Cow. 639, the facts proved or offered to be proved were that the plaintiff held a note against one Moon; that Moon sold hay to the defendant, who in consideration of that sale promised the plaintiff by parol to pay the note. The only question was whether the Statute of Frauds applied to the case. It was held by the Supreme Court, and afterward by the Court of Errors, that it did not. Such is also precisely the doctrine of Ellwood v. Monk, 5 Wend. 235, where it was held that a plea of the Statute of Frauds to a count upon a promise of the defendant to the plaintiff, to pay the latter a debt owing to him by another person, the promise being founded on a sale of property to the defendant by the other person was bad. * * *

The cases in which some trust was involved are also frequently referred to as authority for the doctrine now in question, but they do not sustain it. If A. delivers money or property to B., which the latter accepts upon a trust for the benefit of C., the latter can enforce the trust by an appropriate action for that purpose. Berly v. Taylor, 5 Hill, 577. If the trust be of money, I think the beneficiary may assent to it and bring the action for money had and received to his use. If it be of something else than money, the trustee must account for it according to the terms of the trust and upon principles of equity. There is some authority even for saying that an express promise founded on the possession of a trust fund may be enforced by an action at law in

the name of the beneficiary, although it was made to the creator of the trust. Thus in Comyn's Digest (Action on the Case upon Assumpsit, B. 15), it is laid down that if a man promise a pig of lead to A., and his executor give lead to make a pig to B., who assumes to deliver it to A., an *assumpsit* lies by A. against him. The case of The Delaware & Hudson Canal Company v. The Westchester County Bank, 4 Denio, 97, involved a trust because the defendants had received from a third party a bill of exchange under an agreement that they would endeavor to collect it, and would pay over the proceeds when collected to the plaintiffs. A fund received under such an agreement does not belong to the person who receives it. He must account for it specifically; and perhaps there is no gross violation of principle in permitting the equitable owner of it to sue upon an express promise to pay it over. Having a specific interest in the thing, the undertaking to account for it may be regarded as in some sense made with him through the author of the trust. But further than this we cannot go without violating plain rules of law. In the case before us there was nothing in the nature of a trust or agency. The defendant borrowed the money of Holly and received it as his own. The plaintiff had no right in the fund, legal or equitable. The promise to repay the money created an obligation in favor of the lender to whom it was made and not in favor of any one else.

I have referred to the *dictum* in Schermerhorn v. Vanderheyden, 1 Johns. 140, as favoring the doctrine contended for. It was the earliest in this state, and was founded, as already observed, on the old English case of Dutton v. Poole, in Ventris. That case * * * belongs to a class of cases somewhat peculiar and anomalous, in which promises have been made to a parent or person standing in a near relationship to the person for whose benefit it was made, and in which, on account of that relationship, the beneficiary has been allowed to maintain the action. Regarded as standing on any other ground, they have long since ceased to be the law in England. * * *

The question was also involved in some confusion by the earlier cases in Massachusetts. Indeed, the Supreme Court of that state seems at one time to have made a nearer approach to the doctrine on which this action must rest than the courts of this state have ever done. 10 Mass. 287; 17 Mass. 400. But in the recent case of Mellen, Administratrix, v. Whipple, 1 Gray, 317, the subject was carefully reviewed and the doctrine utterly overthrown. One Rollin was indebted to the plaintiff's testator, and had secured the debt by a mortgage on his land. He then conveyed the equity of redemption to the defendant by a deed which contained a clause declaring that the defendant was to assume and pay the mortgage. It was conceded that the acceptance of the deed with such a clause in it was equivalent to an express promise to pay the mortgage debt, and the question was whether the mortgagee or his representative could sue on that undertaking. It was held that the suit could not be maintained, and in the course of a very careful and discriminating

opinion by Metcalf, J., it was shown that the cases which had been supposed to favor the action belonged to exceptional classes, none of which embraced the pure and simple case of an attempt by one person to enforce a promise made to another from whom the consideration wholly proceeded. I am of that opinion.

The judgment of the court below should therefore be reversed and a new trial granted.

GROVER, J., also dissented.

*Judgment affirmed.*

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## BORDEN *v.* BOARDMAN.

**(Supreme Judicial Court of Massachusetts, 1892. 157 Mass. 410, 32 N. E. 469.)**

Contract. Trial in the Superior Court, before Braly, J., who reported the case for the determination of this court in substance as follows:

On July 24th, 1890, Daniel J. Collins, a contractor, made a contract in writing with the defendant to build him a house in New Bedford, for the sum of $2,650, payable one half when the house was ready for plastering, the balance when finished. The defendant advanced to Collins $200 before the first payment was due, taking his receipt therefor. During the progress of the work, and before the first payment became due according to the terms of the contract, the building was blown off the foundation. Collins employed the plaintiffs, who were building movers, to put the building back, under an agreement that it should not cost more than $150; the plaintiffs put the building back, finishing the moving a month or six weeks prior to the first payment. Collins then proceeded with the work, and got the building ready to plaster. When the time for the first payment arrived the defendant told Collins he would like to have all persons who had lienable bills against the house present to see that they were paid. The plaintiffs were not present, so the defendant asked Collins how much was due them, and was told $150. The defendant thereupon, at the request and with the consent of Collins, reserved $200 for the plaintiffs, saying he would hold this money to pay them with, and would pay them himself. Collins thereupon gave the defendant a receipt for $1,125, as first payment on the house. Neither Collins nor the defendant informed the plaintiffs of the holding of this money, but in consequence of what a third person told Manchester, one of the plaintiffs, Manchester called upon the defendant, and said to him, "I understand that you are holding my money for me for moving that building back. Is that so?" Boardman replied that it was. Manchester then said, "I am glad that you have got it and will pay it." Boardman said, "I don't know as I will now, I have been advised not to." No other interview was had between the plaintiffs and the defendant.

The defendant claimed that, upon this evidence, the action could not be maintained, and offered to show, in bar of the action, that, a day or so after the time of the first payment, Collins abandoned and broke his said contract, and the defendant was obliged to finish the building at a loss, and that at the time of refusing to pay Manchester, he, Manchester, was told by the defendant that Collins had broken his contract; and that on December 9th, 1890, after refusal to pay them by the defendant, the plaintiffs commenced an action against said Collins for the recovery of the claim now in suit. The evidence was excluded. The judge directed a verdict for the plaintiffs for $150, and interest from the date of the writ. If the ruling was right, then judgment was to be entered on the verdict; otherwise, judgment for the defendant.

MORTON, J. The evidence offered in bar was rightly excluded. The subsequent failure of Collins to perform his contract would not release the defendant from the obligation, if any, which he had assumed to the plaintiffs, in the absence of any agreement, express or implied, that the money was to be paid to the plaintiffs only in case Collins fulfilled his contract. Cook v. Wolfendale, 105 Mass. 401. There was no evidence of such an agreement.

The other question is more difficult. The case does not present a question of novation, for there was no agreement among the plaintiffs, Collins, and the defendant that the defendant should pay the plaintiffs, out of the money in his hands and due to Collins, a specific sum, and that thenceforward the defendant should be released from all liability for it to Collins, and should be liable for it to the plaintiffs. Neither was there any agreement between the plaintiffs and the defendant that the latter would pay the money to them. The conversation between one of the plaintiffs and the defendant cannot be construed as affording evidence of such an agreement. Coupled with the defendant's admission that he was holding money for the plaintiffs was his repudiation of any liability to the plaintiffs for it. Nether can it be claimed that there was an equitable assignment of the amount in suit from Collins to the plaintiffs. There was no order or transfer given by him to them; nor was any notice of the arrangement between him and the defendant given by him to the plaintiffs. Lazarus v. Swan, 147 Mass. 330. The case upon this branch, therefore, reduced to its simplest form, is one of an agreement between two parties, upon sufficient consideration it may be between them, that one will pay, out of funds in his hands belonging to the other, a specific sum to a third person, who is not a party to the agreement, and from whom no consideration moves. It is well settled in this State that no action lies in such a case in favor of such third party to recover the money so held of the party holding it. Exchange Bank v. Rice, 107 Mass. 37, and cases cited. Rogers v. Union Stone Co., 130 Mass. 581; New England Dredging Co. v. Rockport

Granite Co., 149 Mass. 381; Marston v. Bigelow, 150 Mass. 45; Saunders v. Saunders, 154 Mass. 337. Certain exceptions which were supposed to exist have either been shown not to exist, or have been confined within narrower limits. Exchange Bank v. Rice and Marston v. Bigelow, *ubi supra.*

We have assumed that the sum which the defendant agreed with Collins to pay the plaintiffs was specific. But it is to be observed that the agreement between the plaintiffs and Collins was that it should not cost more than $150 to put the building back. Collins told the defendant that that sum was due to the plaintiffs. The defendant reserved $200. It may well be doubted, therefore, whether the defendant had in his hands a specific sum to be paid to the plaintiffs, or whether he agreed with Collins to hold and pay the plaintiffs a specific sum. If the sum was not specific, the plaintiffs do not claim, as we understand them, that they can recover.

*Judgment for the defendant.*

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## JENKINS v. CHESAPEAKE & O. RY. CO.

**(Supreme Court of Appeals of West Virginia, 1907. 61 W. Va. 597, 57 S. E. 48, 49 L. R. A. (N. S.) 1166, 11 Ann. Cas. 967.)**

Action by David Jenkins against the Chesapeake & Ohio Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

MILLER, J.[6] The plaintiff in December, 1903, during the prevalence of an epidemic of smallpox in Fayette county, and who had been taken with that disease, was arrested at Montgomery by the health officers near the railroad of the defendant company about 3 o'clock in the afternoon, and put into a common box car and locked up, without any provision for fire or bed clothing to protect him from the severe cold weather then prevailing. This car was, about 6 o'clock in the evening of the same day, taken by the defendant, put into a freight train, and about 12 o'clock that night set out on a side track at Fire Creek, near the county pesthouse, without any notice to the defendant's agent or to the pesthouse authorities. The next morning about 10 o'clock the plaintiff was discovered, taken out of the car, and carried to the pesthouse, where it was found that both his feet were badly frozen, so that in a few days the flesh began to slough off the bones, necessitating amputation of one leg in May and the other in July following. He endured intense suffering the night of his arrest and transportation and for several weeks afterward; but finally recovered from the disease, and was released.

The plaintiff had nothing to do with the arrangements with the railroad for his transportation. In November, 1904, he instituted this suit

[6] Parts of the opinion are omitted.

in assumpsit in the circuit court of Fayette county. The declaration is in two counts, to recover damages as for the breach of a contract for carriage with the defendant company. The first count charges that the defendant company on the 24th day of December, 1903, accepted the plaintiff as a passenger upon one of its freight trains for hire and reward, and then and there agreed to carry, transport, and deliver him safely and securely and protect him against the cold and inclement weather while such passenger from Montgomery to Fire Creek, and then and there deliver him to the superintendent of the county pesthouse. It then charges the defendant company with breach of its contract and duty to the plaintiff as a passenger. The second count counts upon an alleged contract or arrangement with the county court of Fayette county with the defendant company, whereby, in consideration that said county court would provide and maintain a pesthouse at Fire Creek for the purpose of treating, caring for, and preventing the spread of smallpox in said county and along the defendant's railway, detrimental to its business, the defendant agreed to provide and especially equip a car with necessary heat and conveniences for smallpox patients, and deliver all persons who might be suffering from that disease to the said pesthouse, to be there taken charge of by the county authorities. It is further alleged by said second count that the plaintiff, pursuant to this agreement and by authority of one of the members of the board of health of said county, was delivered to the defendant to be transported and carried from Montgomery to said pesthouse; that the defendant accepted the plaintiff as a passenger, and agreed to provide a comfortable car for the purpose, to protect him while in its charge from undue exposure to cold, and to safely deliver him to the pesthouse authorities; the breach of which contract of the defendant and of its duties to the plaintiff is charged as resulting in the injuries he sustained, and for which he asks $25,000 damages. The court below sustained the defendant's demurrer to the second count, and overruled it as to the first. There was issue and trial only on the first count, resulting in a verdict and judgment thereon for the plaintiff for $3,000. The trial court refused a new trial, and the case is here upon a writ of error prosecuted by the defendant company. Upon the trial there was practically no conflict of evidence respecting the manner in which the plaintiff had been dealt with by the health officers and by the railroad company, nor does the evidence leave any doubt that the plaintiff lost his legs by the cruel and inhuman treatment of the health officers and agents of the railroad company; and, if we disturb the verdict and judgment, it will be because of technical rules of practice binding us and now urged for reversal of the judgment.

It is claimed by the railroad company that the plaintiff's remedy was *ex delicto,* and not *ex contractu,* and that his suit in assumpsit was not a proper substitute for one in case. The plaintiff, on the other hand, seeks to sustain the verdict and judgment, not upon an actual contract

of carriage for hire and reward with the defendant, as charged in the first count and of which there is absolutely no evidence, but, first, upon the implied contract which he claims arose out of the relationship of carrier and passenger while being carried from Montgomery to Fire Creek; and, second, upon the theory that the contract for carriage made by the county court with the defendant company was for his sole benefit, or for him as one of a class of smallpox patients, which he is entitled to enforce. * * * In the case at bar the plaintiff elected to sue in assumpsit; and the count in the declaration upon which the trial was had was upon a contract of carriage for hire and reward described as entire. * * * The only proof offered of any contract for carriage related to the one alleged in the second count of the declaration. The writ of error awarded does not bring up the action of the trial court in sustaining the demurrer to that count. We cannot look to it, therefore, to support the verdict and judgment. There was no issue on that count, no trial, and no response thereto by the verdict of the jury. Met. Life Ins. Co. v. Rutherford, 95 Va. 773, 780, 30 S. E. 383. From these authorities we are forced to the conclusion that the court below erred in refusing to give to the jury the defendant's instruction No. 1, based on the failure of the plaintiff's evidence to prove the contract as alleged, and in refusing to set aside the verdict of the jury and award the defendant a new trial. * * *

The plaintiff has cross-assigned as error the ruling of the court below sustaining its demurrer to said second count. We think that count is good, and, if sustained by proof, will entitle the plaintiff to recover. The contract being there stated, however, as an entirety, the plaintiff may possibly encounter some difficulties in sustaining it in all its parts by competent evidence. This count distinctly states an agreement, we think, upon a proper consideration, made between the county court and the railroad company, to meet the emergencies of an epidemic of smallpox and to provide against the same, not only in the interest of the public, but of the railroad company. On the part of the county court, it agreed to establish and maintain a pesthouse; and, in consideration thereof, on the part of the railroad company it agreed to provide and equip a proper car and furnish transportation for patients. While the contract as alleged was in the interest of the parties thereto, it was also made in the interest of a person of that class of which the plaintiff was one; and, when the plaintiff was received, voluntarily or involuntarily, as a passenger upon the defendant's car, to be transported under the contract thus made, the obligations of carrier and passenger at once arose under the contract, as well as impliedly, for the proper, safe, convenient transportation contemplated by the contract; and for a breach of the duty of the defendant to him under the contract the plaintiff would have a proper cause of action, either upon the contract or in an action *ex delicto*, as he might elect. This position seems well supported by numerous authorities cited by counsel. Among them are Hutch. on Carr.

(2d Ed.) § 537 (see, also, 3d Ed. § 992, note 27); 3 Page on Cont. § 1308 and notes; Rowan v. Hull, 55 W. Va. 335, Syl., point 5, 47 S. E. 92, 104 Am. St. Rep. 998. Besides these authorities and others cited by counsel, our own Code (Code 1899, § 2, c. 71 [Code 1906, § 3021]) provides that "if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon which he might maintain in case it had been made with him only and the consideration had moved from him to the party making such covenant or promise."[7] See on this subject, also, Nutter v. Sydenstricker, 11 W. Va. 547, Johnson v. McClung, 26 W. Va. 659, and Ross v. Milne, 12 Leigh. (Va.) 204, 37 Am. Dec. 646. This doctrine has been extended, by persuasive authority, to one of a class of persons where the class is sufficiently designated. Burton v. Larkin, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541; Johannes v. Ins. Co., 66 Wis. 50, 27 N. W. 414, 57 Am. Rep. 249; Locklin v. Beckwith, 6 N. Y. St. 583.

We therefore reverse the judgment of the circuit court, overrule the demurrer to the second count of the declaration, set aside the verdict of the jury, and award the defendant a new trial; and the cause is remanded to the court below, with leave to the plaintiff, if so advised, to amend his declaration, and to be further proceeded with according to law.

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## NATIONAL BANK *v.* GRAND LODGE.

**(Supreme Court of the United States, 1878. 98 U. S. 123, 25 L. Ed. 75.)**

This is an action by the Second National Bank of St. Louis, Mo., against the Grand Lodge of Missouri of Free and Accepted Ancient

**7 Local statutes should be consulted.**

**In Roddy v. Missouri Pac. R. Co., 104 Mo. 234 (1891) a servant of a quarry owner, injured because the defendant company did not supply its cars with proper brakes, was not allowed to recover as beneficiary of the contract whereby cars were furnished by defendant to the quarry owner for the transportation of stone, which contract required the company to see that its cars were provided with proper brakes.**

**Whether a beneficiary is a sole beneficiary and allowed to recover, or only incidentally benefited and denied a recovery, where there is no express contract provision showing how the parties regarded the benficiary or class of beneficiaries, is a question of what is reasonable in view of the purposes of the contracting parties and the situation of the beneficiary.**

**"In order that a third party may sue upon a contract made by others he must show that he was intended by them to have an enforceable right or at least that the performance of the contract must necessarily be of benefit to him and such benefit must have been within the contemplation and purpose of the contracting parties. He has no right of action where he incidentally finds a provision in some contract which makes to his advantage." Corbin's Anson on Contracts, pp. 344-345.**

Masons, to compel the payment of certain coupons formerly attached to bonds issued in June, 1869, by the Masonic Hall Association, a corporation existing under the laws of the State of Missouri, in relation to which bonds the Grand Lodge, October 14th, 1869, adopted the following resolution:

"*Resolved,* That this Grand Lodge assume the payment of the $200,000 bonds, issued by the Masonic Hall Association, provided that stock is issued to the Grand Lodge by said association to the amount of said assumption of payment by this Grand Lodge as the said bonds are paid."

The court below instructed the jury that independently of the question of the power of the Grand Lodge to pass the resolution, it was no foundation for the present action, and directed a verdict for the defendant.

The jury returned a verdict in accordance with the direction of the court, and judgment having been entered thereon, the plaintiff sued out this writ of error.

STRONG, J. It is unnecessary to consider the several assignments of error in detail, for there is an insurmountable difficulty in the way of the plaintiff's recovery. The resolution of the Grand Lodge was but a proposition made to the Masonic Hall Association, and, when accepted, the resolution and acceptance constituted at most only an executory contract *inter partes.* It was a contract made for the benefit of the association and of the Grand Lodge—made that the latter might acquire the ownership of stock of the former, and that the former might obtain relief from its liabilities. The holders of the bonds were not parties to it, and there was no privity between them and the lodge. They may have had an indirect interest in the performance of the undertakings of the parties, as they would have in an agreement by which the lodge should undertake to lend money to the association, or contract to buy its stock to enable it to pay its debts; but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names. We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to maintenance of an action of assumpsit. The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely inter-

ested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract is required. There are some other exceptions recognized, but they are unimportant now. The plaintiff's case is within none of them. Nor is he sole beneficiary of the contract between the association and the Grand Lodge. The contract was made, as we have said, for the benefit of the association, and if enforceable at all, is enforceable by it. That the several bondholders of the association are not in a situation to sue upon it is apparent on its face. Even as between the association and the Grand Lodge, the latter was not bound to pay anything except so far as stock of the former was delivered or tendered to it. The promise to pay and the promise to deliver the stock were not independent of each other. They were concurrent and dependent. Of this there can be no doubt. The resolution of the lodge was to assume the payment of the $200,000 bonds, issued by the association, "*Provided*, that stock is issued to the Grand Lodge by said association to the amount of said assumption," * * * "as said bonds are paid." Certainly the obligation of the lodge was made contingent upon the issue of the stock, and the consideration for payment of the debt to the bondholders was the receipt of the stock. But the bondholders can neither deliver it nor tender it; nor can they compel the association to deliver it. If they can sue upon the contract, and enforce payment by the Grand Lodge of the bonds, the contract is wholly changed, and the lodge is compelled to pay whether it gets the stock or not. To this it cannot be presumed the lodge would ever have agreed.[8] It is manifest, therefore, that the bondholders of the association are not in such privity with the lodge, and have no such interest in the contract as to warrant their bringing suit in their own names.

[8] That a beneficiary takes subject to express or implied conditions affecting performance by the promisor would seem to be clear. Ellis v. Conrad Seipp Brewing Co., 207 Ill. 291 (1904); Russell v. W. U. Tel. Co., 57 Kans. 230 (1896); Gill v. Weller, 52 Md. 8 (1879); Osborn v. Cabell, 77 Va. 462 (1883). See also Supreme Council of the Royal Arcanum v. Behrend, 247 U. S. 394 (1918). But see East v. New Orleans Ins. Assoc., 76 Miss. 697 (1899).

For a discussion of Hartman v. Pistorius, 248 Ill. 568 (1911), see note 24, *post*, in this chapter.

So the beneficiary takes subject to the promisor's defenses of fraud (Arnold v. Nichols, 64 N. Y. 117 (1876); Jenness v. Simpson, 84 Vt. 127 (1910)), mistake (Gold v. Ogden, 61 Minn. 88 (1895); Green v. Stone, 54 N. J. Eq. 387 (1896)), infancy, insanity, etc.

Hence the present action cannot be sustained, and the Circuit Court correctly directed a verdict for the defendant.

*Judgment affirmed.*

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## SEAVER *v.* RANSOM ET AL.

**(Court of Appeals of New York, 1918. 224 N. Y. 233, 120 N. E. 639, 2 A. L. R. 1187.)**

Action by Marion E. Seaver against Matt C. Ransom and another, as executors, etc., of Samuel A. Beman, deceased. From a judgment of the Appellate Division (180 App. Div. 734, 168 N. Y. Supp. 454), affirming judgment for plaintiff, defendants appeal. Affirmed.

POUND, J. Judge Beman and his wife were advanced in years. Mrs. Beman was about to die. She had a small estate, consisting of a house and lot in Malone and little else. Judge Beman drew his wife's will according to her instructions. It gave $1,000 to plaintiff, $500 to one sister, plaintiff's mother, and $100 each to another sister and her son, the use of the house to her husband for life, and remainder to the American Society for the Prevention of Cruelty to Animals. She named her husband as residuary legatee and executor. Plaintiff was her niece, 34 years old in ill health sometimes a member of the Beman household. When the will was read to Mrs. Beman, she said that it was not as she wanted it. She wanted to leave the house to the plaintiff. She had no other objection to the will, but her strength was waning, and, although the judge offered to write another will for her, she said she was afraid she would not hold out long enough to enable her to sign it. So the judge said, if she would sign the will, he would leave plaintiff enough in his will to make up the difference. He avouched the promise by his uplifted hand with all solemnity and his wife then executed the will. When he came to die, it was found that his will made no provision for the plaintiff.

This action was brought, and plaintiff recovered judgment in the trial court, on the theory that Beman had obtained property from his wife and induced her to execute the will in the form prepared by him by his promise to give plaintiff $6,000, the value of the house, and that thereby equity impressed his property with a trust in favor of the plaintiff. Where a legatee promises the testator that he will use property given him by the will for a particular purpose, a trust arises. O'Hara v. Dudley, 95 N. Y. 403, 47 Am. Rep. 53; Trustees of Amherst College v. Ritch, 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305; Ahrens v. Jones, 169 N. Y. 555, 62 N. E. 666, 88 Am. St. Rep. 620. Beman received nothing under his wife's will but the use of the house in Malone for life. Equity compels the application of property thus obtained to the purpose of the testator, but equity cannot so impress a trust, except on property ob-

tained by the promise. Beman was bound by his promise, but no property was bound by it; no trust in plaintiff's favor can be spelled out.

An action on the contract for damages, or to make the executors trustees for performance, stands on different ground. Farmers' Loan & Trust Co. v. Mortimer, 219 N. Y. 290, 294, 295, 114 N. E. 389. The Appellate Division properly passed to the consideration of the question whether the judgment could stand upon the promise made to the wife, upon a valid consideration, for the sole benefit of plaintiff. The judgment of the trial court was affirmed by a return to the general doctrine laid down in the great case of Lawrence v. Fox, 20 N. Y. 268, which has since been limited as herein indicated.

Contracts for the benefit of third persons have been the prolific source of judicial and academic discussion. Williston, Contracts for the Benefit of a Third Person, 15 Harvard Law Review, 767; Corbin, Contracts for the Benefit of Third Persons, 27 Yale Law Review, 1008. The general rule, both in law and equity (Phalen v. United States Trust Co., 186 N. Y. 178, 186, 78 N. E. 943, 7 L. R. A. [N. S.] 734, 9 Ann. Cas. 595), was that privity between a plaintiff and a defendant is necessary to the maintenance of an action on the contract. The consideration must be furnished by the party by whom the promise was made. The contract cannot be enforced against the third party, and therefore it cannot be enforced by him. On the other hand, the right of the beneficiary to sue on a contract made expressly for his benefit has been fully recognized in many American jurisdictions, either by judicial decision or by legislation, and is said to be "the prevailing rule in this country." Hendrick v. Lindsay, 93 U. S. 143, 23 L. Ed. 855; Lehow v. Simonton, 3 Colo. 346. It has been said that "the establishment of this doctrine has been gradual, and is a victory of practical utility over theory, of equity over technical subtlety." Brantly on Contracts (2d Ed.) p. 253. The reasons for this view are that it is just and practical to permit the person for whose benefit the contract is made to enforce it against one whose duty it is to pay. Other jurisdictions still adhere to the present English rule (7 Halsbury's Laws of England, 342, 343; Jenks' Digest of English Civil Law, § 229) that a contract cannot be enforced by or against a person who is not a party (Exchange Bank v. Rice, 107 Mass. 37, 9 Am. Rep. 1). But see, also, Forbes v. Thorpe, 209 Mass. 570, 95 N. E. 955; Gardner v. Denison, 217 Mass. 492, 105 N. E. 359, 51 L. R. A. (N. S.) 1108.

In New York the right of the beneficiary to sue on contracts made for his benefit is not clearly or simply defined. It is at present confined: First. To cases where there is a pecuniary obligation running from the promisee to the beneficiary, "a legal right founded upon some obligation of the promisee in the third party to adopt and claim the promise as made for his benefit." Farley v. Cleveland, 4 Cow. 432, 15 Am. Dec. 387; Lawrence v. Fox, supra; Garnsey v. Rogers, 47 N. Y. 233, 7 Am. Rep. 440; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep.

195; Lorillard v. Clyde, 122 N. Y. 498, 25 N. E. 917, 10 L. R. A. 113; Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49; Townsend v. Rackham, 143 N. Y. 516, 38 N. E. 731; Sullivan v. Sullivan, 161 N. Y. 554, 56 N. E. 116. Secondly. To cases where the contract is made for the benefit of the wife (Buchanan v. Tilden, 158 N. Y. 109, 52 N. E. 724, 44 L. R. A. 170, 70 Am. St. Rep. 454; Benton v. Welch, 170 N. Y. 554, 63 N. E. 539), affianced wife (De Cicco v. Schweizer, 221 N. Y. 431, 117 N. E. 807, Ann. Cas. 1918C, 816), or child (Todd v. Weber, 95 N. Y. 181, 193, 47 Am. Rep. 20; Matter of Kidd, 188 N. Y. 274, 80 N. E. 924) of a party to the contract. The close relationship cases go back to the early King's Bench case (1677), long since repudiated in England, of Dutton v. Poole, 2 Lev. 211 (s. c., 1 Ventris, 318, 332). See Schemerhorn v. Vanderheyden, 1 Johns. 139, 3 Am. Dec. 304. The natural and moral duty of the husband or parent to provide for the future of wife or child sustains the action on the contract made for their benefit. "This is the furthest the cases in this state have gone," says Cullen, J., in the marriage settlement case of Borland v. Welch, 162 N. Y. 104, 110, 56 N. E. 556.[9]

The right of the third party is also upheld in, thirdly, the public contract cases (Little v. Banks, 85 N. Y. 258; Pond v. New Rochelle Water Co., 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. [N. S.] 958, 5 Ann. Cas. 504; Smyth v. City of New York, 203 N. Y. 106, 96 N. E. 409; Farnsworth v. Boro Oil & Gas Co., 216 N. Y. 40, 48, 109 N. E. 860; Rigney v. N. Y. C. & H. R. R. R. Co., 217 N. Y. 31, 111 N. E. 226; Matter of International Ry. Co. v. Rann, 224 N. Y. 83, 120 N. E. 153. Cf. German Alliance Ins. Co. v. Home Water Supply Co., 226 U. S. 220, 33 Sup. Ct. 32, 57 L. Ed. 195, 42 L. R. A. [N. S.] 1000), where the municipality seeks to protect its inhabitants by covenants for their benefit; and, fourthly, the cases where, at the request of a party to the contract, the promise runs directly to the beneficiary although he does not furnish the consideration (Rector, etc., v. Teed, 120 N. Y. 583, 24 N. E. 1014; F. N. Bank of Sing Sing v. Chalmers, 144 N. Y. 432, 439, 39 N. E. 331; Hamilton v. Hamilton, 127 App. Div. 871, 875, 112 N. Y. Supp. 10). It may be safely said that a general rule sustaining recovery at the suit of the third party would include but few classes of cases not included in these groups, either categorically or in principle.[10]

[9] Under this second class perhaps would fall Galla v. Barton, 149 N. Y. Supp. 952 (1914), where a member of a labor union after working at an agreed wage for about two years discovered that during all that time his union had had an agreement with the employer under which its members were to be paid twice as much as he was receiving. As beneficiary of the contract with the union he was allowed to recover the extra wages.

[10] New York was long unfavorable to recovery by a sole beneficiary, chiefly because of the fondness of New York judges for their statement that only a beneficiary to whom some legal or equitable duty was owing by the promisee could sue. The wide departure from that statement shown in the third class listed in the above opinion, and the liberality of the remark to which this is

The desire of the childless aunt to make provision for a beloved and favorite niece differs imperceptibly in law or in equity from the moral duty of the parent to make testamentary provision for a child. The contract was made for the plaintiff's benefit. She alone is substantially damaged by its breach. The representatives of the wife's estate have no interest in enforcing it specifically. It is said in Buchanan v. Tilden that the common law imposes moral and legal obligations upon the husband and the parent not measured by the necessaries of life. It was, however, the love and affection or the moral sense of the husband and the parent that imposed such obligations in the cases cited, rather than any common-law duty of husband and parent to wife and child. If plaintiff had been a child of Mrs. Beman, legal obligation would have required no testamentary provision for her, yet the child could have enforced a covenant in her favor identical with the covenant of Judge Beman in this case. De Cicco v. Schweizer, supra. The constraining power of conscience is not regulated by the degree of relationship alone. The dependent or faithful niece may have a stronger claim than the affluent or unworthy son. No sensible theory of moral obligation denies arbitrarily to the former what would be conceded to the latter. We might consistently either refuse or allow the claim of both, but I cannot reconcile a decision in favor of the wife in Buchanan v. Tilden, based on the moral obligations arising out of near relationship, with a decision against the niece here on the ground that the relationship is too remote for equity's ken. No controlling authority depends upon so absolute a rule. In Sullivan v. Sullivan, supra, the grandniece lost in a litigation with the aunt's estate, founded on a certificate of deposit payable to the aunt "or in case of her death to her niece;" but what was said in that case of the relations of plaintiff's intestate and defendant does not control here, any more than what was said in Durnherr v. Rau, supra, on the relation of husband and wife, and the inadequacy of mere moral duty, as distinguished from legal or equitable obligation, controlled the decision in Buchanan v. Tilden. Borland v. Welch, supra, deals only with the rights of volunteers under a marriage settlement not made for the benefit of collaterals. Kellogg, P. J., writing for the court below well said:

"The doctrine of Lawrence v. Fox is progressive, not retrograde. The course of the late decisions is to enlarge, not to limit, the effect of that case."

The court in that leading case attempted to adopt the general doctrine that any third person, for whose direct benefit a contract was intended, could sue on it. The headnote thus states the rule. Finch, J., in Gifford v. Corrigan, 117 N. Y. 257, 262, 22 N. E. 756, 6 L. R. A. 610, 15 Am. St. Rep. 508, says that the case rests upon that broad proposition; Ed-

a note disclose that in New York a sole beneficiary is at last in a fairly secure position.

ward T. Bartlett, J., in Pond v. New Rochelle Water Co., 183 N. Y. 330, 337, 76 N. E. 211, 213 (1 L. R. A. [N. S.] 958, 5 Ann. Cas. 504), calls it "the general principle;" but Vrooman v. Turner, supra, confined its application to the facts on which it was decided. "In every case in which an action has been sustained," says Allen, J., "there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise," 69 N. Y. 285, 25 Am. Rep. 195. As late as Townsend v. Rackham, 143 N. Y. 516, 523, 38 N. E. 731, 733, we find Peckham, J., saying that, "to maintain the action by the third person, there must be this liability to him on the part of the promisee." Buchanan v. Tilden went further than any case since Lawrence v. Fox in a desire to do justice rather than to apply with technical accuracy strict rules calling for a legal or equitable obligation. In Embler v. Hartford Steam Boiler Inspection & Ins. Co., 158 N. Y. 431, 53 N. E. 212, 44 L. R. A. 512, it may at least be said that a majority of the court did not avail themselves of the opportunity to concur with the views expressed by Gray, J., who wrote the dissenting opinion in Buchanan v. Tilden, to the effect that an employee could not maintain an action on an insurance policy issued to the employer, which covered injuries to employees.

In Wright v. Glen Telephone Co., 48 Misc. Rep. 192, 195, 95 N. Y. Supp. 101, the learned presiding justice who wrote the opinion in this case said at Trial Term:

"The right of a third person to recover upon a contract made by other parties for his benefit must rest upon the peculiar circumstances of each case rather than upon the law of some other case."

"The case at bar is decided upon its peculiar facts." Edward T. Bartlett, J., in Buchanan v. Tilden.

But, on principle, a sound conclusion may be reached. If Mrs. Beman had left her husband the house on condition that he pay the plaintiff $6,000, and he had accepted the devise, he would have become personally liable to pay the legacy, and plaintiff could have recovered in an action at law against him, whatever the value of the house. Gridley v. Gridley, 24 N. Y. 130; Brown v. Knapp, 79 N. Y. 136, 143; Dinan v. Coneys, 143 N. Y. 544, 547, 38 N. E. 715; Blackmore v. White, [1899] 1 Q. B. 293, 304. That would be because the testatrix had in substance bequeathed the promise to plaintiff, and not because close relationship or moral obligation sustained the contract. The distinction between an implied promise to a testator for the benefit of a third party to pay a legacy and an unqualified promise on a valuable consideration to make provision for the third party by will is discernible, but not obvious. The tendency of American authority is to sustain the gift in all such cases and to permit the donee beneficiary to recover on the contract. Matter of Edmundson's Estate (1918, Pa.) 103 Atl. 277, 259 Pa. 429. The equities are with the plaintiff, and they may be enforced in this action, whether it be regarded as an action for damages or an action for

specific performance to convert the defendants into trustees for plaintiff's benefit under the agreement.

The judgment should be affirmed, with costs.

*Judgment affirmed.*

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## FRY *v.* AUSMAN ET AL.

(Supreme Court of South Dakota, 1912. 29 So. Dak. 30, 135 N. W. 708, 39 L. R. A. (N. S.) 150, Ann. Cas. 1914 C, 842.)

Action by Uriah S. Fry against L. E. Ausman and others. From a judgment for defendants plaintiff appeals. Affirmed.

The deed to the grantor contained the following clause: "The same are free from all incumbrances, except a first mortgage of $5,000," but contained no statement that she assumed the mortgage. The deed from the grantor to the grantee contained the following clause: "The same are free from all incumbrances, except a first mortgage of $5,000 and interest from April 26, 1908, at 6 per cent which second party agrees to assume." The mortgage was foreclosed, and, the proceeds being insufficient to satisfy it, this action was brought to recover the deficiency.

WHITING, J.[11] The sole question presented by this appeal is whether one holding a note secured by a mortgage upon real estate can recover upon such note against a party other than the mortgagor, where such party had taken a deed to said mortgaged premises, and in such deed had assumed such mortgage indebtedness, the grantor in such deed being in no manner bound to pay such mortgage indebtedness, and there being no evidence, other than such deed, to show an intent on the part of the grantor and grantee in such deed to contract for the benefit of the owner of the note and mortgage. The trial court held there could be no recovery.

Respondent contends that, disregarding the other question involved herein, appellant cannot recover because of a lack of privity of contract between appellant and respondent. It is true that, under what is known as the English rule and which is followed in several of the states, appellant would not be the proper party plaintiff, and it would be necessary that the action be brought in the name of the grantor in the deed; but there early arose in this country what is known as the American rule allowing the real party in interest to sue in his own name upon a contract made for his benefit. The so-called "Code" states have many or all adopted, many by statutory enactment, the American rule. This state adopted such rule by section 1193, Civil Code, which reads: "A contract, made expressly for the benefit of a third person, may be en-

[11] Part of the opinion is omitted.

forced by him at any time before the parties thereto rescind it."
* * *

Pomeroy at section 1207 of the third edition of his work on Equity Jurisprudence notes that the courts, holding that there can be no liability upon the part of the grantee where there was none on the part of the grantor, also hold that the liability, when any does exist, results only from an application of the doctrine of subrogation, and that, unless there was a liability or obligation on the part of the grantor so that, as between the grantor and grantee, the grantee became the principal debtor and the grantor but a surety, there would be nothing upon which the creditor could base a right of subrogation. Pomeroy also notes that the courts holding the grantee liable where the grantor was not liable base the right of recovery solely upon the contract, taking the position that, where a contract is made for the benefit of one not a party thereto, he may treat the promise as though made to himself, and may sue in his own name thereon.

The federal Supreme Court has adopted the subrogation theory of liability as appears by the following from the case of Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667: "The doctrine of the right of a creditor to the benefit of all securities given by the principal to the surety for the payment of the debt does not rest upon any liability of the principal to the creditor, or upon any peculiar relation of the surety towards the creditor, but upon the ground that the surety, being the creditor's debtor, and in fact occupying the relation of surety to another person, has received from that person an obligation or security for the payment of the debt, which a court of equity will therefore compel to be applied to that purpose at the suit of the creditor. Where the person ultimately held liable is himself a debtor to the creditor, the relief awarded has no reference to that fact, but is grounded wholly on the right of the creditor to avail himself of the right of the surety against the principal. If the person who is admitted to be the creditor's debtor stands at the time of receiving the security in the relation of surety to the person from whom he receives it, it is quite immaterial whether that person is or ever has been a debtor of the principal creditor, or whether the relation of suretyship or the indemnity to the surety existed, or was known to the creditor, when the debt was contracted. In short, if one person agrees with another to be primarily liable for a debt due from that other to a third person, so that as between the parties to the agreement the first is the principal and the second the surety, the creditor of such surety is entitled in equity to be substituted in his place for the purpose of compelling such principal to pay the debt."

For a general discussion of this question and a review of the numerous authorities bearing upon the different phases thereof, we refer to the very exhaustive notes pages 176 to 207 of 71 Am. St. Rep. These notes call particular attention to the two elements required under the

New York decisions in order that there may be a recovery: (1) There must be an intent to benefit the third party; and (2) the promisee must owe some obligation to the third party. It is very apparent that the decisions from those states which have adopted the English rule above referred to are of no authoritative value upon the question before us. Among these states seem to be Georgia, Massachusetts, Michigan, New Hampshire, North Carolina, Vermont, Virginia, and Wyoming. We therefore cite cases from those states only which recognize the American rule allowing suit by real party in interest.

Among the authorities supporting the New York rule and denying a right of recovery under the facts in this case are the following: King v. Whitely, 10 Paige (N. Y.) 465; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195; Matter of Wilber v. Warren, 104 N. Y. 192, 10 N. E. 263; Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49; Jefferson v. Asch, supra; Kramer v. Gardner, 104 Minn. 370, 116 N. W. 925, 22 L. R. A. (N. S.) 492; Clement v. Willett, 105 Minn. 267, 117 N. W. 491, 17 L. R. A. (N. S.) 1094, 127 Am. St. Rep. 562, 15 Ann. Cas. 1053; Morris v. Mix, 4 Kan. App. 654, 46 Pac. 58; New Eng. Trust Co. v. Nash, 5 Kan. App. 739, 46 Pac. 987; Crone v. Stinde, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907; Y. M. C. A. v. Croft, 34 Or. 106, 55 Pac. 439, 75 Am. St. Rep. 568; Eakin v. Shultz, 61 N. J. Eq. 156, 47 Atl. 274; Ward v. De Oca, 120 Cal. 102, 52 Pac. 130. Supporting the other rule we find: Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 474; Harts v. Emery, 184 Ill. 560, 56 N. E. 865; Birke v. Abbott, 103 Ind. 1, 1 N. E. 485, 53 Am. Rep. 474; Marble v. Mesarvey, 101 Iowa, 285, 70 N. W. 199; McGregor v. Easter B. & L. Assoc., 5 Neb. (Unof.) 563, 99 N. W. 509; Hare v. Murphy, 45 Neb. 809, 64 N. W. 211, 29 L. R. A. 851; Merriman v. Moore, 90 Pa. 78; Brewer v. Mauer, 38 Ohio St. 543, 43 Am. Rep. 436; McKay v. Ward, 20 Utah, 149, 57 Pac. 1024, 46 L. R. A. 623; Enos v. Sanger, 96 Wis. 150, 70 N. W. 1069, 37 L. R. A. 864, 65 Am. St. Rep. 38; Tweeddale v. Tweeddale, 116 Wis. 517, 93 N. W. 440, 61 L. R. A. 509, 96 Am. St. Rep. 1003; Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1056, 4 L. R. A. (N. S.) 666, 110 Am. St. Rep. 946, 5 Ann. Cas. 435.

We could call particular attention to the Utah case owing to the very exhaustive dissenting opionion found therein. There are many other authorities which in principle support one or the other of the two theories mentioned herein, but we have confined our citations to those where the facts passed upon were the same as here, namely, where the grantee in a deed had assumed a mortgage debt for which his grantor was not liable.

While we think it must be conceded that, in case the second element required under the New York decisions does exist, it may, from that fact, be presumed that the first element is also present, and therefore the party for whose benefit the contract is made be entitled, *under the subrogation theory,* to recover of the party who has rendered himself the principal debtor; yet it seems equally clear to us that, whenever two parties

enter into an agreement that appears to have been made expressly for the benefit of a third party, and such agreement has a good and sufficient consideration, the agreement itself creates all the privity there need be between the person for whose benefit the agreement was entered into and the party assuming the obligation, and *an action at law should lie* regardless of whether there was any obligation existing between the other party to the agreement and the third party. But, before the third party can adopt the agreement entered into and recover thereon, he must show clearly that it was entered into with the intent on the part of the parties thereto that such third party should be benefited thereby. This intent might, in a given case, sufficiently appear from the contract itself, but it must frequently be shown by other proof. While the cases sustaining a recovery have few, if any of them, expressly recognized the necessity of the existence of the first element (the intent to benefit the third party), yet an examination of the decisions will reveal the fact that such element was clearly established in nearly all such cases.

We concur heartily in the following words of Chief Justice Bartch of Utah in his dissenting opinion in McKay v. Ward: "My conclusion is that the rule which exempts a grantee, who has merely in a deed of conveyance assumed and agreed to pay the mortgage in case his immediate grantor is not personally liable for the payment of the mortgage debt, from liability to the mortgagee, or owner of the mortgage, is not only founded in reason and principle, but is sustained by an overwhelming weight of authority. I do not intend to hold, however, that the grantee of mortgaged premises, whose grantor is under no personal obligation to pay the mortgage debt, cannot render himself liable to the mortgagee for a deficiency judgment upon foreclosure and sale by accepting a deed containing an assumption clause with knowledge of such contents, and which clause contains apt words showing that the grantor intended to bestow a benefit upon the mortgagee. The rule cannot be thus extended; for doubtless a grantor may direct the payment of the purchase price as he chooses, and may, if he so wishes, contract with a grantee that the latter will pay a certain sum to a stranger, or a mortgagee, or any person upon whom the grantor chooses to confer a benefit, and in such cases the beneficiary may enforce the contract. Where, however, as in the case at bar, the grantor is not personally liable, the assumption clause ought to be construed as a mere indemnity to the grantor, unless there is something to show a different intention by the contracting parties. In this case there appears to be nothing which indicates any other intention on the part of the grantor, than that of indemnity to himself. There are no words in the deed, nor any evidence of facts or circumstances, which indicate that the grantor had any interest in protecting the mortgagee, to whom he was under no personal obligation. Doubtless, in general, the greatest interest a grantor has is in effecting a sale of the premises, and it cannot

be assumed that he would hazard the chances of such a sale by insisting on that which would not benefit him. The circumstances of this case disclose no intention to benefit the mortgagee, and therefore he is not entitled to a deficiency judgment against the promisor; the assumption in the deed being intended merely to indemnify the promisee. If the intention of the contracting parties had been otherwise, the respondent could easily have shown it by placing the vendor, McDonald, upon the stand, and interrogating him upon the subject. This he failed to do, although, under the great weight of authority, the burden was upon him to show that the contract was intended for his benefit, or that the vendor was under some legal obligation to him respecting the debt. The respondent not having done this, why should the appellate court assume that as a fact of which there is no proof?"

We think also that the very terms of our statute determine this question in favor of respondent. Recovery can only be had in case the contract was "made expressly for the benefit of a third person." The state of California has identically the same statute, and in Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100, the Supreme Court of that state said: "It is not necessary that the parties for whose benefit the contract has been made should be named in the contract. It must appear, however, by the direct terms of the contract, that it was made for the benefit of such parties. It cannot be implied from the fact that the contract would, if carried out between the parties to it, operate incidentally to their benefit." See, also, Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609.

From both reason and authority we conclude: That inasmuch as the provision in the deed before us merely provided that the grantee assumed the mortgage debt, and there being no other evidence of the intent of the parties to such deed, we should construe such provision as a mere agreement or contract to indemnify the grantor, and therefore insufficient as the basis of an action founded upon the doctrine of subrogation—there being no obligation on part of grantor to the third person—and also insufficient, as the basis of an action under section 1193, Civil Code, it not appearing that the said agreement or contract was entered into "expressly for the benefit of a (the) third person."

*The judgment of the trial court is affirmed.*[18]

[18] In McDonald v. Finseth, 32 No. Dak. 400 (1916), *contra*, Bruce, J., for the court, said of Fry v. Ausman and other cases in accord, that they "seem to totally ignore, in their conclusions at any rate, even if not in their reasoning, the well established rule of law that when one makes a promise to another for the benefit of a third person such third person can maintain an action upon the promise, even though the consideration does not run directly from him and even though at the time he knew nothing of the promise to pay him" (p. 407) and pointed out that the defendant's promise "can be and is properly supported by the consideration afforded by the transfer of land to him and by the fact that the amount of the mortgage was deducted from the

## THE N. O. ST. JOSEPH'S ASSOCIATION *v.* A. MAGNIER.

(Supreme Court of Louisiana, 1861. 16 La. Ann. 338.)

VOORHIES, J. The defendant Magnier, and several other hatters in the city of New Orleans, entered into a contract to close their respective stores on Sundays. They stipulated, in express terms, that those who would violate this obligation would become subject, for each infraction, to a fine of one hundred dollars for the benefit of the asylum of the St. Joseph's Orphans.

A. Magnier having, on several Sundays, opened his store, the present suit was brought to recover the stipulated fine.

To the general rule that parties to a contract cannot stipulate but for themselves, there is an exception when one makes, in his own name, some advantages for a third person the condition or consideration of a commutative contract, or onerous donation. C. C. 1884, 1896. He, for whose benefit this advantage is stipulated, has an equitable action to enforce the stipulation, when he has signified his assent in the premises. C. P. 35.

The text is clear that the advantage must be the condition or consideration of the contract: hence it is that a penal obligation cannot be stipulated for the benefit of third persons. 6 Toullier, No. 846; Rolland de Villargues, 2 Dict. Not. No. 50; C. N. 1121.

A penal clause, being a secondary obligation having for its object the enforcement of a primary obligation, cannot be assimilated to a condition or consideration. C. C. 2113.

"The penal obligation," says C. C. 2115, "has this in common with a conditional obligation, that the penalty is due only on condition that the first part of the contract be not performed. But it differs from it in this, that in penal contracts there must be always a principal obligation, independent of the penalty; while in conditional contracts, there is no obligation, unless the condition happens."

The stipulation to pay a fine of one hundred dollars for each violation of the contract, is, in the very language of the parties, a penal obligation. Its very object and purpose is to enforce the primary obligation, which each of the contracting parties assumed, to close his respective store on Sundays. It is a strained and unnatural construction to say that the contract was entered into with the view of making a donation to the plaintiffs, dependent upon the condition that any of the parties would not close their stores. This was a commutative contract with a penal clause, not a conditional donation.

It is, therefore, ordered and decreed, that the judgment of the Dis-

purchase price, and this, even though there was no direct dealing between him and the plaintiff mortgagee" (p. 409).

For a recent case, *contra*, to Fry v. Ausman, the principal case, see Title Guaranty & Trust Co. v. Bushnell (Tenn.), 228 S. W. 699 (1921).

trict Court be reversed, and that the plaintiff's demand be rejected, with costs in both courts.[18]

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## GORRELL *v.* GREENSBORO WATER-SUPPLY CO.

(Supreme Court of North Carolina, 1899. 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598.)

Action by Charlotte J. Gorrell an inhabitant, property owner, and tax payer of the City of Greensboro against the Greensboro Water-Supply Company, the predecessor of which had contracted with the city to furnish the city and its inhabitants with water for all domestic, sanitary and fire purposes, and in particular to keep at all times a specified pressure for use in the case of fires. The complaint alleged facts showing that the defendant through careless, wilful and wanton neglect failed to keep the fire pressure agreed upon and needed and in consequence the plaintiff's property was destroyed by fire when, if defendant had supplied the water at the agreed fire pressure, the property would have been saved. Defendant demurred. The demurrer was overruled and judgment entered for the plaintiff. Defendant appeals. Affirmed.

CLARK, J.* This cause is presented upon complaint and demurrer. * * * The demurrer, so far as it relates to the merits of the case, is, substantially, that the complaint has stated no cause of action (1) because the plaintiff, though a citizen and taxpayer of Greensboro (as alleged in the complaint), is neither a party nor privy to the contract, the breach of which is the foundation of the action; (2) the failure of the defendant to furnish water was not the proximate cause of the plaintiff's loss. It is true, the plaintiff is neither a party nor privy to the contract, but it is impossible to read the same without seeing that, in warp and woof, in thread and filling, the object is the comfort, ease, and security from fire of the people, the citizens of Greensboro. This is alleged by the eleventh paragraph of the complaint, and is admitted by the demurrer. The benefit to the nominal contracting party, the city of Greensboro, as a corporation, is small in comparison, and, taken alone, would never have justified the grants, concessions, privileges,

[18] "If the intention to create a right in a third party is indicated with reasonable certainty, an action by him should be maintainable, even though the intention to benefit him was only secondary and conditional, and irrespective of whether he is a donee or a creditor." Corbin's Anson on Contracts, p. 345, where, in a footnote, it is said of the principal case: "This decision should not be followed."

* The statement of facts is abbreviated from the opinion, and part of the opinion is omitted.

benefits, and payments made to the water company. Upon the face of the contract, the principal beneficiaries of the contract in contemplation of both parties thereto were the water company on the one hand and the individual citizens of Greensboro on the other. The citizens were to pay the taxes to fulfill the money consideration named, and furnishing the individual citizens with adequate supply of water, and the protection of their property from fire, was the largest duty assumed by the company. One not a party or privy to a contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach. This has been sustained by many decisions elsewhere. Ellis v. Harrison, 104 Mo. 270, 16 S. W. 198; Lawrence v. Fox, 20 N. Y. 268; Simson v. Brown, 68 N. Y. 355; Vrooman v. Turner, 69 N. Y. 280; Wright v. Terry, 23 Fla. 160, 2 South 6; Austin v. Seligman, 18 Fed. 519; Burton v. Larkin, 36 Kan. 246, 13 Pac. 398. And even when the beneficiary is only one of a class of persons, if the class is sufficiently designated. Johannes v. Insurance Co., 66 Wis. 50, 27 N. W. 414. It was considered, though without decision, by this court, in Haun v. Burrell, 119 N. C. 544, 548, 29 S. E. 111, and Sams v. Price, 119 N. C. 572, 29 S. E. 170. Especially is this so when the beneficiaries are the citizens of a municipality whose votes authorized the contract, and whose taxes discharge the financial burdens the contract entails. The officials who execute the contract are technically the agents of the corporation, but the corporation itself is the agent of the people, who are thus effectively principals in the contract. The acceptance of the contract by the water company carries with it the duty of supplying all persons along its mains. Griffin v. Water Co., 122 N. C. 206, 30 S. E. 319; Haugen v. Water Co. (Or.), 28 Pac. 244. In Paducah Lumber Co. v. Paducah Water-Supply Co. (1889), 89 Ky. 340, 12 S. W. 554, and 13 S. W. 249, it is held: "If a water company enter into a contract with a municipal corporation whereby the former agrees, in consideration of the grant of a franchise and a promise to pay certain specified prices for the use of hydrants to construct waterworks of a specified character, force, and capacity, and to keep a supply of water required for domestic, manufacturing, and fire protection purposes for all the inhabitants and property of the city, a taxpayer of the city may recover of the water company when, through a breach if its contract, he is left without means of extinguishing fire, and his property is on that account destroyed;" and it is therein further held: "Where a party undertakes to furnish water in such mode and quantity that it may be used to extinguish fires in the city in which it is to be supplied, damages sustained by the destruction of buildings by the failure to so furnish such water is a natural and proximate consequence of such breach of the undertaking." This opinion is based upon sound reason, and is adopted by us. It is conclusive of both points raised as to the merits of the controversy by the demurrer. Indeed, it could not be doubted

that, if the city buildings were destroyed by fire through failure of the defendant to furnish water for their protection, as provided by the contract, the city could recover. New Orleans & N. E. R. Co. v. Meridian Waterworks Co., 18 C. C. A. 519, 72 Fed. 227.[14] Besides, the complaint, in paragraphs 13 and 14, alleges that the defendant's failure to furnish water as per contract was the direct and sole cause of the loss, and this is admitted by the demurrer. Thus, the question really narrows down to the question whether the beneficiaries of a contract, who furnish the consideration money of the contract, can maintain an action for damages caused by its breach. The case of Paducah Lumber Co. v. Paducah Water-Supply Co. (Ky.) 12 S. W. 554, is exactly in point, was reaffirmed on a rehearsing (13 S. W. 249), and is followed by Duncan v. Water Co. (Ky.) 12 S. W. 557, making three decisions altogether. The decisions, however (12 in number), in other states where the question has been presented, are the other way. But this is a case of the first impression in this state, and decisions in other states have only persuasive authority. They have only the consideration to which the reasoning therein is entitled. They are to be weighed, not counted.

We should adopt that line which is most consonant with justice and the "reason of the thing." Did the people of Greensboro have just cause to believe that by virtue of that contract they, as well as the corporation, were guaranteed a sufficient quantity of water to protect their property from fire; and did the water company understand it was agreeing, for the valuable considerations named, to furnish a sufficient quantity of water to protect private as well as public property from fire? The intent is to be drawn from the instrument itself, and on its face there can be no doubt it was contracted that the water supply should be sufficient to protect private as well as public property. If so, it follows that when, by breach of that contract, private property is destroyed, the owner thereof, one of the beneficiaries contemplated by the contract, is the party in interest, and he, and he alone, can maintain an action for his loss. As is said by Judge Freeman, the learned annotator of the American State Reports, in commenting on the fact (Briton v. Waterworks Co. [Wis.] 29 Am. St. Rep., at page 863; s. c. 51 N. W. 84), that the majority of decisions so far rendered were adverse to the position taken in the Kentucky case above cited, and approved by us: "As none of the courts have fairly faced what seems to be the logical result of these decisions, viz. that the injured person

[14] But it has been decided in several cases that even the city may not recover. Ukiah v. Ukiah Water City Co., 142 Cal. 173 (1904); Inhabitants of Milford v. Bangor Ry. and Electric Co., 106 Me. 316 (1909). The courts seem to fear, unnecessarily, that if they allow a recovery they will be turning water companies into fire insurance companies. That fear undoubtedly has played its part in causing the great majority of courts to decide against a recovery by the individual citizen property owner and water user.

is left without any remedy at all, it must be admitted that the subject is left in an extremely unsatisfactory position. It seems to be universally agreed, and on the soundest reasoning, that the city itself is not liable for failing to protect the property of taxpayers from fire, unless made liable by express statutory provisions. Wright v. City Council of Augusta, 78 Ga. 241. And it seems equally clear that the city would have no right of action in such case in behalf of the taxpayer, for the basis of all the [adverse] decisions is that there is no privity of contract between the taxpayers and the water companies. If the contract is not made for the benefit of the taxpayers in such a sense that they can sue upon it, it can hardly be maintained that the same contract is made for one of those taxpayers in such a sense that the city can recover damages in his name. * * * If, then, neither the taxpayer himself nor the city on his behalf can sue the company, the conclusion seems to be that the loss by fire in these cases is regarded by the law as damage for which there is no redress." This is a complete *reductio ad absurdum,* and we prefer not to concur in cases, however numerous,—there are probably a dozen scattered through half a dozen states,—which lead to such conclusion. All these cases (when not based on reference to the others) rest upon the narrow technical basis that a citizen, because not a privy to the contract, cannot sue, whereas authorities are numerous that a beneficiary of a contract, though not a party or privy, may maintain an action for its breach. 7 Am. & Eng. Enc. Law (2d Ed.) 105-108. Here the water company contracted with the city to furnish certain quantities of water for the protection of the property of the city as well as of the city, and received full consideration, a large part of which comes in the shape of taxation, paid annually by those citizens. On a breach of the contract, whereby the property of a citizen is destroyed, he, as a beneficiary of the contract, is entitled to sue; and under our Code requiring the party in interest to be plaintiff he is the only one who can. Whether there was a breach of the contract, and whether it was the proximate cause of the loss, regarded as matters of fact, will be determined by the jury, if, when the case goes back, the defendant shall file an answer, as it has a right to do (Code, § 272), raising those issues. But in overruling the demurrer to the complaint there was no error. As was said by the supreme court of Kentucky, when affirming, on a petition to rehear, the decision in the Paducah Case, *supra*: "The water company did not covenant to prevent occurrence of fires, nor that the quantity of water agreed to be furnished would be a certain and effectual protection against every fire, and consequently does not in any sense occupy the attitude of an insurer; but it did undertake to perform the plain and simple duty of keeping water up to a designated height in the standpipe, and, if it failed or refused to comply with that undertaking, and such breach was the proximate cause of destruction of the plaintiff's property, which involves issues of fact for determination by a

jury, there exists no reason for its escape from answering in damages that would not equally avail in case of any other breach of contract."

*Affirmed.*[15]

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## WILLIAM J. FLYNN *v.* NORTH AMERICAN LIFE INS. CO.

(Supreme Judicial Court of Massachusetts, 1874. 115 Mass. 449.)

GRAY, C. J. This action is brought by William J. Flynn upon a policy of insurance on the life of Garrett Royle, his father-in-law. The application states, and the policy shows, that the insurance was obtained for the benefit of Flynn; and the application was signed "Garrett Royle for William J. Flynn." The original premium was paid by Flynn for Royle, and a receipt therefor given by the insurance company to Flynn in his own name; the annual premiums were paid by Flynn; part only of the first premium, and none of the subsequent ones, were repaid to him by Royle. By the policy, the insurers promise and agree to pay the sum insured to Flynn and his representatives. But this promise and agreement is expressed to be made to and with Royle and his representatives; and the policy is under seal. Royle and not Flynn is the covenantee. It is well settled that upon an agreement under seal, none but the party to it can maintain an action at law. Sanders v. Filley, 12 Pick. 554; Johnson v. Foster, 12 Met. 167; Millard v. Baldwin, 3 Gray, 484; Northampton v. Elwell, 4 Gray, 81; Dicey on Parties, 101. Whatever, therefore, might have been Flynn's right of action if the agreement sued on had been a simple contract, there was not sufficient privity between him and the insurers to maintain an action in his name upon this policy; and it is unnecessary to consider the other grounds of defence.

*Judgment for the defendant.*[16]

[15] See Arthur L. Corbin Liability of Water Companies, 19 Yale L. J. 425. See also 49 L. R. A. (N. S.) 1166, note.

It has been held that the water company is not liable in a tort action. German Alliance Ins. Co. v. Home Water Supply Co., 226 U. S. 220 (1912). But compare Hamilton v. Madison Water Co., 116 Me. 157 (1917) and Pittsfield Cottonwear Co. v. Pittsfield Shoe Co., 71 N. H. 522 (1902).

[16] But in 1894 Massachusetts passed a statute giving the beneficiary of a life insurance policy a direct right of action in his own name against the insurance company. Mass. Stat. 1894, C 225. See Wright v. Vermont Life Ins. Co., 164 Mass. 302 (1895). As early as 1887 the beneficiary was given by statute the right to have the proceeds of the policy from the personal representatives of the insured. Mass. Stat. 1887, C 214, § 73.

But even where a beneficiary may recover on a sealed insurance policy, special grounds of public policy may operate to make the court deny a recovery, as where the beneficiary murders the insured to get the insurance, etc. See New York Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591 (1886). It has been stated that an assignee of such a beneficiary can no more recover than could

## CASE *v.* CASE.

(Court of Appeals of New York, 1911. 203 N. Y. 263, 96 N. E. 440, Ann. Cas. 1913 B, 311.)

Action by Earl A. Case against Bert L. Case. From a judgment of the Appellate Division (137 App. Div. 393, 121 N. Y. Supp. 746) unanimously affirming a judgment for plaintiff, defendant appeals. Reversed.

WERNER, J. The controlling question in this case is whether an action can be maintained upon a contract under seal by one who is not a party to the instrument. The action is brought by the plaintiff against his brother, upon a contract under seal, made by the latter with his mother for her support and maintenance. The contract recites that it was entered into by the defendant upon the consideration that the mother, who is the other party thereto, had united with the plaintiff in a deed of a farm to the defendant, and that by the contract, based upon the consideration, the defendant bound himself to support the mother in health and in sickness during her life. The complaint alleges that the defendant failed to keep the covenant thus entered into by him, and that by reason of such failure the plaintiff has been compelled to support and maintain the mother at an expense to him in the sum of $500, for which amount, with interest, he asks judgment. The case was tried and submitted to a jury with the result that the plaintiff was given a verdict for $392. From the judgment entered upon that verdict an appeal was taken to the Appellate Division, where there was a unanimous affirmance.

Before any evidence had been taken, counsel for the defendant moved to dismiss the complaint upon the ground that it does not state a cause of action in favor of the plaintiff against the defendant, and on the argument in support of the motion he directed the attention of the trial court to the specific objection that the contract, being a sealed instrument, was not between the plaintiff and the defendant, but between the defendant and his mother, and that the latter was not a party to the action. The motion to dismiss the complaint, thus made at the opening of the case, was denied, and to this ruling of the court the defendant's counsel duly excepted.

the beneficiary. See Johnston v. Metropolitan Life Ins. Co. (W. Va.), 100 S. E. 865, 866 (1919). In that case it was held that the personal representative of one who was murdered could not recover the amount of the insurance policy on the life of the deceased where the murder was committed by the party who was the sole distributee of the estate of the insured, and who, because of the murder, was denied a recovery as beneficiary of the policy. The court expressed no opinion as to the situation where the sole beneficiary of the policy is only one of several distributees of the estate of the insured. See also McDonald v. Mutual Life Ins. Co., 178 Ia. 863 (1916); Supreme Lodge v. Menkhausen, 209 Ill. 277 (1904). See explanation of last case in Wall v. Pfanschmidt, 265 Ill. 180, 192 (1914).

Upon appeal to this court, such an exception survives the unanimous affirmance at the Appellate Division, and it is therefore our duty to determine whether the exception was well taken.

Nothing is more definitely settled in our law than that an instrument under seal cannot be enforced by or against one who is not a party to it. This is so elementary as to be axiomatic and needs no support in the citation of authorities. A different rule exists as to simple contracts which, for reasons adverted to in Briggs v. Partridge, 64 N. Y. 357, 362, 21 Am. Rep. 617, may be brought by or against the real principal although he is not named in the instrument. There are exceptions to the rigid rule that only the parties to a contract under seal can be parties to a litigation for its enforcement, such, for instance, as a suit to enforce an antenuptial agreement for a marriage settlement by the person for whose benefit it was made (Phalen v. U. S. Trust Co., 186 N. Y. 178, 187, 78 N. E. 943, L. R. A. [N. S.] 734); but even in such cases it is the rule, both in law and equity, that mere volunteers or strangers to the consideration have no standing in court (Borland v. Welch, 162 N. Y. 104, 56 N. E. 556).[17]

The case at bar is not within this or any other exception to the general rule, for the plaintiff is a mere volunteer who is not a party to the contract and who is an utter stranger to the consideration.

The learned justice who wrote for the Appellate Division, was impressed with the view that the contract was made for the benefit of the plaintiff, since he was under the legal and moral obligation to support his mother, and that the effect of the contract was to relieve him from that obligation. It was also deemed a circumstance of controlling weight that the conveyance to the defendant of the farm, the title to which appeared to have been in the plaintiff, furnished a consideration which invested the latter with the right to enforce the contract. We are unable to subscribe to that view, and we find direct authority against it in one of the cases cited to support the judgment below. In Durnherr v. Rau, 135 N. Y. 219, 222, 32 N. E. 49, 50, the plaintiff sought to enforce a covenant in a deed made by her husband to the defendant, to the effect that the grantee would pay certain mortgages upon the premises conveyed. The wife had joined her husband in the execution of these mortgages, but had expressly reserved her dower right from the operation of the deed. In that case this court held that the wife's joinder in the mortgages was a voluntary surrender of her right for the benefit of her husband, and bound her interests to the extent necessary to protect the mortgagees. There, in short, the whole doctrine was summed up in one pregnant paragraph. "It is not sufficient," said Judge Andrews, "that the performance of the covenant may

[17] See note on right of person not a party thereto to enforce an instrument under seal, Ann. Cas. 1913 B, 313. See also 71 Am. St. Rep. 265-206, note.

For a decision under a statute, see Newberry Land Co. v. Newberry, 95 Va. 119 (1897).

benefit a third person. It must have been entered into for his benefit, or at least such benefit must be the direct result of performance and so within the contemplation of the parties, and in addition the grantor must also have a legal interest that the covenant be performed in favor of the party claiming performance." [18] In the case at bar the covenants of the agreement were made for the benefit of the mother, and she alone had a legal interest in their enforcement. Without going further into the by-paths of distinctions and refinements, it is enough to repeat that this is an action upon an agreement under seal to which the plaintiff is not a party. It can only be enforced by the mother, who is a party thereto, and for whose benefit it was made.

The judgment should be reversed and a new trial granted, with costs to abide event.

*Judgment reversed, etc.*

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## STAFF *v.* BEMIS REALTY CO. ET AL.

(Supreme Court of New York Special Term, New York County, 1920. 111 Misc. Rep. 635, 183 N. Y. Supp. 886.)

Action by John Staff against the Bemis Realty Company, David Rosensweig, and Abraham Finkenthal.

BIJUR, J.† These are cross-motions, one by plaintiff for judgment on the pleadings, and one by the defendant Finkenthal to sustain a demurrer to the complaint, interposed on the ground that the complaint does not set forth facts sufficient to constitute a cause of action and that there has been a misjoinder of causes of action. It appears from the complaint that plaintiff on December 21, 1915, rented from defendant corporation for the term of over five years a store in a block of buildings owned by the corporation. The lease contained the following provision:

"And the said party of the second part covenants and agrees to use

[18] It would seem the sounder view that a wife who has mortgaged her inchoate dower right for her husband is entitled to exoneration by the payment by him of the incumbrance. Gore v. Townsend, 105 N. C. 228 (1890). See also Henagon v. Harllee, 10 Rich. Eq. (S. Car.) 285 (1858); McCord v. Wright, 97 Md. 34 (1884). Had the New York Court taken that view, it might not have found it difficult to conclude that the defendant's promise was exacted for her benefit as well as the husband's and that the fact that the promise was under seal should not stand in the way of her recovery. In Silver King Coalition Mines Co. of Nevada v. Silver King Consol. Min. Co. of Utah, 204 Fed. 166 (1913), it is said that a creditor beneficiary may recover in equity on a contract whether it was made for his benefit or not. That was said in reference to subrogation, but the right of exoneration conceivably might have been given as favorable a hearing.

† Part of the opinion is omitted.

the said rented premises only for the sale of dry goods and men's and boys' shirts, collars, ties, socks, and handkerchiefs, and the landlord hereby agrees that he will not rent any other store in the block, from Post to Sherman avenues, for the sale of any of the foregoing articles; but it is understood that the tenant takes this lease subject to the provision of the existing leases giving the other tenants the right to sell ladies' waists, dresses, infants' wear, cloaks, suits, ladies' gloves, corsets, and hosiery."

This lease was recorded in the register's office January 15, 1916. On March 17, 1919, defendant Finkenthal rented a store from the same landlord in the same block for a term of two years; his lease containing the covenant:

"That the said party of the second part [tenant] further covenants and agrees to use said rented premises only for the sale of ladies' gloves, corsets, and hosiery."

The complaint, after the further allegation that defendant Finkenthal "is now selling goods, to wit, handkerchiefs, boudoir caps, and underwear, not expressly or impliedly permitted in his said lease," all of which articles are alleged to be dry goods, asks that by reason of the absence of an adequate remedy at law the defendants be enjoined from further violation of the exclusive privilege granted to plaintiff herein first above set forth.

The demurrer is sought to be sustained upon two contentions.

First, that "the leases being under seal, no cause of action at law or in equity lies in favor of plaintiff against the defendant Finkenthal." Case v. Case, 203 N. Y. 263, 96 N. E. 440, Ann. Cas. 1913 B 311, is cited as authority for this proposition. The opinion in that case, however, indicates plainly, both by its language and by its reference to Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617, that what was there decided was that an instrument under seal cannot be enforced by a stranger not mentioned in it on the theory that he is a party to it, as, for example, an undisclosed principal. Reference is made in the opinion, however, to the theory that the plaintiff might have enforced the contract as one "made for his benefit," and the distinction mentioned by Andrews, J., in Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49, is emphasized to the effect that: "It is not sufficient that the performance of the covenant may benefit a third person. It must have been entered into for his benefit, or at least such benefit must be the direct result of performance and so within the contemplation of the parties," etc. The mere fact, therefore, that the lease of the defendant Finkenthal is under seal is no reason why a covenant therein may not be enforced by the plaintiff, provided it comes within the distinction pointed out by Judge Andrews of covenants so enforceable. There is ample authority for the application of the doctrine of Lawrence v. Fox, 20 N. Y. 268, to instruments under seal as well as to unsealed instruments. Burr v. Beers, 24 N. Y. 180, 80 Am. Dec. 327, and the numerous cases which have fol-

lowed it.[19] It seems to me, however, that if he relied upon the doctrine announced in Burr v. Beers plaintiff must necessarily be impaled upon the other horn of the dilemma, namely, that he is joining the defendant Finkenthal in a cause of action upon the restrictive covenant in Finkenthal's lease with a cause of action against defendant Rosensweig upon a similar covenant in Rosensweig's lease which contains different terms made under different circumstances and at a different period (which, by the way, happens to be long before the execution of plaintiff's lease). Plaintiff does not satisfactorily meet this difficulty by urging that his cause of action depends upon his own lease, for, if the doctrine of Lawrence v. Fox be invoked by him at all, it can only be in reference to the respective leases of Finkenthal and Rosensweig. I think, however, that the plaintiff has an undoubted cause of action in equity to enforce an incumbrance placed by the landlord upon his own property for plaintiff's express benefit, or, as it is sometimes termed, to avail of an equitable servitude in his favor. This right has received conscious judicial recognition since Tulk v. Moxhay, 2 Phil. 774 (1884), and has been enforced in innumerable cases in this state, for example, Booth v. Knipe, 225 N. Y. 390, 122 N. E. 202; Korn v. Campbell, 192 N. Y. 490, 85 N. E. 687, 37 L. R. A. (N. S.) 1, 127 Am. St. Rep. 925; Flynn v. New York, W. & B. R. Co., 218 N. Y. 140, 112 N. E. 913, Ann. Cas. 1918B, 599; Bull v. Burton, 227 N. Y. 101, 124 N. E. 111, and the cases there cited.

It is foreign to the present purpose to analyze the basis of the plaintiff's right, namely, whether it be contractual or founded upon the theory of a servitude enforceable in equity at the instance of the complainant. See article on the Progress of the Law, subtitle "Equitable Servitudes," by Prof. Roscoe Pound, in the Harvard Law Review for April, 1920, at page 813. Suffice it that the right is recognized and enforced in our courts, and has, indeed, been applied without question, or even discussion, in a case practically on all fours with the instant case, namely, Waldorf-Astoria Segar Co. v. Salomon, 109 App. Div. 65, 95 N. Y. Supp. 1053, affirmed on opinion below 184 N. Y. 584, 77 N. E. 1197. If, upon minute analysis, any point of distinction can be found between the two cases, it is only that, as the opinion there mentions, the real defendant, the Acker, Merrall & Condit Company, had actual notice of the plaintiff's privilege, namely, the restriction in the use of the premises as against all parties other than the plaintiff.

In the instant case—and passing by the question whether the recording of the plaintiff's lease was not constructive notice to the world of his peculiar rights and the resultant restriction upon others—it is to my mind decisive that plaintiff's equity against defendant is, if I may be permitted the term, even stronger than if the defendant had had actual notice, because the defendant has expressly covenanted to limit his use of the premises, so as not to invade plaintiff's right therein.

[19] In some states by statute, and, apparently, now in a majority of states in the absence of statute, a third party sole or creditor beneficiary of a sealed contract may recover upon it. See Ann. Cas. 1913B, 313, note.

The basis of plaintiff's rights, as I have analyzed it, disposes of the second ground of demurrer; i.e., improper joinder of causes of action, because it is clear that plaintiff has but one cause of action to enforce a servitude in his favor against the landlord and all other persons who may be equitably held bound by or subject to it. * * *

Plaintiff's motion is granted, with $10 costs, and defendant's motion is denied, with $10 costs, with leave, however, to demurrant to withdraw his demurrer, if he be so advised, and answer over within 20 days, upon payment of said costs and the costs of action before trial.

*Ordered accordingly.*[20]

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GIFFORD, AS RECEIVER, ETC., RESPONDENT, *v.* CORRIGAN, AS EXECUTOR, ETC., APPELLANT.

(Court of Appeals of New York, 1889. 117 N. Y. 257, 22 N. E. 756, 6 L. R. A. 610, 15 Am. St. Rep. 508.)

Appeal by defendant Corrigan, as executor of Cardinal John McCloskey, deceased, from a judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 11th, 1889, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought to foreclose a mortgage executed by defendant, the Father Mathew Temperance Society. Defendant Corrigan, as executor, was sought to be charged for any deficiency on sale upon a covenant in a deed of the mortgaged premises executed to his testator by John McEvoy, by the terms of which the grantee assumed and agreed to pay the mortgage.

FINCH, J.[21] * * * The finding of the Special Term that there was a delivery and acceptance [of the deed to the defendant's testator, McCloskey, by which the grantee assumed the payment of plaintiff's mortgage] * * * must conclude us on this appeal.

But another circumstance introduces an additional defence and raises a further question. Just after the issue of a summons in this action and the filing of a *lis pendens*, the executor of McEvoy formally released McCloskey from his covenant, and the latter pleads that release. * * * This release was executed after the knowledge of the deed of McCloskey and the covenant contained in it had reached the mortgagee; after the latter had accepted and adopted it as made for his benefit and communicated that fact to the debtor by a formal demand of payment; after the mortgagee had, for three years, permitted the grantee to ab-

[20] But in University Club v. Deakin, 265 Ill. 257 (1914), there is a *dictum contra* to the right of the one lessee to sue the other on the latter's sealed contract with the landlord, under circumstances similar to those in the principal case. See 10 Ill. L. Rev. 61.

[21] Part of the opinion is omitted.

sorb and appropriate the rents and profits in reliance upon the covenant; and after he had commenced an action for foreclosure by the issue of a summons and filing of a *lis pendens*, at a moment when the executor who released was aware that trouble was approaching, but before McCloskey was actually served or had appeared in the action.

Is this release thus executed a defence to this action? I shall not undertake to decide, if, indeed, the question is open (Knickerbocker Life Ins. Co. v. Nelson, 78 N. Y. 137; Comley v. Dazian, 114 N. Y. 161, 167), whether in the interval between the making of the contract and the acceptance and adoption of it by the mortgagee it was or was not revocable without his assent. However that may be, the only inquiry now presented is, whether it is so revocable after it has come to the knowledge of the creditor, and he has assented to it and adopted it as a security for his own benefit. My judgment leads me to answer that question in the negative.

Of course it is difficult, if not impossible, to reason about it without recurring to Lawrence v. Fox, 20 N. Y. 268, and ascertaining the principle upon which its doctrine is founded. That is a difficult task, especially for one whose doubts are only dissipated by its authority, and becomes more difficult when the number and variety of its alleged foundations are considered. But whichever of them may ultimately prevail, I am convinced that they all involve, as a logical consequence, the irrevocable character of the contract after the creditor has accepted and adopted it, and in some manner acted upon it. The prevailing opinion in that case rested the creditor's right upon the broad proposition that the promise was made for his benefit, and, therefore, he might sue upon it, although privy neither to the contract or its consideration. That view of it necessarily involves an acquisition at some moment of time of the right of action which he is permitted to enforce. If it be possible to say that he does not acquire it at a moment when the promise for his benefit is made, it must be that he obtains it when it has come to his knowledge and he has assented to and acted upon it. For he may sue; that is decided and conceded. If he may sue, he must, at that moment, have a vested right of action. If it was not obtained earlier it must have vested in him at the moment when his action was commenced, so that the right and the remedy were born at the same instant. But there is no especial magic in a law suit. If it serves for the first time to originate the right which it seeks to enforce, it can only be because the act of bringing it shows unequivocally that the promise of the grantee has come to the knowledge of the plaintiff, that the latter has accepted and adopted it, that he intends to enforce it for his own benefit, and gives notice of that intention to the adversary. From that moment he must be assumed to act or omit to act in reliance upon it. But if all these things occur before a suit commenced, why do they not equally vest the right of action in the assignee? What more does the mere lawsuit accomplish? And so the contract between grantor and

grantee, if revocable earlier, ceases to be so when by his assent to it and adoption of it the creditor brings himself into privity with it and elects to avail himself of it, and must be assumed to have governed his conduct accordingly. I see no escape from that conclusion.

But two of the judges who concurred in the decision of Lawrence v. Fox stood upon a different proposition. They held that the mortgagor granting the land accepted the grantee's covenant, as agent of the mortgagee who might ratify the act with the same effect as if he had originally authorized it. While I think the idea of such an agency is a legal fiction, having no warrant in the facts, yet the same result as to the power of revocation follows. While the agency remained unauthorized it might be possible to change the transaction, but after the ratification the promise necessarily becomes one made to the mortgagee, through his agent, the mortgagor, acting lawfully in his behalf, and from that moment cannot be altered or released without his sanction and consent.

But another basis for the action has been asserted, applicable however, only to cases like the present, where, on foreclosure of the mortgage, its owner seeks a judgment for a deficiency against the new covenantor. In Burr v. Beers, 24 N. Y. 179, and again in Garnsey v. Rogers, 47 N. Y. 242, it was pointed out that the liability of the grantee to the mortgagee rested upon the equitable right of subrogation, and had been recognized and enforced long before Lawrence v. Fox made its appearance. It was held that where the mortgagor acquired a new security for his indemnity against the debt which he owed to the mortgagee, the latter might, in equity, be subrogated to the right of his debtor, and, under the statute permitting any person liable for the mortgage debt to be made defendant and charged with a deficiency in the foreclosure, the new covenant became available to the mortgagee. It was so held in Halsey v. Reed, 9 Paige, 446, and the right of the mortgagee was put upon the equity of the statute. That, if a sound proposition, was all very well so long as there was supposed to be no equivalent remedy at law, but after the decision of Lawrence v. Fox that remedy existed. And so in Thorp v. Keokuk Coal Company, 48 N. Y. 258, the court said that it saw no reason for invoking the doctrine of equitable subrogation, or resting upon it in such a case. When the law has absorbed, in a broader equity, the narrow one enforced in chancery, the form and measure of the latter ceases to be of consequence. One does not seek to trace the river after it has lost itself in the lake. And so I think the suggestion is well founded. But if I am wrong about that, as, perhaps I may prove to be, and the right of the present plaintiff against the Cardinal's estate does stand upon the doctrine of equitable subrogation, still I think the same result follows. When does that equitable right arise and become vested in the creditor? It would seem that it must be when the situation is created out of which the equity is born. If it be possible to adjourn to a later period, it must certainly attach when the creditor asserts his right to it and notifies the other party of

his intention to rely upon it. As a right, founded upon the equity of the statute, it must have come into being before the foreclosure suit was commenced, for the permission reads, "any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action." His liability must precede the commencement of the action. It must exist as a condition of his being sued at all; and so, assuming that this action can be maintained against him upon his promise, the right of action must have arisen at once upon the delivery of the deed, or at the latest when the promise came to the knowledge of the creditor, and he assented to and adopted it.

I have been quite favorably impressed with a fourth suggestion respecting the basis of these rights of action which appears in the opinion of Andrews, J., rendered when this case was before us on a previous appeal. "After all," he says, "does not the direct right of action rest upon the equity of the transaction?" If we discard the fictitious theory of an agency, what remains is the equitable right of subrogation swallowed up in the greater equity of the legal right founded on the theory of a promise made for the benefit of the creditor. It is no new thing for the law to borrow weapons from the arsenal of equity. The action for money had and received is a familiar illustration. May we not deem this another? If we do, and the door is thus opened wide to equitable considerations, I am quite sure it will follow that while no right of the mortgagee is invaded by a change of the contract before it is brought to his knowledge, and he has assented to it and acted upon it, yet to permit a change thereafter, while the creditor is relying upon it would be grossly inequitable and practically destroy the right which has maintained itself after so long a struggle.

It seems to me, therefore, that however we may reasonably differ as to the doctrine underlying the plaintiff's right of action, yet all the roads lead to the one result that upon the facts of this case the release to McCloskey was wholly ineffectual.

The judgment should be affirmed with costs.

All concur except DANFORTH and PECKHAM, JJ., dissenting.

*Judgment affirmed.*[22]

[22] "Cases are cited to the effect that the mortgagor may release his grantee from his promise to pay the debt of the mortgagee at any time before such mortgagee brings suit to enforce the promise. The cases referred to proceed upon the grounds that the promise of the grantee is made to his grantor, and not to the mortgagee, and that the latter has no interest in the promise until he assents to and relies upon the promise, and such acceptance is manifested by bringing suit to enforce the promise; or they proceed, in other cases, upon the theory that by relying on or accepting the promise of the grantee to the mortgagor, the mortgagee releases the mortgagor, and accepts his grantee as his debtor; and there is still another theory, and that is, that the promise by the grantee is in the nature of an indemnity to the mortgagor, and under either of these theories the mortgagor may surrender or release the indemnity, or release the grantee from his promise before it is accepted, or before the

## TWEEDDALE *v.* TWEEDDALE ET AL.

**(Supreme Court of Wisconsin, 1903. 116 Wis. 517, 93 N. W. 440, 61 L. R. A. 509, 96 Am. St. Rep. 1003.)**

Action by Edward Tweeddale against Daniel Tweeddale and others. Judgment for defendants, and plaintiff appeals. Reversed.

Action to foreclose a mortgage. The facts admitted by the pleadings and found by the court are as follows: October 21, 1896, Mary Tweeddale owned certain land constituting her homestead. She conveyed the same to her son, the defendant Daniel Tweeddale, taking therefor a bond for her support. Said parties thereafter united in conveying the land to one Perry. In consideration therefor, in part, he conveyed the land covered by the mortgage in suit, to Mr. Tweeddale. Such land was then incumbered by a mortgage, and a second mortgage was placed thereon by the grantee to the grantor. In lieu of the interest which Mary Tweeddale had in the land conveyed to Perry, her son gave to her a bond for support, and secured the same by the mortgage in suit upon the land conveyed by Perry to her. The indebtedness was $1,350. It was conditioned, among other things, that in case Tweeddale should at any time sell the land or any portion thereof covered by the mortgage, $1,200 should immediately become due from him to his mother, $50 should likewise become due his sister, Margaret Merverden, and $100 to his brother, Edward Tweeddale. The mortgage specified that it was given to secure all the obligations and conditions of the bond. It was executed and acknowledged so as to entitle it to be recorded under the registry laws

mortgagor is released from the debt by the mortgagee. This court has never recognized either of these theories as the law. It has ever been held by this court that such a promise inures to the benefit of the person for whose benefit it is made, and the right to sue is vested in him by force of the agreement itself. It has never been held by this court that the express assent of the beneficiary is essential to his right to avail of its benefits; nor has it been held, to have force as an agreement to the person in whose favor it was made he must discharge his debtor, and accept the maker of the new promise as his debtor. On the contrary, it was held in Dean v. Walker [107 Ill. 540], *supra*, that the mortgagee might sue either the mortgagor or his grantee assuming to pay the debt. Nor has it been held that the promise of the grantee to the mortgagor is a mere indemnity of the latter against the payment of the mortgage. On the contrary, this court has uniformly held that the beneficiary may sue at law, which repudiates the doctrine of indemnity, as the person for whose benefit the promise is made can never reach an indemnity or security given to his debtor but in chancery, and then only when his debtor is insolvent, or on some other equitable grounds. The principle upon which this court has acted is that such a promise invests the person for whose use it is made with an immediate interest and right, as though the promise had been made to him. This being true, the person who procures the promise has no legal right to release or discharge the person who made the promise, from his liability to the beneficiary. Having the right, it is under the sole control of the person for whose benefit it is made—as much so as if made directly to him." Walker, J., in Bay v. Williams, 112 Ill. 91, 95-97 (1884).

of this state, and was duly recorded. The land covered by the mortgage passed under the control of Daniel Tweeddale, and the bond and mortgage, when executed, were delivered to his mother. Subsequently the condition mentioned in the bond, making operative the promise to pay $1,200 to Mrs. Tweeddale, $50 to her daughter and $100 to her son, who is the plaintiff in this action, was satisfied by Daniel Tweeddale selling the land covered by the mortgage, to John Paul. At the time of such sale the claim of Mary Tweeddale under the bond was settled and paid at $686. She thereupon, in form, fully satisfied the mortgage by signing the usual memorandum to that effect in the margin of the record thereof. Plaintiff did not give her any authority to satisfy the mortgage as to his interest therein. Being unable to obtain payment of the sum secured to him by the mortgage, he commenced this action to foreclose the same. Neither he nor his sister knew that the bond and mortgage made any provision for them till after the mortgage was discharged.

In the nature of conclusions of law, the court made findings to the effect that provisions in the bond and mortgage as to plaintiff and his sister, under the circumstances existing at the time the mortgage was discharged, were mere incomplete gifts, subject to be recalled by Mrs. Tweeddale, and that she then recalled them. All matters of fact not specifically mentioned, entitling plaintiff to the relief prayed for in his complaint if the interest in form secured to him by the bond and mortgage vested in him beyond the control of his mother upon the execution and delivery of the papers to her, were found by the court or admitted by the pleadings.

The court held as a matter of law that plaintiff had no cause of action, and ordered the complaint dismissed with costs. Judgment was entered accordingly.

MARSHALL, J.[23] The agreement by Daniel Tweeddale to pay plaintiff $100 and his sister $50, as part of the consideration for the property which came to him from his mother, stands upon the same footing as any promise made by one person to another, for a consideration, for the benefit of a third person. As soon as the title to the land was vested in Daniel Tweeddale and the bond and mortgage were delivered to his mother, he became obligated to pay to them that part of the consideration for the land represented by the sums secured to his brother and sister, if the principle controls that a grantor of land becomes obligated to pay the whole or a part of the consideration for the property conveyed to him to a stranger to the transaction if it is left in his hands for that purpose, and upon his promise to make such payment. We apprehend the trial court so viewed the matter. Notwithstanding the finding that the sum secured to appellant and that secured to his sister were mere gifts, the turning point in the case, in the mind of the circuit

[23] Part of the opinion is omitted.

judge, we apprehend, was that the beneficiaries did not know of the agreement and did not accept the same or in any way become parties thereto till their mother, with the consent of Daniel Tweeddale, rescinded the transaction. An agreement by one person, upon a good consideration, to pay his debt to another by paying the same to a third person, is just as binding where there is no consideration for the promise between the immediate promisee and the third person as where there is such consideration. Whether the benefit secured to the third person is a gift, strictly so called, or one intended when realized, to discharge some liability of such promise to the third person does not change the situation. It is the exchange of promises between the immediate parties, and the operation of law thereon, that binds the promisor to the third person. The idea which ruled this case,—that where a person for a consideration paid to him by another agrees to pay a sum of money to a third person, a stranger to the transaction, the latter does not thereby become possessed of the absolute right to the benefit of the promise, nor until he accepts the same in some way; and that while he is ignorant of the promise, or thereafter, at any time before he assents to the transaction, it may be rescinded,—we must admit is well supported in the books. The authorities so holding, in the main, go upon the ground that privity between parties is absolutely essential to a liability of one to another of a contractual nature, and that until the third person brings himself into privity with the one who has promised to be his debtor by at least assenting thereto, he has at least no legal right to the benefit of the promise; and that, till then, the parties to the transaction may rescind it or change it as they see fit. There is also much authority to the effect that, while the element of privity between the promisor and the third person is essential to render the promise absolutely binding upon the former, no act of the latter is necessary thereto; that the law, operating upon the acts of the parties to the transaction, creates the privity immediately upon its being consummated between them, and that neither one nor both of them can thereafter, without the third person's consent, enforce the promise. The first class of authorities is well represented by the following: Trimble v. Strother, 25 Ohio St. 378; Brewer v. Maurer, 38 Ohio St. 543, 43 Am. Rep. 436; Crowell v. Hospital, 27 N. J. Eq. 650; Durham v. Bischof, 47 Ind. 211; Davis v. Calloway, 30 Ind. 112, 95 Am. Dec. 671; White v. Hunt, 64 N. C. 496. The second class of authorities is fairly well represented by the following: Bay v. Williams, 112 Ill. 91, 54 Am. Rep. 209; Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467; Hare v. Murphy, 45 Neb. 809, 64 N. W. 211, 29 L. R. A. 851; Graves v. Macfarland, 58 Neb. 802, 79 N. W. 707; Brewer v. Dyer, 7 Cush, 337; Mallett v. Page, 8 Ind. 364; Henderson v. McDonald, 84 Ind. 149; Pruitt v. Pruitt, 91 Ind. 595; Rodenbarger v. Bramblett, 78 Ind. 213; Frank v. Railroad Co., 7 N. Y. St. Rep. 814; Esling v. Zantzinger, 13 Pa. 50.

It is useless to endeavor to review the authorities touching the subject before us with a view of harmonizing them upon any one single

theory as to the principle upon which the liability to the third person is based, or as to what are the essential elements to effect it. There is as much confusion, probably, in the judicial holdings in respect to the matter, as on any question of law that can be mentioned. As indicated there are authorities to the effect that there is no absolute liability to the third person till in some way he is brought into privity with the promisor. Others are to the effect that such privity is entirely unnecessary. Others, as we have indicated, hold that while the element of privity is necessary, the law creates it, no act of the third party being necessary thereto. There are others to the effect that there is no liability at law without the element of privity between the promisor and the third person, hence if he has a right to enforce the promise the remedy is in equity unless he can show that he adopted the promise made for his benefit so as to become a party thereto. There are many other phases of the question that find support in the books. The liability is sustained in some cases under the doctrine of novation, and held not to exist in the absence of any of the elements necessary to satisfy the law on that subject. In other cases it is held that there is no principle of subrogation or novation involved in the liability; that it rests solely upon and is fixed absolutely by the transaction between the person making the promise and receiving the consideration and the person to whom the promise is made and from whom the consideration moves. There is confusion not only between different courts, but confusion in the decisions in many jurisdictions in the same court. The supreme court of Illinois, in Bay v. Williams, *supra*, speaking on the subject, correctly described the situation in the following language:

"The courts are not harmonious,—not even the courts in the same states,—and it may be added that the cases are not capable of being reconciled. * * * On the mere authority of adjudged cases in other tribunals, we would have to vacillate to keep in line."

The extent to which the first class of cases we have mentioned goes in one direction is indicated by the following from the syllabus of Trimble v. Strother, *supra*:

"In an action to recover a debt which the defendant agreed with a third party to pay the plaintiff, it is a good defense to show that before the plaintiff assented to or acted on the promise made in his favor, the agreement had been rescinded."

The sharp conflict between the two principal classes of cases is well indicated by reading in connection with that quotation the following from the syllabus of Bay v. Williams, *supra*:

"A purchaser of mortgaged premises from the mortgagor, who assumes payment of the mortgage debt, or who accepts a conveyance reciting his assumption of the same with a knowledge of such recital, will at once become personally liable to the mortgagee for the mortgage indebtedness; and he cannot defeat the mortgagee's right to hold him responsible, by procuring a release from the mortgagor."

It is believed that this court is committed to that doctrine, though it must be admitted that there are expressions in several opinions that may well be taken as indicating either a contrary view or that it is uncertain just what the rule here is on the subject. * * * Without further discussion of the matter we adhere to the doctrine that where one person, for a consideration moving to him from another, promises to pay to a third person a sum of money, the law immediately operates upon the acts of the parties, establishing the essential of privity between the promisor and the third person requisite to binding contractual relations between them, resulting in the immediate establishment of a new relation of debtor and creditor, regardless of the relations of the third person to the immediate promise in the transaction; that the liability is as binding between the promisor and the third person as it would be if the consideration for the promise moved from the latter to the former and such promisor made the promise directly to such third person, regardless of whether the latter has any knowledge of the transaction at the time of its occurrence; that the liability being once created by the acts of the immediate parties to the transaction and the operation of the law thereon, neither one nor both of such parties can thereafter change the situation as regards the third person without his consent. It is plainly illogical to hold that immediately upon the completion of the transaction between the immediate parties thereto, the law operates upon their acts and creates the element of privity between the promisor and the third person, and at the same time to hold that such third person's status as regards the promise may be changed thereafter without his consent. The idea that privity between the promisor and the third person is necessary to render the transaction between the original parties thereto beyond the reach of either of them to revoke it, or both acting together to rescind it, springs from the supposed necessity of contractual relations between the promisor and the third person, binding upon the promisor at law. The moment such essential is established, it seems clear that such third person's right accrues and becomes absolute.

True, the doctrine that the element of privity may be established without the knowledge or assent of the third person, other than that constructive assent arising from the operation of law upon the acts of the parties, is inconsistent with the rule prevailing here as to all but married women, that a mere beneficiary of a policy of life insurance has no vested rights therein; but so is the doctrine that mere assent by a third person to a promise made for his benefit will render it irrevocable, inconsistent therewith. Neither the assent of a mere beneficiary in a policy of life insurance, to the promise made for his benefit, nor such assent coupled with an independent promise by the insurance company to him to abide thereby, has any effect upon the power of the assured to control the policy by changing the beneficiary or disposing of the insurance fund by will. The doctrine here in that regard was established at an early day. It is contrary to the rule which prevails

generally. It is adhered to under the rule of *stare decisis*, and the the doctrine that rules of property established by judicial decisions long adhered to should not be disturbed even if a different decision would be rendered if the court were permitted to treat the subject from an original standpoint. The rule as to insurance contracts has not been applied by this court to any other class of contracts. The court is not disposed to treat it as a principle of general application or extend it beyond the special class of contracts to which it has been applied.

In view of what has been said we must hold that, upon the sale of the land to Paul, Daniel Tweeddale became absolutely indebted to plaintiff upon the bond and mortgage mentioned in the complaint for the sum of $100; that the satisfaction of the mortgage by Mary Tweeddale is void as regards such debt; that his interest in the bond and mortgage was sufficiently brought home to Daniel Tweeddale's grantee, Paul, by the record of the mortgage, to preclude him from being an innocent party to the void satisfaction and successfully invoking the registry laws for protection.

The judgment is reversed and the cause remanded with directions to render judgment in favor of plaintiff in accordance with this opinion.[24]

[24] In Wetnutske v. Wetnutske, 158 Wis. 305 (1914) where somewhat similar facts existed and one of the plaintiffs recovered despite the attempted rescission, Timlin, J., in dissenting said: "In this case I dissent from the conclusion that the promisor and promisee, in a contract executory on the part of the promisor, but executed on the part of the promisee, which contract contains a promise to pay a sum of money to a third person who parted with no consideration, cannot, while the contract remains executory and unperformed on the part of the promisor, rescind that contract and return the consideration to the promisee without the assent of such third person and without the aid of a court. In Tweeddale v. Tweeddale, 116 Wis. 517, the contract had been executed according to its terms between the immediate parties thereto, and to say the least the rule of that case should not be extended. Suppose the rule of the majority opinion in this case were applied in a case like Dilger v. McQuade, *post* [158 Wis.] p. 328, [where the provision was to leave a legacy], if the immediate parties had attempted a rescission?"

Professor Williston is in favor of treating the case of the sole beneficiary as one where the beneficiary's right is irrevocable as soon as the contract for his benefit is made, subject only to disclaimer by him (1 Williston on Contracts § 396), but the case of the creditor beneficiary as one where the right is revocable except where the promisee's revocation of it as a gift to the promisor leaves him with insufficient means to pay his debts (Id., § 397). He concedes, however, that the cases in general do not distinguish between sole beneficiaries and creditor beneficiaries as regards this matter (Id. § 396b). At some stage each kind of beneficiary gets an irrevocable right and the question is merely whether he gets it immediately upon the making of the contract, (Waterman v. Morgan, 114 Ind. 237 (1887); Starbird v. Cranston, 24 Colo. 20 (1897); Bay v. Williams, 112 Ill. 91 (1884); Tweeddale v. Tweeddale, the principal case), or when he first hears of it and does not dissent (Hill v. Hoeldtke, 104 Tex. 594 (1912) ), or when he expressly assents (Gifford v. Corrigan, *ante*, p. 627), or when he acts upon the promise made for his benefit. People's Bank and Trust

## ROOKWOOD'S CASE.

(Court of Common Pleas, 1589-1590. Cro. Eliz. 164.)

Rookwood having issue three sons, had an intent to charge his land with four pounds per annum to each of his two youngest sons for their

Co. v. Weidinger, 73 N. J. L. 433 (1906); Crowell v. Hospital, 27 N. J. Eq. 152, 650 (1876); Wood v. Moriarty, reported *post* p. 639.

In Hartman v. Pistorius, 248 Ill. 568 (1911) plaintiff in a suit to foreclose a chattel mortgage on standing timber joined as defendants certain persons alleged to have assumed and agreed in writing, for a valuable consideration, to pay the mortgage debt, in order that plaintiff might hold those defendants for any deficiency. It was shown that those defendants made a contract with Brown & Osby, to whom the mortgaged timber had been conveyed and who had assumed the mortgage, that Brown & Osby would pay defendants $350 in cash and convey to them the mortgaged property, subject to the mortgage, which the defendants agreed to pay, and the defendants would convey to Brown & Osby certain other land, also subject to a mortgage which Brown & Osby assumed. Two months later, nothing having been done under the contract, it was abandoned by mutual consent of Brown & Osby and of the defendants, Brown & Osby, under a new agreement, paying $50.00 and defendants quit-claiming to Brown & Osby the property they were to convey. The plaintiff in the foreclosure suit did not change his position in any particular and did not even notify any of the parties of his willingness that the contract should be carried out. Cartwright, J., said that "the parties were as free to cancel and abandon the contract as they had been to enter into it. * * * The parties were not bargaining for promises but for conveyances (Tyler v. Young, 2 Scam. 444; Mason v. Wait, 4 id. 127; Davis v. McVickers, 11 Ill. 327; Thompson v. Shoemaker, 68 id. 256). The plaintiffs in error [defendants] were under no greater obligation to pay the mortgage debt than any other person would have been who had an option on the timber subject to the assumption of the mortgage debt" (p. 573).

It has been suggested that Hartman v. Pistorius cannot be supported if a creditor beneficiary is deemed to have "an irrevocable right either immediately or as soon as he knows of the promise." 1 Williston on Contracts, § 397, p. 744, n. 15. But that depends, in part, on the remedies to be allowed a beneficiary. In any case where the beneficiary proceeds in chancery for specific performance, a holding that the promisor may be discharged by the promisee without the consent of the beneficiary is of course a denial of the latter's irrevocable right; but in any case where the remedy resorted to by the beneficiary is an action at law for damages, the promisor may well have the defense to the beneficiary's action that his promise was conditioned on the performance to come from the promisee and, as that is not going to be forthcoming, as the rescission agreement shows, it is not fair or possible to make the promisor perform. The beneficiary cannot hold the defendant on the theory that he has prevented performance and thereby dispensed with the condition, if the obligation of the promisor to the promisee justifies such prevention. It is theoretically possible to deny the right of the promisee to discharge a promisor from an unconditional promise for the benefit of another and yet, as far as recovery at law is concerned, permit the promisee to arrange with the promisor not to perform some condition precedent or concurrent to the promisor's duty to pay the beneficiary. Probably, if equity is applied to, where a contract is specifically enforceable, it will nevertheless compel the promisee to perform the condition and the promisor to pay the beneficiary, but at law that need not be so. Hartman v.

lives; but the eldest desired him not to charge the land, and promised to pay to them duly the four pounds per annum; to which the two younger sons, being present, agreed; and he promised to them to pay it. And for non-payment after the death of the father, they brought an assumpsit. The whole court held clearly, that it was well brought, and that it was a good consideration; for otherwise his land had been charged with the rents.[25]

Pistorius, *supra*, was similar to a decision at law, in that specific performance, which would have necessitated a payment of $300 more by the promisee to the promisor, was not asked, and it is by no means clear that the holding is not justified by National Bank v. Grand Lodge, reported *ante* p. 603. The question in a case like Hartman v. Pistorius is whether the defendant should be made to pay, even though he is not to get what was to be his recompense for paying, since the reason why he does not get that recompense is that he has consented not to receive it in return for a discharge by the promisee of his obligation to pay. In National Bank v. Grand Lodge, *ante*, of course, the breach of condition was not condoned; but still the question in both the cases is whether the plaintiff shall be paid, although express or implied conditions precedent or concurrent affecting such payment are not complied with. Compare 1 Williston on Contracts, § 395. May not the defendant in Hartman v. Pistorius well say, "The rescission of this contract by the promisee and myself was to be total and the beneficiary cannot set it aside in part. If it is to be set aside, my performance becomes again conditional and the beneficiary cannot recover except on that basis?" It certainly would seem as if, were specific performance sought, the chancellor would agree with the defendant, and would condition relief against the defendant accordingly. If he would, Hartman v. Pistorius may be justified on the ground that specific performance was not sought, without in the least impairing the doctrine that the creditor beneficiary's right is irrevocable. Even irrevocable rights may be subject to conditions precedent or concurrent to their enforcement and may be fully enforceable only by a resort to a special kind of procedure. While there is language in Hartman v. Pistorius (see quotation *supra*), denying that the right is irrevocable, the actual decision can be supported without subscribing to that language.

[25] In Preston v. Preston, (Mich.) 172 N. W. 371 (1919), reaffirmed on rehearing in 175 N. W. 266 (1919), where a daughter was suing a father on an agreement by the father with the mother, that as long as he lived he would support the daughter, who was blind and otherwise physically incapacitated to care for herself, the court in the original opinion allowed the plaintiff to recover as a beneficiary on the theory that a procedural statute had changed the Michigan rule that such a beneficiary could not recover; but on rehearing the court found that the promise of the father to the mother was made in the daughter's presence and hearing, that in effect the promise of the father was made directly to her, and that she was a party to the contract entitled as such to recover.

In Rector, etc., of St. Mark's Church v. Teed, 120 N. Y. 583 (1890), where one Thomas Wright abandoned a contest of a will in consideration of defendant's promise to pay St. Mark's Church $500 and gave St. Mark's Church a written promise to pay that sum, Vann, J., for the court, in holding in favor of plaintiff's right to recover, said:

"If the form of the promise had been to pay directly to Thomas Wright, no reason is perceived why it could not have been enforced. As the arrangement was made with him, and the consideration was furnished by him, the fact that the money was made payable by his direction to the plaintiff does

## WOOD AND ANOTHER, COPARTNERS, *v.* MORIARTY.

(Supreme Court of Rhode Island, 1887. 15 R. I. 518, 9 Atl. 427.)

Plaintiffs' petition for a new trial.

DURFEE, C. J.[26] This is assumpsit for the price of lumber furnished to one Joshua W. Tibbetts for use in the erection of two houses for the defendant, Tibbetts having entered into a written contract with the defend-

not render the promise void. The plaintiff became his appointee, and upon receiving from him the written agreement, or evidence of the promise, it became his donee; and thus privity was established between the parties to the action. This is not the case of a mere stranger who attempts to intervene, and claim the benefit of a contract to which he is not a party, as in many of the authorities relied on by the appellant, because the promise was made directly to the plaintiff, and there was a clear intention on the part of the person furnishing the consideration to secure a benefit to the plaintiff. If the sum in question had been made payable to Thomas Wright, he could have given the claim to the plaintiff, whose title would thus have been perfect; and why could he not make the gift by causing the promise to be made directly to the plaintiff? The intention of the parties should not be defeated by releasing the defendant from his promise, after he had received the consideration therefor, simply on account of the form of the transaction, which violates no statute, nor any rule of public policy.

"If A sells a horse to B for $100, and B gives in payment therefor a note for that amount drawn payable to C at A's request, and A delivers the note to C, the latter can enforce it against the maker. The case supposed differs in no essential particular from that under consideration."

Massachusetts treats a contract made by a parent to name his child for the promisor in return for the latter's promise to provide for the child as a contract made between the child and the promisor through the agency of the parent, with consideration moving from the child. Gardner v. Denison, 217 Mass. 492 (1914). See Eaton v. Libby, 165 Mass. 218 (1896), where, however, the note given by the promisor was made payable to the infant.

But the English court is becoming committed to the doctrine—some say it is already committed to it—that even a party cannot recover on a contract unless consideration moved from him. West Yorkshire Darracq Agency, Ltd. v. Coleridge, [1911] 2 K. B. 326, indeed, took the view of Rookwood's Case, but Dunlop, etc. Co. v. Selfridge & Co. [1915] A. C. 847, though an undisclosed principal case and not strictly on all fours with these other cases, contains such emphatic language that it is generally taken as settling the English law. In that case, [1915] A. C. 847, at p. 853, Viscount Haldane, L. C., said:

"My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it, consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognized in the same fashion by the jurisprudence of certain continental countries or of Scotland, but here

[26] Part of the opinion is omitted.

ant to build the houses before the lumber was furnished. Tibbetts, after going on for a while in the execution of the contract, released it or assigned it to the defendant by an instrument under seal. * * * At the trial testimony was introduced, or offered, to prove the purchase of the lumber, the execution of the release or assignment; that the defendant, besides paying the consideration recited therein, agreed, by way of further consideration, to pay all bills incurred by Tibbetts on account of the contract released; that among these bills was the bill of the plaintiffs for lumber; and that notice of the arrangement between Tibbetts and the defendant was given by Tibbetts to the plaintiffs. The testimony as to the agreement to pay the bills incurred by Tibbetts was allowed to go in *de bene esse*, and at the close of the testimony for the plaintiffs the court directed a nonsuit. The plaintiffs petition for a new trial. The questions are whether the plaintiffs were entitled to prove by oral testimony that the defendant agreed to pay the bills incurred by Tibbetts under his contract, by way of further consideration for the release or assignment, and, if so, whether, upon proof thereof, the plaintiffs could maintain their action. * * *

The defendant contends that the agreement was within the statute of frauds, being an agreement not in writing to answer for the debt of another. But an agreement to answer for the debt of another, to come within the statute of frauds, must be an agreement with the creditor. A promise by A to B to pay a debt due from B to C is not within the statute of frauds. Eastwood v. Kenyon, 11 Adol. & E. 438; Browne, St. Frauds, § 188. The contract here, as made between Tibbetts and the defendant, was certainly not within the statute. The question therefore takes this form, namely, whether the plaintiffs are entitled to take advantage of the contract, and bring suit upon or under it; and, if so, whether to such suit the statute is not a good defense. Some of the cases cited for the plaintiffs cover both these points completely. Barker v. Bucklin, 2 Denio, 45; Johnson v. Knapp, 36 Iowa, 616; Barker v. Bradley, 42 N. Y. 316, 1 Amer. Rep. 521; Beasley v. Webster, 64 Ill. 458; Jordan v. White, 20 Minn. 91 (Gil. 77); Joslin v. New Jersey Car-Spring Co., 36 N. J. Law, 141; Townsend v. Long, 77 Pa. St. 143, 146. Similar citations

they are well established. A third proposition is that a principal not named in the contract may sue upon it if the promisee really contracted as his agent. But again, in order to entitle him so to sue, he must have given consideration either personally or through the promisee, acting as his agent in giving it."

In Palmer Savings Bank v. Insurance Co. of North America, 166 Mass. 189, 195-6 (1896), Field, C. J., said: "While in this commonwealth the rule is held strictly that no one can sue or be sued on a simple contract who is not a party to it, either disclosed or undisclosed, yet it is not in all cases necessary that the consideration should move from the promisee to the promisor, in the ordinary sense of those words. In a novation, no consideration moves from the promisee directly to the promisor. An assignee of a non-negotiable debt must sue in the name of the assignor, unless the debtor has promised to pay it to the assignee; but if there is such a promise, the assignee can sue in his own name, although no consideration for this promise moves directly from the promisee to the promisor."

might be multiplied if we cared to load our opinion with them. See Browne, St. Frauds, § 166*a*, 166, and notes. On the other hand, the cases are numerous which hold that such an action is not maintainable for want of privity between the parties. Mr. Browne, in section 166*a*, says that this is the settled doctrine in England, Michigan, and Connecticut; that in North Carolina and Tennessee the question seems to remain open; and that in Massachusetts the English doctrine seems to be growing in favor contrary to the earlier cases; but that in the other states the creditor's right to sue has been generally recognized. The course of decisions in this state favors the creditor's right to sue, and in principle we think recognizes it, though it has not hitherto extended to a purely oral contract. Urquhart v. Brayton, 12 R. I. 169; Merriman v. Social Manuf'g Co., Id. 175. Courts that allow the action generally hold that it is not affected by the statute of frauds, though, as Mr. Browne remarks, they do not unite in the reasons which they give for so holding.[27] Mr. Browne himself suggests that the contract, as between the creditor and promisor, arises by implication out of the duty of the promisor under his contract with the debtor, and that being implied, it is not within the statute of frauds. Browne, St. Frauds, § 166*b*. The view accords with the doctrine of Brewer v. Dyer, 7 Cush. 337, where the court remark (page 340) "that the law operating on the act of the parties creates the duty, establishes the privity, and implies the promise and obligation, on which the action is founded."

The diversity of decisions shows that the action cannot be maintained without resorting to implications or assumptions, which the courts do not always find it easy to allow, and which they sometimes refuse to allow. It seems to us that we shall best find the grounds, if there are any, on which the action can be maintained, by an analysis or explication of the contract with the debtor. The contract is this: A agrees with B, for a consideration moving from B, to pay to C the debt which B owes to C. The contract is absolute. If A does not pay the debt, and B has to pay, it is broken. It is therefore a contract by A to pay the debt in lieu of B, or in relief of B; to take it on himself, and become so far as he can, independently of C, the debtor of C in place of B. The contract, as between A and B, is not collateral but substitutional. But this being so, how does C, who is not a party to it, get the right to sue A upon or by reason of it? It has been held that he gets this right directly from the contract itself, because B, in

[27] One of the striking cases is Eddy v. Roberts, 17 Ill. 505 (1856). In one count the plaintiff sued defendant on the latter's promise to plaintiff, for a consideration moving from plaintiff, to pay the debt of Williams, and at the trial proved that defendant made also a promise to Williams, as part of the purchase of a business from Williams, to pay the same debt of Williams to plaintiff. Recovery was denied on the promise made to plaintiff because of the debt, default or miscarriage clause of section 4 of the statute of frauds, but the court said that it would be allowed on the promise made to Williams for plaintiff's benefit if plaintiff would by amendment declare upon it.

making it with A, makes it for C, if C desires to accede to it, as well as for himself, so that C has only to ratify or assent to it, which he does unequivocally by suing on it, in order to become a party to it. But in this view, if C accepts the contract, he must accept it as made; that is, as a contract by which A agrees that he, instead of B, will pay the debt which B owes to C. C cannot at the same time assent to the contract and dissent from the terms of it. Accordingly, if he sues A on the contract, he must sue him instead of B, and cannot also sue B, and B is therefore released. But, as we have seen, another view has been taken. It has been held that the contract between A and B imposes a duty upon A to pay to C the debt which D owes to him, and that from this duty the law implies a promise by A in favor of C to pay B's debt to C. But if a promise is implied from the duty, the promise must correspond to the duty. The duty which the contract imposes upon A is that he, instead of B, shall pay the debt which B owes to C, and, accordingly, so must be the promise to be implied from it. If, therefore, C sues A upon the implied promise, he must sue him as liable, instead of B, for the debt of B to him, C; he cannot consistently sue both A and B, and consequently B is released. We do not claim that either of these views is free from difficulty. Either of them, however, is free from one difficulty which other views encounter, and which is a principal reason why the courts which refuse to allow the action refuse to do so. Other views give the creditor the benefit of the new contract for nothing, since they allow him still to retain his hold upon the original debtor; whereas, according to either of the views above set forth, the creditor cannot have the benefit of the new contract without assenting to the terms of it, thereby releasing the original debtor, so that the assent is in itself a consideration. As cases which support these views we will refer to Warren v. Batchelder, 16 N. H. 580; Bohanan v. Pope, 42 Me. 93.[28]

[28] In Bohanan v. Pope (1856), where defendant had contracted with plaintiff's employer to pay the latter's "hired men," the plaintiff, who had first taken judgment against his employer and collected on execution 96 cents, was denied a recovery against the defendant on the ground that plaintiff had elected to hold his employer and thereby had abandoned his remedy against the defendant. The court said that he had a remedy against the defendant and a remedy against the employer, but the two remedies were "not concurrent but elective," and an election of one "implies an abandonment" of the other. See Henry v. Murphy, 54 Ala. 246 (1875); Warren v. Batchelder, 16 N. H. 580 (1845). If the plaintiff does not know that a promise has been made for his benefit when he takes judgment against the original debtor, there is no election and he may proceed against the new promisor. Young v. Hawkins, 74 Ala. 370 (1883). And here, as in the field of quasi-contracts, courts adopting the election theory doubtless would differ as to whether election occurs when action is brought or when judgment is recovered.

Of Wood v. Moriarity and kindred cases, Professor Corbin has said: "The theory underlying these cases, though not expressed clearly, seems to be that the agreement between the promisor and the promisee operates as an offer of a novation to the beneficiary. The chief objection to this theory is that

See, also, Clough v. Giles, 5 Atl. Rep. 835. Of course, if either view be correct, the liability under the contract is not collateral, but direct and substitutional, and therefore not within the statute of frauds.

We do not think this case is distinguishable in principle from Urquhart v. Brayton, 12 R. I. 169. The doctrine of the latter case is not only just and convenient, but also consonant with the purposes of the parties, and we are not prepared to recede from it. As is remarked by the court, in Lehow v. Simonton, 3 Colo. 346, "it accords the remedy to the party who in most instances is chiefly interested to enforce the promise, and avoids multiplicity of actions." We think the declaration is proper in point of form, and we do not think the nonsuit is justifiable on the ground of variance.

In Warren v. Batchelder, 16 N. H. 580, the court held that a demand on the defendant was requisite before suit. Whether this is so we need not decide, for the evidence in this case shows a demand before suit.

*Petition granted.*

in fact the parties contemplate no such offer and the beneficiary has no reason to believe that in taking advantage of the new contract he is extinguishing his previous rights. * * * Where the beneficiary is not a creditor of the promisee he has no rights to discharge, and the novation theory is wholly inapplicable. Clearly also the better authority appears to be that the creditor beneficiary's right against the new promisor is an additional security. This carries out the real intention of the parties." Corbin's Anson on Contracts, pp. 347-348. See to the latter effect, Fischer v. Hope Mut. Life Ins. Co., 69 N. Y. 161 (1877); Stephany v. More, 82 N. J. L. 186 (1912); Johnson v. Shuey, 40 Wash. 22 (1905); Smith v. Pfluger, 126 Wis. 253 (1905). Professor Williston states that the more common doctrine "allows the creditor a right against both the original debtor and the new promisor. And in some states he is allowed to join both as defendants in the same action. Roberts v. Abney (Tex. Civ. App.), 189 S. W. 1101. He ought to be compelled to do so." 1 Williston on Contracts, § 393, pp. 736-7.

A more troublesome question is as to whether the promisee as well as the beneficiary may sue the promisor. The courts which are influenced by the novation theory deny the promisee a recovery. Where the beneficiary is a sole beneficiary, it would seem that the promisee's damages would necessarily be nominal, except in a jurisdiction allowing him to sue as trustee for the beneficiary, and except in such a jurisdiction no harm would result from denying the promisee a recovery. Compare Livet v. Hawes, Cro. Eliz. 619, 652 (1599), holding that a father could not maintain an action on a promise made to him to give a certain sum to his son in consideration of marriage. Where the beneficiary is a creditor to benefit as such, however, although there is occasional dissent (as in Burbank v. Gould, 15 Me. 118 (1838); Dye v. Mann, 10 Mich. 291 (1862), neither of which cases seems now to be followed in the state deciding it), the promisee whose debt is not paid is deemed damaged to the full extent of the debt even though he has not yet paid it (1 Sedgwick on Damages, 9 ed., § 789), and, in that view, must be allowed to sue. But, on the principle of preventing unnecessary vexation of the defendant, a recovery by either the promisee or the beneficiary will bar action by the other. 1 Williston on Contracts, § 392, p. 734, and cas. cit. If the promisee is the first to get judgment, such a result is inconsistent with the doctrine of those states which hold that the promisee has no power to release the promisor from his duty to the beneficiary.

## SCHOOL DISTRICT OF KANSAS CITY ex rel. KOKEN IRON WORKS *v.* LIVERS et al., APPELLANTS.

(Supreme Court of Missouri, 1899. 147 Mo. 580, 49 S. W. 507.)

BURGESS, J. Upon the trial of this cause in the Circuit Court there was judgment for plaintiffs, from which defendant sureties appealed to the Kansas City Court of Appeals, where the judgment of the Circuit Court was reversed.

Plaintiffs then filed motion for rehearing which was overruled, and the cause certified to this court because one of the judges of that court was of the opinion that the decision rendered is in conflict with Board of President and Directors of the St. Louis Public Schools v. Woods et al., 77 Mo. 197.

The facts are as follows:

Defendants Livers and Pullman having acquired the contract at the price of $72,500 for erecting an addition to the Central High School in Kansas City, Missouri, were required to give and did excute bond in the sum of $54,000, conditioned that the bond was executed not only for the protection of the school district, but also for the benefit of all parties who might furnish materials used in the building, and that any such party, having unpaid bills therefor, might, in the name of the school district, maintain an action upon the bond to recover the amount of such bills.

Schmidt & Wible and David Pullman were securities on the bond. Pullman has since deceased and Anna A. Pullman, administratrix, represents his estate.

The decision rendered by the court of appeals is not only in conflict with the Board of President and Directors of the St. Louis Public Schools v. Woods et al., 77 Mo. 197, but is in conflict with the more recent decisions of this court in city of St. Louis to use of Glencoe Lime and Cement Co. v. Von Phul et al., 133 Mo. 561, and Devers v. Howard, 144 Mo. 671, in which it is held that a contract between persons made upon a valid consideration may be enforced by a third person, though not named in the contract, when the obligee owes to him some duty, legal or equitable, which would give him a just claim, and must therefore be overruled.

It is contended by defendants that the evidence showed that the school district paid Livers and Pullman, the contractors, in excess of eighty per cent of the amount due them on their contract, which was in violation of its terms, and as such payment was without the knowledge or consent of the securities, that the defendants, Anna Pullman, administratrix, and Schmidt and Wible, were thereby released. Defendants asked a declaration of law presenting this theory of the case which was refused, and as there was evidence tending to show such payment, we take it for granted that it was refused upon the ground, that, even if true, it did not have the effect to release defendants upon

the bond, for causes of action, if there were such, which had accrued upon the bond before that time.

Plaintiff's rights are original and independent of the school district, the board being constituted under the bond the trustee of an express trust. Board v. Woods, *supra*. The bond is dual in its nature, being for the benefit and protection of the school district against loss or damage for the non-fulfilment of their contract by the contractors, and the payment by them of laborers for work done, and of materialmen for material furnished, rights which when once fixed could not be destroyed or taken away by any act of the school district.

In Doll v. Crume, 41 Neb. 655, a city let a contract for grading its streets to one Davis which McGavock and Doll signed as his securities. The contract provided among other things that Davis should be paid forty-five per cent of the cost of the work when two-thirds of it was completed; that he would pay for all labor and material furnished by him in executing the contract, and complete the work in one hundred and eighty days. The contract recited that "said parties of the third part (McGavock and Doll) hereby guaranty that said party of the second part (Davis) will well and truly perform the covenant hereinbefore contained to pay all laborers employed on said work; and if said laborers are not paid in full by said party of the second part, that said party of the third part hereby agrees to pay for said labor, or any part thereof, which shall not be paid by said second party within ten days after the money for said labor becomes due and payable." On completion of two-thirds of the work the city paid Davis ninety per cent of the estimated cost thereof. It also granted Davis an extension of time for the completion of his contract beyond the time fixed thereby. It was held "(1) That the contract between the city and Davis and his sureties and the promises and liabilities of the latter thereon, were of a dual nature,—a promise to the city that Davis should perform the work in the time and manner he had agreed; and a promise, in effect, to Crume to pay him for the labor he should perform for Davis; (2) that the city's overpaying Davis and extending the time of performance of his contract did not release the sureties from the contract to pay Davis' laborers; (3) that if the city had precluded itself from calling on the sureties to make good to it any default of Davis, its acts did not estop the laborers of Davis from enforcing against the sureties their contracts and promises."

Paraphrasing what is said in that case, the case stands just as if Livers and Pullman and their sureties had made the written promise directly to the Koken Iron Works instead of to the school district. Then how can it be said that any act of the school district in overpaying Livers and Pullman can release them or their sureties from their contract with the Koken Iron Works. It may be that the school district by its actions has precluded itself from recovering from the sureties of the contractors for any default of theirs in the premises, but it by no

means follows that the school district's action estops the Koken Iron Works. In other words, there were two contracts with one consideration to support both. To the same effect is Lyman v. Lincoln, 38 Neb. 794.[39]

Henricus v. Englert, 137 N. Y. 488, was an action upon a bond executed by defendant as surety for one Leonard Vogel. Plaintiffs were the original contractors. Thereafter they sub-let the carpenter's work upon the building to Vogel, who thereupon executed to them a bond in the penal sum of $5,000, conditional that Vogel, "shall perform all the obligations and agreements made and entered into with the said Henricus & Son, agents, and shall erect, work, make and complete a certain town hall and fire department building for the village of Brockport, New York, agreeable to the plans, and in perfect keeping with the revised carpenter's specifications prepared for the same by H. B. Gleason, architect." After the completion of the building the village claimed that it had not been erected according to contract, and claimed damages on account of defects in the work which were thereafter adjusted with Vogel at the sum of $550, which amount was deducted from the contract price payable to plaintiffs. Thereafter plaintiffs began suit on the bond, alleging breaches thereof and claiming damages in the sum of $5,000 the penalty of the bond. The defence was that at the time of the execution of the bond there was an arrangement between plaintiffs and

[39] See Sailling v. Morrell, 97 Neb. 454 (1914).

"In Missouri and Nebraska it has been held that a surety for the promise of a contractor to a district or municipality to pay for his labor and materials is liable to workmen and materialmen in spite of the fact that the promisee, the district or municipality, has paid the contractor during the progress of the work to an amount not allowed by the contract. The Missouri decision relies on the fact that the plaintiffs had become creditors on the faith of the defendant's suretyship before the promisee had committed any breach of duty. The Nebraska decisions make no such distinction." 1 Williston on Contracts, p. 739, note.

On the right of one furnishing labor or material to sue on the bond given by the contractor to the property owner, see Ann. Cas. 1916 A, 754, note.

Local statutes have a bearing on the problem and should be consulted. Some of the Missouri statutes are discussed in National Roofing Tile Co. v. McDonald (Conn.), 108 Atl. 726 (1919), which held, among other things, that a clause, in a bond given to a school district that the contractor would pay for material and labor, providing that the bond might "be assigned by the obligee to subcontractors, materialmen, and laborers," etc., "neither supersedes nor subtracts from the [Missouri] statutory provision under which the materialman or workman is authorized to sue in the name of the obligee without an assignment" (108 Atl. at p. 727).

Of course, bonds may be so drawn as not to make it reasonable to construe them as making laborers or materialmen more than incidental beneficiaries. See Fosmire v. National Surety Co., 229 N. Y. 44 (1920); Morganton Mfg. & Trading Co. v. Anderson, 165 No. Car. 285 (1914). Moreover, where the state statute provides for a mechanics' lien on public buildings (Commissioners v. Fell, 52 N. J. Eq. 689 (1894) ), such construction may normally be proper. Standard Gas Power Corp. v. New England Casualty Co., 90 N. J. L. 570 (1917).

Vogel by which he, Vogel, was to become the original contractor for the work done by him, and that thereupon his bond was assigned and delivered to the village as security for the work by him, and that after the work was completed all matters of difference between the plaintiffs and Vogel, and between Vogel and the village, or in any way growing out of his contract, or connected therewith, were adjusted and settled. It appeared that some changes and alterations were made in the plans between the architect, Vogel, and the village, without the consent of plaintiffs. It was held that the changes did not release defendant from, or affect his liability upon, the bond.

At the time of the payment of the eighty per cent the Koken Iron Works had already complied with its contract, and its right of action accrued, which the school district could by no act of its board take away, or deprive it of.

We therefore reverse the judgment of the Kansas City Court of Appeals, with directions to affirm the judgment of the Circuit Court.[30]

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## WHITEHEAD *v.* BURGESS.

(Supreme Court of New Jersey, 1897. 61 N. J. L. 75, 38 Atl. 802.)

Action by Edward Whitehead against William W. Burgess on a contract. Heard on demurrer to declaration. Demurrer overruled.

VAN SYCKEL, J.[31] The first count of the declaration sets out that the defendant, being the owner of a stallion known as "Lynne Bel," published a certain circular, in which he offered the services of the said stallion for the sum of $100, and therein promised to pay the owner of the first one of the foals of said stallion that should trot a mile in 2

[30] On the reasons why a municipality should be authorized to exact, and should exact, bonds for the benefit of laborers and materialmen, it has been said:

"Suppose we concede that there is no legal duty or moral obligation upon the city to see that the laborers who work for its contractors are paid. It may nevertheless be to the best interests of the city to have the payment of laborers and materialmen secured. In the first place, the certainty of securing their pay might induce them to work for a less wage, or furnish materials at a smaller cost, than if their pay was uncertain and they were obliged to look solely to a contractor whose honesty or solvency might be doubted. And the credit which such security gives the contractor might well be presumed to enable him to prosecute the work with diligence, and less danger of strikes or difficulty with his workmen. Public inconvenience and delays in public improvements are not infrequently occasioned by the failure of employees and laborers to secure prompt payment or adjustment of their claims. By avoiding such complications and making it certain that the laborer will receive his pay, it is to be presumed that the city is enabled to make a better contract and get its improvement constructed at less expense and in less time than would otherwise be possible." Reavis, J., in State v. Liebes, 19 Wash. 589, 595-596 (1898). Such reasons have a bearing on the attitude of the courts toward the problem in the principal case.

[31] Parts of the opinion are omitted.

minutes and 30 seconds, or less, the sum of $750. The declaration further sets out that one Pursell, being the owner of a mare called "'Eva,'' bred the said mare to said stallion, and paid the said defendant the sum of $100 for the privilege of so doing; that the said defendant, in consideration of such payment, promised the said Pursell to pay the owner of the foal of the said mare the sum of $750 if such foal should prove to be the first one of the get of said stallion that should trot a mile in 2 minutes and 30 seconds; that the plaintiff, having knowledge of the said promise made to said Pursell, did purchase the foal of the said mare Eva by the said stallion, and while the said foal was owned by the plaintiff the said foal trotted a mile in less than 2 minutes and 30 seconds, and was the first one of the get of said stallion to make the said time. The second count is substantially like the first count, except that it avers that at the time the service money was paid the defendant repeated to said Pursell the promise and undertaking in said circular set forth. A separate demurrer is filed to each count of the declaration. * * *

A further reason [relied upon by the defendant] to support the demurrer is that the promise as alleged was made to Pursell, and that there is no privity of contract between the plaintiff and defendant. The law of this state is that an action may be maintained on a promise made by the defendant to a third person for the benefit of the plaintiff without any consideration moving from the plaintiff to the defendant. Joslin v. Car-Spring Co., 36 N. J. Law, 141. The fact that the person to whose benefit the promise may inure is uncertain at the time it is made, and that it cannot be known until the happening of a contingency, cannot deprive the person who afterwards establishes his claim to be the beneficiary of the promise of the right to recover upon it. In the familiar case of a promise to give a reward for the arrest and conviction of a criminal, the right of the person who secures such conviction to recover the reward is well settled. Sergeant v. Stryker, 16 N. J. Law, 465; Furman v. Parke, 21 N. J. Law, 310. * * *

The demurrer must be overruled, with costs.[32]

[32] See Gaffney v. Sederberg, 114 Minn. 319 (1911); Lenz v. Chicago, etc., R. Co., 111 Wis. 198 (1901). See also popularity contest prize winner case, Smead v. Stearns, 178 Ia. 174 (1915).

But in the case of a sealed contract, it has been suggested that "there cannot be a floating covenant corresponding to a public or general offer of a simple contract. A promise under seal to such person as shall in the future fulfil a given description is therefore not a valid covenant when delivered, and does not later become so when the promisee becomes identified." 1 Williston on Contracts, § 215, p. 428. But query? The case cited to support the text is Saunders v. Saunders, 154 Mass. 337 (1891), which seems to be simply a decision that the beneficiary of a sealed contract cannot sue upon it. *Contra* to it is cited Nelson Coke & Gas Co. v. Pellatt, [1902] 4 Ontario 481, to be compared with Hudson Real Estate Co. v. Tower, 156 Mass. 82 (1892). As is suggested, *ante*, a state which permits the beneficiary of a sealed contract to sue upon it need not worry about the fact that the beneficiary is unascertained or unascertainable at the time of the contract. See *ante*, p. 42, note.

## CHAPTER VI.

## JOINT AND JOINT AND SEVERAL CONTRACTS.[1]

### ALPAUGH ET AL. *v.* WOOD ET AL.

(Court of Errors and Appeals of New Jersey, 1891. 53 N. J. L. 638, 23 Atl. 261.)

Suit by Spencer M. Alpaugh and others against William Wood and others on a contract. Judgment of nonsuit for defendants. Plaintiffs bring error. Reversed. For former reports, see 11 Atl. Rep. 469, and 16 Atl. Rep. 676.

The plaintiffs, Alpaugh & Magowan, brought suit in the supreme court against the defendants, Wood and Barlow, upon the following contract:

"Agreement made this seventh day of May, A. D. eighteen hundred and eighty-three, between Spencer M. Alpaugh and Frank A. Magowan, of the city of Trenton, New Jersey, party of the first part, and William Wood, of the township of Lawrence, and James Barlow, of the city of Trenton, in the county of Mercer and state of New Jersey, parties of the second part. Witnesseth, that whereas the said party of the first part own and operate a pottery manufactory in the city of Trenton, heretofore known as the pottery of Coxon and Company; and whereas they have agreed to employ and have employed the said parties of the second part, respectively, to superintend and manage the manufacturing part of the business of said pottery, including the decorating department, taking entire charge of the works, employment of hands, and selection of materials; therefore it is agreed between the said parties as follows: That said Alpaugh and Magowan have agreed, and by these presents do agree, to employ, and do hereby employ, the said William Wood and said James Barlow to take the entire charge of the manufacturing department of their said pottery, including the decorating department, for the term of three years and two months from the date of this agreement. And the said parties of the second part do hereby agree to enter the employment of the said party of the first part as aforesaid, and to take the entire charge of the manufacturing department of said pottery, and to give their whole time, labor, and skill towards the proper management of said business during the term aforesaid. And the said party of the first part do agree that the said parties of the second part shall receive for their said services during the said period the salary of three thousand dollars a year each, payable

[1] Local statutes should be consulted. The statutes vary. For a brief summary of them, see 1 Williston on Contracts, § 336.

in weekly payments, and do further agree that said Wood and Barlow shall also have and be entitled to ten per cent. of the net profits of said business during said period. And said party of the first part do guaranty that said profits shall bring in to said party of the second part a sum of at least two thousand dollars a year to each of them; and said salary and profits to begin on the twenty-first day of May, eighteen hundred and eighty-three.

+ "It is further understood that James Barlow gives his + entire knowledge and services in modeling to Alpaugh & Magowan, and renders no service or knowledge to + any one else. +

"In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

"Spencer M. Alpaugh, [L. S.]
"F. A. Magowan, [L. S.]
"William Wood, [L. S.]
"James Barlow, [L. S.]

"Signed, sealed and delivered in the presence of [+ clauses between marks thus + inserted before signing].

"Geo. R. Cook.

"Trenton, N. J., May 7, '83."

The *gravamen* of the complaint is that the defendants did not exercise proper care and skill in the performance of their obligations, and that in consequence thereof losses were sustained by the plaintiffs. At the close of the plaintiffs' case a nonsuit was ordered by the trial judge. Upon exception to this ruling a writ of error was sued out from this court.

DIXON, J.[2] * * * It is urged by the defendants that the obligations imposed upon them by this contract are not joint, but several only. Whenever an obligation is undertaken by two or more persons, it is the general presumption of the law that it is a joint obligation. Words of express joinder are not necessary for this purpose; but, on the other hand, there should be words of severance in order to create a several responsibility. 1 Pars. Cont. *11; Chitty, Cont. 128. This presumption is corroborated when the promisors have undertaken to accomplish together a single result; for in such cases the promisee evidently relies upon a joint performance. The inference of a joint obligation is not defeated by the fact that it appears, either in the terms of the contract or from the circumstances of the transaction, that each promisor is to contribute separately to the entire result for which they bargain. Byers v. Dobey, 1 H. Bl. 236; Muzzy v. Whitney, 10 Johns, 226; Field v. Runk, 22 N. J. Law, 525.[3] Nor is the nature of the obligation, with respect to its being joint or several, to be determined by considering whether the

[2] The statement of facts is abbreviated and part of the opinion is omitted.

[3] That charitable subscription papers call for a different construction, see Robertson v. March, reported next *post*.

remedies of the same parties under the contract would be joint or several; for their remedies depend largely, if not wholly, on the nature of their interest, from which, of course, their liability is entirely distinct. 1 Pars. Cont. *13. Under these principles, it is clear that the obligation of the defendants now in suit is joint. They are joined as the parties of the second part in the agreement; together they covenant to enter the employment of the party of the first part, to take the entire charge of the manufacturing department of the pottery, and to give their whole time, labor, and skill towards the proper management of the business. This covenant does not assign to each of the defendants his several duties, nor require from either the exercise of skill and diligence in any special department of the work, but binds both to the due management of the entire manufacturing business, leaving them to divide the charge between themselves according to their own discretion, and holding them responsible, not each for what he may arrange with his partner severally to assume, but both for the result to be jointly accomplished,—the skillful and careful management of the pottery. Even the last clause of the contract, which secures to the plaintiffs exclusively the knowledge and services of the defendant Barlow in modeling, is not cast in the form of a separate covenant by Barlow, but is expressed only as a part of the understanding agreed upon by the parties, viz., by the plaintiffs on the one part, and the defendants on the other. But even if this clause should be construed as Barlow's separate covenant, and as not involving Wood in responsibility for modeling, that would not affect the present question; for the plaintiffs' case does not rest upon defective modeling, or at least not upon that alone. The judgment of nonsuit should be reversed, and the record remitted for a *venire de novo*.[4]

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## JONATHAN ROBERTSON, APPELLANT *v.* EDWARD MARCH ET AL., APPELLEES.

(Supreme Court of Illinois, 1841. 4 Ill. (3 Scam.) 198.)

TREAT, J.[5] * * * The bill of exceptions shows that on the trial in the Circuit Court, the appellees, to support the action on their part, offered in evidence an instrument in writing as follows: "On or before the first day of January, 1841, we, the undersigned, promise to pay the

[4] In March v. Ward, Peake's Cas. 130 (1792), assumpsit was brought against Ward only on a promissory note reading "I promise" and signed by Bowling and by Ward. Lord Kenyon said, that "this note beginning in the singular number is several as well as joint. * * * The letter I applies to each severally," and held the action maintainable.

The Uniform Negotiable Instruments Law so provides in § 17 (7).

[5] Parts of the opinion are omitted.

sum annexed to each of our names, to William Hodgson, A. G. Phillips, Watson Sinclair, Samuel Smith, and Edward March, trustees, in trust of the Bethel Society of the Methodist Episcopal Church, in Morgan County, Illinois, for the purpose of building an addition to, and finishing, the church at the Bethel camp ground, as a more comfortable and spacious place of worship, and a school. August 24th, 1840." Which instrument is signed by some sixty persons, with the sums by them severally subscribed written opposite their names, among them the appellant, subscribing $50. * * * The jury found a verdict for the appellees for $40, and judgment was rendered thereon. * * *

It is insisted that the contract is joint, and that all of the subscribers should have been sued. If this objection could be now made, it would not be well taken.

The contract is manifestly in severalty. Each subscriber promises to pay a particular sum, and is not a surety for his co-subscribers.

The judgment of the court below is affirmed, with costs.

*Judgment affirmed.*[6]

[6] In subscription contracts the usual presumption does not apply, but instead several obligations are presumed. Hall v. Thayer, 12 Met. (Mass.) 130 (1846); Davis v. Belford, 70 Mich. 120 (1888). See 22 L. R. A. 80, note.

In Colt v. Learned, 118 Mass. 380 (1875), the executors of Pollock sued Learned and Pomeroy on a contract signed by the three which recited that they jointly and severally guaranteed the repayment to Pollock of $15,000 loaned by him to a corporation. Gray, C. J., said for the court:

"The written contract between the parties cannot be construed as creating a joint liability, without making Pollock, jointly with the two defendants, of the one part, contract with himself individually, of the other part. The manifest intention and legal effect of the contract are that each of the three signers shall assume the liability of one third of the sum named, and that each of the defendants should guarantee to Pollock, upon his paying the whole sum, the repayment of one third thereof. Upon the facts stated in the declaration, therefore, there is no joint liability of the defendants, but each of them is severally liable for $5,000."

In Read v. Price, [1909] 1 K. B. 577, 586, in reply to a claim that the words of a bond: "We bind ourselves and each of us and the heirs, executors and administrators of us and each of us and of every of them jointly and severally by these presents" made the executors jointly liable, Channell, J., said: "Now these words purport, no doubt, to bind all the surviving debtors and the executors and administrators of deceased debtors in every possible way; as to the several liabilities there is no difficulty; but how can a man make his executor liable jointly with another? How can a person without his consent be made liable jointly with others for the payment of future sums? The difference between joint liability and several liability is that the latter devolves upon the executor of the debtor, while the former does not, but passes by survivorship to the surviving joint debtors. If all the obligors should die, would all their executors be jointly liable? That would do away with the survivorship of the joint liability. Therefore, it seems to me that, though the words of this bond show the strongest intention to bind everybody that can be bound, yet the way in which executors are intended to be bound, and the only way in which they can be bound, is by the several liability. Accordingly for the pur-

## L. L. SATLER LUMBER CO. *v.* EXLER.

(Supreme Court of Pennsylvania, 1913. 239 Pa. 135, 86 Atl. 793.)

Action by the L. L. Satler Lumber Company against Joseph Exler. From judgment for plaintiff, defendant appeals. Affirmed.

At the trial it appeared that the written guaranty upon which the suit was brought was as follows:

"Whereas the American Box Company of Etna, Pa., is indebted to the L. L. Satler Lumber Company for lumber furnished in amount of thirty hundred and forty-four ($3,044.00) dollars and also indebted to the American Lumber & Manufacturing Co. in amount of thirty-two hundred and forty-four ($3,244.00) dollars: The aforesaid lumber companies agree to accept in payment thereof the American Box Company's notes with Theodore Geiselhart's indorsement thereon as follows:

"One sixty days for $761.00 and $811.00.

"One eighty days for $761.00 and $811.00.

"One hundred days for $761.00 and $811.00.

"One four months $761.00 and $811.00.

"It is understood and agreed by the American Lumber & Mfg. Co. and the L. L. Satler Lumber Co. that, if requested by the American Box Company, they will renew either or all of these notes at maturity for one-half for a period of 30 or 60 days.

"In consideration of the above, also in consideration of the sum of $1.00, receipt for which is hereby acknowledged, and other valuable consideration, I, the undersigned, hereby agree to become guarantor on the above paper in the sum of $3,000.00 and no more.

"Witness our hands and seals this 20th day of November, 1907.

"Jos. Exler [Seal.]

"L. L. Satler Lumber Co., [Seal.]

"L. L. Satler, Pres.

"American Lumber & Mfg. Co., [Seal.]

"W. D. Johnston, Pres.

"Witness: P. F. Quinn." * * *

MOSCHZISKER, J.[7] * * * We do not view the guaranty as a joint contract with the two lumber companies, and we cannot agree with the appellant's contention that any action thereon would have to be by the companies jointly. The court below reached the proper conclusion on this branch of the case when it stated: "The contract is several. * * * The sum of $3,000 is * * * the fixed limit of liability,

pose of this case there is no material distinction between the wording of this bond and that of a bond which makes the obligors jointly and severally liable in the common form."

On fixing the extent of liability of the several obligors to an agreement as making it joint, joint and several or several, see L. R. A. 1915 B, 221, note.

[7] The statement of facts is abbreviated.

and means not to exceed $3,000." At the time of the execution of the guaranty each of the lumber companies held four notes of the box company; those of the plaintiff being drawn for $761 each, and those of the other company for $811 each. The plaintiff's notes were indorsed over to and held by it individually, and the four belonging to the American Company were indorsed to and held by that company individually. As we construe the contract, the intention was to guarantee this paper for the benefit of the several holders thereof in the proportions to which they might respectively be entitled; it was not in any sense for the benefit of the two companies jointly.

Whether a contract is joint or several depends upon the nature of the interest of the parties and the intention at the time it was made, and the rule is that, if the consideration moves from the promisees separately, a promise to them is prima facie several. 2 Page on Contracts, § 1142. The writings in the case consist of the notes and the contract of guaranty. The notes are specifically referred to in the contract, and the defendant therein agrees to become guarantor "on the above paper." When these writings are taken together, it is apparent that the contract was not intended as a joint one. Although the lumber companies had a common interest, because each held the notes of the box company, they were not connected in any way, and they had no joint interest to be protected. Neither company could have renewed the notes of the other, and there was nothing to suggest that it ever was the intention that they should. As already indicated, we are of opinion that the contract was properly held to be several; [8] but we may

[8] "There are not wanting cases in which it has been held that when the interests of the covenantees are several, they may sue severally, though the terms of the covenant upon which they sue are strictly joint. Even this, however, has been doubted." Strong, J., in City of Philadelphia v. Reeves & Cabot, 48 Pa. St. 472, 476 (1865).

In Anderson v. Nichols, 93 Vt. 262, 107 Atl. 116 (1919), the defendant, the owner of an electric light and power transmission line, agreed to extend the line to furnish electric current to the plaintiffs, who owned farms, and they severally promised to pay him $125 when the line should be constructed to a point opposite their buildings and $125 when their buildings should be by defendant properly wired and equipped. The defendant also promised to charge any person living on the line $250 for connection and to divide half of it between the plaintiffs. In this action brought for the half of sums so charged others, the defendant demurred to the declaration on the ground that the contract was as to plaintiffs several and not joint and so there was a misjoinder of plaintiffs. The demurrer was sustained and judgment entered for the defendant. In affirming that judgment, Powers, J., for the court said:

"If you contract with two or more jointly, and their interests are several only, your engagement, in the absence of controlling language, will be taken to be several, and each promisee should sue separately for his damages. Note, Saund. 154; Beckwith v. Talbot, 95 U. S. 289, 24 L. Ed. 496; Emmuleth v. Home Benefit Ass'n, 122 N. Y. 130, 25 N. E. 234, 9 L. R. A. 704. * * *

"When the promise is to pay a group of persons a stated sum to be divided among them in proportions named, the engagement, ordinarily, will be joint,

add that actions were brought thereon by both the lumber companies, the two cases were tried together, and each company recovered a verdict for its proportion; hence no harm can come to the appellant through future suits growing out of the guaranty. * * *.

The assignments of error are overruled, and the judgment is affirmed.[9]

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## STATE OF MAINE *v.* CHANDLER.

(Supreme Judicial Court of Maine, 1887. 79 Me. 172, 8 Atl. 553.)

FOSTER, J. The defendants as sureties, together with one Benjamin R. Condon as principal, entered into a joint and several recognizance upon an indictment found against the said Condon as a common seller of intoxicating liquors. Default having been entered against all the parties upon the recognizance, *scire facias* is brought against these two defendants, who file a general demurrer.

and not several. 1 Parsons, *13; Lane v. Drinkwater, 1 C., M. & R. 599; Byrne v. Fitzhugh, 1 C., M. & R. 613.

"On the other hand, when payment is to be made not to the group, but to its several members, each to receive from the promisor his own share, the engagement, ordinarily, will be several, and not joint. 1 Parsons, *19; Owings' Ex'rs v. Owings, 1 Har. & G. 484.

"When tested by the above rule, the complaint before us breaks down. The interests of these plaintiffs are several. The consideration for the defendant's promise moved from them not jointly, but severally; and this alone is enough to make that promise *prima facie* several. 2 Page, § 1142; Satler Lumber Co. v. Exler, 239 Pa. 135, 86 Atl. 793. Moreover, the contract set up in this complaint does not require the defendant to pay the sum specified to the plaintiffs, but binds him to divide it between them. So the defendant's promise, though joint in form, is several in essence. In legal consequence, it is a group of separate promises, and gives rise to separate actions in favor of the several promisees."

[9] An interesting question, not settled even as to negotiable instruments by the Uniform Negotiable Instruments Law, which only makes instruments so drawn and otherwise in compliance with the law negotiable, is the effect of a promise to pay A or B. In Illinois early, before the Married Women's Separate Property Act, such a promise to pay to A or wife was treated as a promise to pay to A. Young v. Ward, 21 Ill. 223 (1859). But since that act it is treated as payable to the two jointly. Carr v. Bauer, 61 Ill. App. 504 (1895). Prior to the Negotiable Instruments Law a note drawn to A or B was not negotiable in Illinois because of uncertainty as to the payee. Musselman v. Oakes, 19 Ill. 81 (1857). Now that the question of negotiability is obviated in states adopting the Negotiable Instruments Law, the question is simply whether there are joint promisees or alternative promisees. They could be either, but the desirability of making them sue together, to prevent an unseemly race between them for a judgment, may lead a majority of the courts to hold, as a majority did before the Negotiable Instruments Law, that the promisees are joint. Passut v. Heubner, 142 N. Y. Supp. 546 (1913); Page v. Ford, 65 Ore. 450 (1913); Voris v. Schoonover, 91 Kan. 530 (1914).

The only question involved is whether the proper parties are joined as defendants in this action.

It is the general rule in actions *ex contractu* that objection to the non-joinder of a defendant can be taken only by plea in abatement, thereby giving the plaintiff a better writ, by therein disclosing the names of those who ought to be joined. Harwood v. Roberts, 5 Maine, 442; Reed v. Wilson, 39 Maine, 586; Richmond v. Toothaker, 69 Maine, 455. But to this rule there is an exception, as well settled as the rule itself—that if it appears from the face of the declaration or other pleading on the part of the plaintiff, that a person not made defendant was a joint contractor with those who are defendants in the suit, there being no averment of the death of such person, then such non-joinder is good ground for demurrer, as well as abatement. Harwood v. Roberts, *supra;* Richmond v. Toothaker, *supra;* Gould Pl. ch. 5, § 115; 1 Chit. Pl. 46; McGregor v. Balch, 17 Vt. 567.

It is likewise held to be ground for demurrer where there is a misjoinder of defendants, in actions upon contract, where too many persons are made defendants and the objection appears upon the face of the plaintiff's pleadings. Chitty states it thus: "If too many persons are made defendants, and the objection appear on the pleadings, either of the defendants may demur, move in arrest of judgment, or support a writ of error; and even if the objection do not appear upon the pleadings, the plaintiff may be non-suited upon the trial, if he fail in proving a joint contract." 1 Chitty Pl. 44; Gould Pl. ch. 5, § 104. "If it appears on the pleadings, it gives rise to a demurrer; if it appears at the trial, to an adverse verdict." Dicey on Parties, 507.

It is elementary law that where three or more parties contract jointly and severally, all are to be sued in one action, or each may be sued severally. It is improper, as all the authorities hold, to join two and omit the others, for in such case they are sued neither jointly nor severally, as they promised.[10] And in case the plaintiff does not see fit

[10] Similarly, in Sweigart v. Beck, 8 S. & R. (Pa.) 308 (1822), where the bond was given to ten obligees and seven only sued, when all were living, Tilghman, C. J., said that the action was "neither joint nor several," and so not maintainable. He further said (p. 311):

"The action [in the name of all the obligees] may be supported, although some of the obligees have received their shares, because the bond is forfeited unless they have all been paid. It was objected that those who had been paid might refuse to join in the action, or might release the obligor. But the court would permit those who were unpaid, to make use of the names of the other obligees against their consent; neither would their release be suffered to be set up, in bar of the action. It may be resembled to the case of an assigned *chose in action*, where the action is brought in the name of the assignor, for the use of the assignee; there the release of the assignor would not be regarded."

But as to obligors, see, contra, Glasscock v. Hamilton, 62 Tex. 143, 169 (1884), where Walker, J., for the court, said, that "In this state the technical rule of the common law that upon a contract which is joint and several the plaintiff

to proceed against them severally, it is the undoubted right of the defendants to have all their joint promisors or obligors joined with them in the suit. Harwood v. Roberts, *supra;* Bangor Bank v. Treat, 6 Maine 207. * * *

This action, then, must stand or fall like any other founded upon contract. It is brought against two only of the three parties who jointly and severally recognized to the state—now plaintiff in this suit. It is not brought against them in accordance with their obligation entered into by them. They are sued neither jointly nor severally. There are too many joined as defendants to correspond with their several obligation—too few to correspond with it as joint. This being so, the misjoinder in the one case, or on the non-joinder in the other, as we have said, is good ground of demurrer, since the fact appears upon the face of the plaintiff's declaration that there was a joint and several obligation entered into by three, all of whom are known as well to the plaintiff as to the defendants in this suit.

It makes no difference that one of the recognizors was the principal in the criminal process, and the other two were his sureties. The recognizance itself determines the liability of the parties, and, as appears from the record, that liability was joint and several in relation to the three parties who became bound by it. It was not a joint and several undertaking on the part of the sureties only; and the plaintiff cannot, by its pleading, change their liability from that which they assumed.

* * * *Exceptions* [*to overruling of demurrer*] *sustained.*

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## WILLIAM RICHARDSON AND THE EXECUTORS OF JOHN WALL *v.* EDMUND JONES ET AL.

(Supreme Court of North Carolina, 1840. 23 No. Car. 296.)

DANIEL, J. This was an action for debt on a specialty; plea *non est factum.* The plaintiffs declared on a bond dated, on the 16th of April, 1823, for the sum of £3,500, made and executed to William Richardson and John Wall, as obligees. On the trial, the plaintiffs, to support their declaration, offered in evidence a bond for the same sum and date, but executed by the defendants to the said William Richardson and John Wall, Esqrs.: "and the rest of the justices assigned to keep the peace for Rutherford County," "to be *paid* to the said William Richardson and John Wall." The reading of this bond in evidence was objected to, as it appeared to be a bond given to more joint obligees than the one declared on professed to be. The court rejected the evidence; and the plaintiffs were nonsuited and appealed.

must sue all or but one, and cannot sue two or more without suing all, has never been recognized in our practice."

If the obligors on a breach of the bond, had paid to Richardson and Wall, it would have been a good satisfaction and discharge. But if the obligors failed to pay as it is alleged they did, then the instrument offered in evidence informs us that the obligors have contracted, under their seal, with several other obligees besides Richardson and Wall. These other obligees are not made parties plaintiffs in the declaration; nor is there any averment in the declaration that they are dead, so as to enable Richardson and Wall to sue as survivors. In actions *ex contractu*, the omission to join as plaintiffs in the writ and declaration of all those that ought to be joined, (viz. all the obligees who are alive) may be taken advantage of on the trial under the general issue. The contract and obligation were made to others besides Richardson and Wall. The words in the contract "to be paid to said Richardson and Wall," do not restrict the legal force of the deed to these two alone; but as the contract is made jointly with all the named obligees, all must join as plaintiffs in the action. The plaintiffs could have averred in their declaration, who were justices at the date of the bond and have made them parties plaintiff. And they could, and ought to have averred the death of any of the obligees, if any had died since the date of the bond, to enable the survivors to sue and maintain the action. The bond offered in evidence, was a different one from that described in the declaration, and it was properly rejected by the court. The judgment must be affirmed.

PER CURIAM. *Judgment affirmed.*[11]

11 "It is well settled that if a bond be given to several obligees, they must all join in the action, unless some be dead, in which case that fact should be averred in the declaration. And if it appear on the face of the pleadings that there are other obligees living, who have not joined in the action, it is fatal on demurrer or in arrest of judgment." Tilghman, C. J., in Sweigart v. Berk, 8 S. & R. (Pa.) 308, 311 (1822).

In Jell v. Douglas, 4 B. & Ald. 374, 375 (1821), Abbott, C. J., said: "It was decided in Richards v. Heather, 1 B. & A. 29, that a party may maintain an action against a surviving partner without describing him as such; and the reason of that decision was this, that if the partners had been alive, and one only was sued, that circumstance could only be taken advantage of by plea in abatement, and was no defense upon the general issue. But if one of two joint-contractors sue, both being alive, that is a variance, and a good defense upon the general issue. It seems, therefore, to be reasonable, that where a surviving joint-contractor sues, the fact of his being survivor should appear in the declaration."

In Haworth v. Fisher, 3 Blackf. (Ind.) 249 (1833), where A contracted with B and C to deliver a certain number of hogs to be paid for by B and C at an agreed price, part payment being made in advance, and where B purported to assign all his rights to C, it was held that as B could not divest himself of the character of obligor he could not divest himself of that of obligee and, accordingly C could not sue A without joining B, his co-obligee.

It has been pointed out that "the nature of a joint promise to two or more persons * * * excludes a promise to any apart from the others, which, therefore, cannot be declared on as a promise to any apart from the others,

## MAY *v.* HANSON ET AL.

(Supreme Court of California, 1856. 6 Cal. 642.)

This was an action against George M. Hanson, John C. Fall and Samuel L. Dewey, administrator of the estate of B. B. Dewey, deceased, on an undertaking on appeal executed by G. M. Hanson, John C. Fall and B. B. Dewey. The complaint alleges the prosecution of the appeal in the action in which the bond was given, and final judgment against the appellant therein. It also avers the subsequent death of B. B. Dewey and the appointment of S. L. Dewey as his administrator.

The defendants demurred to the complaint on the ground amongst others, "that the defendant Samuel L. Dewey, administrator of the estate of B. B. Dewey, deceased, is improperly joined in this action with the other obligors, to said bond, being the surviving obligors of B. B. Dewey, deceased.

The court below sustained the demurrer, though not on the ground above stated. Plaintiff appealed.

MURRAY, C. J.[12] The demurrer was properly sustained upon the second ground because the administrator of Dewey ought not to have been joined. In actions upon joint and several contracts or obligations, an administrator cannot be joined with the survivor, because one is joined *de bonis testatoris*, and the other *de bonis propriis* (Humphreys v. Yale, 5 Cal. 173). * * *

*Judgment affirmed.*[13]

and in an action upon which, therefore, all must join" in the absence of statutory change. W. H. Griffith, Joint Rights & Liabilities, p. 32.

There is, however, no logical difficulty in imagining promisees to be joint and several, though the courts in general say that they cannot be. Seemingly by inadvertence, one case has held a note payable to A or B to be joint and yet each payee to have a separate right of action. Collyer v. Cook, 28 Ind. App. 272, 62 N. E. 655 (1902). Even the author quoted above found some difficulties with the orthodox thesis, for he said:

"The most important rule * * * is that a promise made by two or more persons to perform an act is a promise that they or some or one of them will perform it; but a promise to two or more persons to perform an act is not a promise to them or some or one of them, but a promise to them all to perform it. * * *

"True, it seems to be the law that payment to one of three may be pleaded as payment to the three, even when made to the separate account of the one and in fraud of the others. The reason seems to be that the one who has been paid cannot sue again, and the others cannot recover without him." W. H. Griffith, Joint Rights and Liabilities, pp. 2-3.

[12] Part of the opinion is omitted.

[13] See Eggleston v. Buck, 31 Ill. 254 (1863).

"The one sufficient reason for the rule of the common law that the surviving joint obligor and the representatives of the estate of the deceased could not be joined as defendants in an action at law was the inability of a court of law to render separate and different judgments in a single action,—against the survivor, to be satisfied *de bonis propriis*, and against the administrators of

## MARTIN *v.* CRUMP.

**(Court of King's Bench, 1698. 2 Salkeld, 444.)**

Two joint merchants make B their factor; one dies, leaving an executor; this executor and the survivor cannot join,[14] for the remedy survives, but not the duty; and therefore on recovery he must be accountable to the executor for that.

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## PICKERSGILL *v.* LAHENS.

**(Supreme Court of the United States, 1872. 15 Wall 140, 21 L. Ed. 119.)**

A statute of the state of New York thus enacts:

"No injunction shall be issued to stay the trial of any personal action at issue in any court of law until the party applying therefor shall execute a bond, with one or more sufficient sureties, to the plaintiff in such action at law, in such sum as the chancellor or master allowing the injunction shall direct, conditioned for the payment to the said plaintiff, and his legal representatives, of all moneys which may be recovered by such plaintiff or his legal representatives * * * in such action at law, for debt, damage and for costs therein."

With this statute in force, Pickersgill sued Lahens at law in the Superior Court of New York, a common law court, on certain indorsements. Thereupon Lahens filed a bill in the Court of Chancery of the state, for relief against the indorsements; and having done so, applied, under the above quoted act, for an injunction to stay the trial at law The court upon the filing of a bond meant to be such as the above quoted act required, granted a temporary injunction staying the suit at law till an answer to the bill in chancery should come in. The bond was the *joint* bond (not the joint and several bond) of Lahens and one Lafarge; this Lafarge not having been any party to the suits already mentioned, nor interested in them, and not deriving any benefit from

the estate of the deceased, to be satisfied from such estate in due course of administration. From the same reason it followed that the survivor alone was liable in an action at law, and that if he were solvent, and the action thus available for the collection of the debt, the plaintiff need go no further and he was not permitted to do so. In the Code states this, the only reason for the rules of common law upon the subject, has entirely disappeared. There is no longer any objection to joining causes of action which were formerly distinguished as legal and equitable. Our courts are no longer hampered as to the form of the judgments they may render in one single form of action called a 'civil action.'" Conaway, J., in Fisher v. Hopkins, 4 Wyo. 379, 388-389 (1893).

[14] See Babcock v. Farwell, 245 Ill. 14 (1910); Park v. Parker, 216 Mass. 405 (1914); Semper v. Coates, 93 Minn. 76 (1904).

On where and how a contract continues obligatory and enforceable after the death of the contractor, see 68 Am. Dec. 758, note; 22 Am. St. Rep. 811, note.

his joining in the bonds. The bond recited the action at law against Lahens, the bill and injunction in chancery, and the condition of the instrument was that the obligors should pay all moneys which should be recovered in the suit at law. Answers to the bill for relief having come in, the action at law proceeded, and a judgment was rendered against Lahens for $129,000. Before this time Lafarge had died; and at the time Lahens had become insolvent. Thereupon Pickersgill filed a bill in equity against the executors of Lafarge to have his estate pay the amount of the bond, with interest from the recovery of the judgment against Lahens. The executors demurred; assigning among other grounds of demurrer that it appeared by the bill that Lafarge was not severally bound by the bond, but *only jointly* bound with Lahens; that Lafarge received no consideration for becoming an obligor; that he was not interested in any way in any of the matters in consequence whereof the bond was given, and was merely a surety therein, and that he departed this life before the filing of the present bill, leaving Lahens surviving him, who was still alive. The court below sustained the demurrer; acting doubtless on the ancient principle of equity announced with a clear mention of its grounds by Grier, J. for this court, in the United States v. Price, 9 How. 90, that after the death of one joint obligor (the other surviving) the estate of the one deceased cannot be pursued in equity unless there was "some moral obligation antecedent to the bond," the which obligation the court declared could not exist where the deceased obligor had been but a surety. To review the action of the court in sustaining the demurrer this appeal was taken.

DAVIS, J. It is very clear that the estate of Lafarge is discharged at law from the payment of the obligation in controversy, on the familiar principle that if one of two joint obligors die the debt is extinguished against his representative, and the surviving obligor is alone chargeable. It is equally clear that in this class of cases, where the remedy at law is gone, as a general rule a court of equity will not afford relief, for it is not a principle of equity that every joint covenant shall be treated as if it were joint and several. The court will not vary the legal effect of the instrument by making it several as well as joint, unless it can see, either by independent testimony, or from the nature of the transaction itself, that the parties concerned intended to create a separate as well as joint, liability. If through fraud, ignorance, or mistake, the joint obligation does not express the meaning of the parties, it will be reformed so as to conform to it. This has been done where there is a previous equity which gives the obligee the right to a several indemnity from each of the obligors, as in the case of money lent to both of them. There a court of equity will enforce the obligation against the representatives of the deceased obligor, although the bond be joint and not several, on the ground that the lending to both creates a moral obligation in both to pay, and that the reasonable presumption is that the parties intended their contract to be joint and several, but through

fraud, ignorance, mistake, or want of skill, failed to accomplish their object. This presumption is never indulged in the case of a mere surety, whose duty is measured alone by the legal force of the bond, and who is under no moral obligation whatever to pay the obligee, independent of his covenant, and consequently there is nothing on which to found an equity for the interposition of a court of chancery. If the surety should die before his principal, his representatives cannot be sued at law; nor will they be charged in equity.[15] These general doctrines on this subject were presented at large in this court in the case of the United States v. Price, [9 How. 90] and they are sustained by the text writers and books of reports in this country and England. [Citations.]

The authority of the decisions on this subject we do not understand the appellant as questioning in a proper case; but he insists they are not applicable here. His position is, that a statutory obligation like the bond in question, is different in principle, and should be interpreted differently from a contract made by private parties between themselves, as the obligors in such a bond cannot direct the form it shall take, nor elect whether to accept or refuse it. The bond, which is the foundation of this suit, was given in 1846, under the order of the Court of Chancery of New York, to stay the proceedings in an action at law then pending in the Superior Court of the city, and it is argued, as the statute does not require bonds of this character to be "joint and several," in legal intendment they must be joint in form, and all the obligors, therefore, should be regarded as principals. It is undoubtedly true, as words of severalty are not employed, that a joint bond is a compliance with the law, but it by no means follows that a joint and several obligation is

[15] *Contra*, see Susong v. Vaiden, 10 So. Car. 247 (1878), holding that the surety's death, with the principal surviving, does not discharge the estate of the surety in equity, nor, under the code, at law.

"The reasoning upon which the exemption of the deceased surety's estate from liability is founded, though sanctioned by numerous cases, is not very convincing, and has not always been viewed by judges and jurists with favor.

"It is difficult to perceive why the estate of a surety who was a joint obligor, upon whose credit and responsibility, mainly, the obligee loaned his money, should be discharged by the death of the surety. It would seem that in good conscience and sound morals, and upon principles of natural justice, it should respond, and bear the loss, if any, rather than the obligee who trusted the surety. But it has been quite uniformly held that the mere joint obligation of the deceased surety is not sufficient to create an equity against his estate.

"In all the cases which have come under my observation where it has been held that death discharged the obligation of a joint surety, it appeared that the joint obligor was a mere surety, who received no benefit whatever from the joint obligation. The cases to be found in the books are generally those of joint accommodation indorsers of notes, joint sureties upon official bonds, or upon undertakings given on appeal, or mere sureties upon other instruments of a similar nature." Earl, J., in Richardson v. Draper, 87 N. Y. 337, 344, 345 (1882).

Local statutes should be consulted.

not an equal compliance with its terms. It is certainly not forbidden, and as the statute is silent on the subject, the fair intendment is that either was authorized to be given. If this be so, then it cannot properly be said that the party enjoined had no voice in the nature or sufficiency of the security to be taken, for the discretion of the chancellor was, necessarily, to be exercised in relation to both these matters, if his attention was directed to them, after both sides were heard. It is quite apparent, if this distinction had been invoked, that the instrument of security might have been different; and equally apparent that Lafarge, in case this had been done, might have been unwilling to assume the additional risks which a separate liability imposed on him. We must suppose, in the absence of any evidence on the subject, that he knew the legal differences between the different kinds of obligations, and became bound in the way he did because a joint liability was more advantageous to him. If this was his intention, it would be manifestly unjust for a court of equity, after the legal status was fixed by his death, to change the nature of the obligation which he executed in order to charge his estate. In the cases in which equity has treated the obligation as joint and several, though in form joint, the surety participated in the consideration. In this case Lafarge had no pecuniary interest in the litigation which was enjoined, and derived no personal benefit from the instrument of writing which he signed, and, therefore, no good reason can be furnished why his standing in a court of equity, is not as favorable as if he were surety without advantage to himself, in the borrowing of money. In neither case is there any obligation to pay independent of the covenant. In the one there is a liability for a debt; in the other, for the result of an action at law. Both are cases of contract, for, indeed, suretyship can exist in no other way; and we know of no principle of equity by which a contract of indemnity is to be construed so as to charge an estate, and an engagement to pay money to receive a contrary construction. The equities in both are clearly equal, and as the estate of Lafarge is not liable at law, it will not be held liable in equity.

The demurrer to the bill was, therefore, properly sustained, and the decree is accordingly

*Affirmed.*[16]

[16] "In England unless the joint obligation is that of a partnership the creditor has no relief against the estate of a deceased joint obligor, even though he was not a surety and [though] the claim cannot be collected from the survivor. By modern statutes it is sometimes broadly provided that all contracts, which by the common law are joint shall be construed as joint and several." 1 Williston on Contracts, § 344, p. 665.

## HENRY J. B. KENDALL AND OTHERS, APPELLANTS *v.* PETER HAMILTON, RESPONDENT.

(House of Lords, 1879. 4 App. Cas. 504.)

LORD BLACKBURN.[17] My Lords, in this case the plaintiffs entered into transactions with the firm of Wilson, McLay & Co., then consisting of two persons, Matthew Wilson and Joseph Corrie Shutters McLay. They, at the request of that firm, and in consequence of contracts made with that firm, accepted bills and entered into other transactions, the result of which was that a large sum was owing to the plaintiffs for which they might have maintained an action for money lent against those two persons.

The plaintiffs did not, at the time when they entered into the contracts which resulted in this cause of action, know that any other person was interested in the contracts; they dealt with Wilson & McLay, and with them alone, and gave credit to them alone. But afterwards (in the view which I take of the case, it is immaterial when) the plaintiffs discovered that the defendant Hamilton had agreed to share with Wilson & McLay in certain adventures which would require the advance of money, and that "the financial arrangements should be managed" by Wilson & McLay.

This amounted to an authority to Wilson & McLay to borrow money for the joint account of Wilson, McLay & Hamilton, who were the undisclosed principals of Wilson & McLay in the contract of loan. And it is, I think, now firmly established as law that a person entering into a contract with one to whom, and to whom alone he trusted, may, on discovering that the contractor really had a principal, though he neither trusted to him nor gave credit to him, nor even knew of his existence, charge that principal, unless something has happened to prevent his doing so. He is not bound to do so. In the present case Wilson & McLay could not, if sued before the Judicature Acts, have pleaded in abatement the non-joinder of Hamilton; nor if Wilson & McLay had sued the plaintiffs could they have resisted a set-off of the money lent to them, on the ground that in borrowing it they were agents for a concealed principal.

I will consider how this case would have stood at law before the Judicature Acts, and then inquire what difference these acts make. I take it, for the reasons I have given, to be clear that, under such circumstances as exist in the present case, the now plaintiffs might have maintained an action for money lent against Hamilton, on the ground that he, jointly with Wilson & McLay, being undisclosed principals to Wilson & McLay, was, as such, liable to the plaintiffs. But the facts are such that Hamilton could have proved a plea that the contract, on

[17] The statement of facts and the opinions of the Lord Chancellor (Earl Cairns) and Lords Gordon, Hatherly, O'Hagan, Penzance and Selborne are omitted.

which he was sued, was made by the plaintiffs with the defendant and Wilson & McLay, jointly, and not with the defendant alone, and that the plaintiffs, before action, had recovered judgment against Wilson & McLay for the same loan upon the same contract. And then the question would have arisen, whether a judgment recovered against one or more of several joint contractors was (without satisfaction) a bar to an action against another joint contractor sued alone. The decision in King v. Hoare, 13 M. & W. 494, was that it is a bar.

I have already said that, in my view of the matter, it was immaterial when the plaintiffs first discovered that they had a right to have this recourse against Hamilton, which they had never bargained for and which was to them a piece of pure good luck. If the principle on which King v. Hoare, 13 M. & W. 494, was decided had been that, by suing some he had elected to take them as his debtors to the exclusion of those whom he had not joined in the action, it would be material; for I assent to the argument that there cannot be election until there is knowledge of the right to elect. But King v. Hoare, 13 M. & W. 494, proceeded on the ground that the judgment being for the same cause of action, that cause of action was gone. *Transivit in rem judicatam,* which was a bar, partly on positive decision, and partly on the ground of public policy, that there should be an end of litigation, and there should not be a vexatious succession of suits for the same cause of action. The basis of the judgment was that an action against one on a joint contract was an action on the same cause of action as that in an action against another of the joint contractors, or in an action against all the joint contractors on the same contract.[18]

[18] In King v. Hoare (1844), cited *supra*, Parke, B., said: "If there be a breach of contract or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, *transit in rem judicatam*,—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action being single cannot afterward be divided into two. * * *

"It is argued that each party to a joint contract is severally liable, and so he is in one sense, that if sued severally and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all, and the several bonds of each of the obligors, and gives different remedies to the obligee. * * *

"If there be a judgment against one of two joint contractors, and the other is sued afterward, can he plead in abatement or not? If he cannot, he would be deprived of a right by the ate of the plaintiff, without his privity or concurrence, in suing and obtaining judgment against the other. If he can, then he

From very early times it was the law that a contract was an entire thing, and that, therefore, all who were parties to the contract must, if alive, join as plaintiffs, and must be joined as defendants. If this was not done there must be a plea in abatement (Com. Dig. Abatement, E. 12, F. 8). That very learned lawyer cites 7 Hen. 4, 6, and 20 Hen. 6, 11, as authorities for this, and probably earlier authorities might be found, but I think it unnecessary to search for them, as it has never, as far as I know, been doubted that the defendant might plead the non-joinder of his joint contractors in abatement, and in that way compel the plaintiff to join as defendants all who were parties to the joint contract and were still alive. But there was long a controversy as to whether the plea in abatement was the only way in which the objection could be raised. If on the evidence it was proved that the contract was joint, it was thought that there was a variance between the proof of a joint contract with the parties to the action, and some one not a party to the action, and still alive, and the allegation in the declaration which, it was thought, must be taken to be allegation of a contract between the parties to the action and no others, and consequently that there should be a nonsuit or verdict for the defendant on the ground of variance. This, it has now been settled, is the law in cases where the objection is the non-joinder of a plaintiff; and consequently the non-joinder of a co-contractor as plaintiff was never in modern times pleaded in abatement. And it was long thought by many that the same course was open to a defendant. Such was the decision of Lord Holt and the Court of King's Bench in Boson v. Sandford, 2 Salk. 440. My Lords, I need hardly point out that if this had been still followed as law, it would have made it clear that the cause of action against the one was the same as that against all; or rather that there was no cause of action at all against the one alone, and never could be judgment against one alone; and so the point could never have risen. But it was established by a series of cases, which may be found collected in Serjeant Williams'

may plead in bar the judgment against himself; and if that be not a bar, the plaintiff might go on, either to obtain a joint judgment against himself and his co-contractor, so that he would be twice troubled for the same cause, or the plaintiff might obtain another judgment against the co-contractor, so that there would be two separate judgments for the same debt. Further, the case would form another exception to the general rule, that an action on a joint debt, barred against one, is barred altogether; the only exception now being where one has pleaded matter of personal discharge, as bankruptcy and certificate. It is quite clear, indeed, and was hardly disputed, that if there were a plea in abatement, both must be joined, and that if they were, the judgment pleaded by one would be a bar for both; and it is impossible to hold that the legal effect of a judgment against one of two is to depend on the contingency of both being sued, or the one against whom judgment is not obtained being sued singly and not pleading in abatement. These considerations lead us, quite satisfactorily to our own minds, to the conclusion that where judgment has been obtained for a debt, as well as a tort, the right given by the record merges the inferior remedy by action for the same debt or tort against another party."

note to Cabell v. Vaughan, 1 Wms. Saund. 290 *a*, that though all the joint contractors must be joined as co-defendants, the only way of taking advantage of the non-joinder was by a plea in abatement. The first case, in which I find this decided was Rice v. Shute, 5 Burr. 2611. The last in which I find it controverted, though unsuccessfully, was Evans v. Lewis, 1 Wms. Saund. 291 (*d*), in 1794. But though the mode of enforcing the joinder of all was thus cut down, it still remained the law that all ought to be joined. And consequently I cannot doubt that the judges in King v. Hoare, 13 M. & W. 494, were accurate in holding that the two actions were upon the same cause of action. I cannot agree in what seems to be the opinion of the noble and learned Lord on my left (Lord Penzance) that the Judicature Act has taken away the right of the joint contractor to have the other joint contractors joined as defendants, or made it a mere matter of discretion in the court to permit it. With great deference I think that the right remains, though the mode of enforcing it is changed.

I do not think the defence a meritorious one; but I think in the present case there is no great hardship. The plaintiffs had a right of recourse against Hamilton, for which they never bargained; but they did nothing inequitable in taking advantage of that which the law gave them. They have destroyed that remedy by taking a judgment against persons who turn out to be insolvent. I do not see that Hamilton does anything inequitable in taking advantage of the defence which the law gives him. The plaintiffs got a right by operation of law, without any merits of their own, by what, as far as regards them, was pure good luck. They have lost it by what was no fault of theirs, but was, as far as they were concerned, pure bad luck. If the plaintiffs were willing to take advantage of their good luck against defendant, it seems no hardship that he should take advantage of their bad luck against them.

But in such a case as King v. Hoare, 13 M. & W. 494, where the plaintiff had contracted with the provisional committee of a company, and consequently was very uncertain how many were joint contractors, it did operate harshly. He dared not join many in the first action, for, as the law then stood, if he failed as to any one he failed as to all; and it does seem hard that a judgment obtained under such circumstances, against one should be, without satisfaction, a bar as to all the others. This hardship is very much removed by the provisions of the existing law, by which the plaintiff recovers judgment against those whom he proves to be his debtors, though he has joined others as defendants; he has only to pay the costs of those improperly joined. But I think that the hardness of the law even if it exist, is a reason for altering it, not for refusing to act upon it; and I think no doubt has ever been expressed, unless perhaps in *Ex parte* Waterfall, 4 De G. & Sm. 199, that King v. Hoare, 13 M. & W. 494, does truly state the law as it existed before the Judicature Acts, and it was not doubted in the courts below, or I think seriously questioned at the bar, that it did so.

But since the Judicature Act, 1873, s. 24, law and equity are to be concurrently administered. And, therefore, if before the passing of those acts the plaintiffs could have sued in equity on these facts, or if they could have successfully applied for an injunction to prevent the defendant from pleading this defence, they may raise the same point in this suit in the Common Pleas Division. But the Judicature Acts do not create any equity applicable to this case which did not exist before. They only enable the court to administer the equities already existing without the delay and expense formerly required.

On the first argument at your Lordship's Bar, Mr. Rigby, in a very excellent argument, convinced me that in cases of joint contracts there was no difference between law and equity, except in the single case of the death of one of the parties to a joint contract, where the contract was such that the maxim *Inter mercatores jus accrescendi locum non habet* applied; but I was diffident of my opinion on a question of such pure, and I might say, technical equity; and was therefore very willing that the case should be re-argued.

I have now heard the opinion of the noble and learned Lords who are conversant with the proceedings in the Courts of Equity, and have no diffidence in saying that I am of the same opinion.[19]

*Judgment [of the Court of Appeal which reversed a judgment for plaintiffs and was] appealed against affirmed, and appeal dismissed with costs.*

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## WEGG PROSSER *v.* EVANS.

(Court of Appeal, 1894. [1895] 1 Q. B. 108.)

LORD ESHER, M. R.[20] In this case the plaintiff was the owner of a farm which he had let, and, being doubtful of the tenant's ability to pay his rent, he took a guarantee from the defendant and one Thomas that the rent would be paid. The guarantee was joint, not joint and

[19] In Hammond v. Schofield, [1891] 1 Q. B. 453, a defendant against whom, after service of summons, a consent judgment had been entered, consented to having the judgment set aside and the writ amended to join another defendant whom the plaintiff discovered to have contracted jointly with the defendant, but the court refused to set the judgment aside because of the rule that judgment recovered against one of two joint contractors is a bar to an action against the other.

In Coles v. McKenna, 80 N. J. L. 48 (1910), the rule of Kendall v. Hamilton was applied to successive judgments in the same action. There the plaintiff took final judgment by default against two defendants and, the cause of action being single, was held to have lost it by merger as against the defendants who did not default.

[20] The statement of facts and the opinions of Rigby, L. J., and Lopes, L. J., are omitted.

several. The tenant did not pay rent that was due; and thereupon the guarantee became effective, and the plaintiff had a right of action upon it. That action ought, no doubt, to be a joint action against both of the guarantors. If in such a case an action were brought against one of the two joint contractors only, he might, under the old system, have pleaded in abatement, and so enforced the joinder of the other; and since the Judicature Act, pleas in abatement having been abolished, the same result could be brought about by an application for an order to enforce joinder of the other joint contractor. The plaintiff, however, did not at that time bring an action against the guarantors or either of them. He took a check for the amount of the rent due from Thomas. By so doing he did not give time to the principal debtor, or do any injury to the present defendant. The check was not by itself a satisfaction of the debt. It was given way of what has been styled a conditional payment. If the check had been paid, it would have been payment of the debt on the guarantee, and that payment would have no doubt prevented the plaintiff from suing the defendant. The defendant would thereupon have become liable to an action by Thomas for contribution; but no additional expense would be occasioned to him through the giving and payment of the check, and his position would not be altered thereby in any way. But the check was dishonored, and Thomas did not pay it. Thereupon the plaintiff sued him upon the check. The cause of action in that action was the dishonor of the check, and upon that the plaintiff recovered judgment. If that judgment had been satisfied, and the plaintiff had obtained the fruits of it by execution, that would have been equivalent to payment of the debt on the guarantee; but it has not been satisfied. The present defendant has not been in any way injured by the transaction with regard to the check. He would not be liable to bear any of the costs of the action upon it, nor is his position altered for the worse in the smallest degree. All that has happened, so far as he is concerned, appears to be that probably he has not been called upon to pay under the guarantee so soon as he otherwise might have been. It is contended, nevertheless, that the rule of law on the subject is that by reason of this transaction with regard to the check which took place between the plaintiff and Thomas, and which did not prejudicially affect the defendant in any way, the plaintiff cannot now sue the defendant on the guarantee. To my mind, if the rule were as alleged, it would be a technicality of the most stringent kind and one which would make the law on the subject contrary to the justice and truth of the matter. I for one object to such a technicality, and, and will not act upon it, unless I am obliged to do so by authority. If I were bound by the authority of decided cases, of course, I should bow to that authority; but we ought, I think, to look very closely at the cases on the subject to see whether we are bound by authority to hold that there is such a technical rule as is suggested. It is no doubt the law that, if the plaintiff had sued Thomas

alone on the guarantee and not on the check, and had recovered judgment against him, he could not afterward have sued the present defendant. If that had been the case here, I should have been bound by a technical rule of law which has existed so long that I must bow to it. But in the present case the plaintiff did not sue Thomas on the guarantee, but on the check. Is there any case which decides that, where a judgment is recovered against one of two joint contractors, not on the original contract, but on a check given by him as this was, the action against the other joint contractor is barred? The case of Drake v. Mitchell, 3 East 251, appears to me to be absolutely to the contrary effect. That was decided by four judges who were eminently well acquainted with the common law of England and with business. Lord Ellenborough, C. J., said in that case: "I have always understood the principle of *transit in rem judicatam* to relate only to the particular cause of action in which the judgment is recovered operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfacton to the party; and therefore till then it cannot operate to change any other collateral concurrent remedy which the party may have." Anything plainer than these expressions there cannot be. In this case no judgment had been recovered against Thomas in respect of the particular cause of action on which the defendant is sued, viz., the breach of the guarantee. Thomas was not sued upon that cause of action, but on another, viz., non-payment of the check. But it was said that Cambefort v. Chapman, 19 Q. B. D. 229, was to the contrary effect. I do not think it can be denied that that case conflicts with Drake v. Mitchell. That being so, the question is which we ought to follow. The decision in Drake v. Mitchell was given in 1803, and has stood from that time till 1887, when Cambefort v. Chapman was decided. I think that that alone is a ground for giving a preference to the older decision; but from what I have said it will be obvious that my judgment goes with that decision and not with the later one. Therefore, I think we should follow the decision in Drake v. Mitchell, unless there is some authority binding upon this court by which it has been overruled. I do not think there is any such authority. I do not think that the House of Lords intended by their judgment in Kendall v. Hamilton, 4 App. Cas. 504, to overrule the decision in Drake v. Mitchell.

The defendant not being prejudiced in any way by what took place with regard to the check, in my view of the case it could only be some mere technical rule of law that could produce what to my mind would be the unjust result of releasing the defendant from liability upon his contract; and there is, in my opinion, no authority which obliges me to say that there is such a rule of law. It was said that the defendant had a right to have Thomas joined as a co-defendant in the action, and that he could not have him joined because of what took place with

regard to the check. But it appears to me that the hypothesis on which this argument is based is incorrect. It follows from what I have said that the defendant, if he thought it worth his while, had a right to call on the plaintiff to join Thomas; and Thomas could have made no valid objection to being joined, nor the plaintiff to joining him.

I think that this case is governed by the decision in Drake v. Mitchell and that Cambefort v. Chapman was wrongly decided. For these reasons I think that the appeal should be dismissed.

*Appeal dismissed.*[21]

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## DENNETT ET AL EX'RS *v.* CHICK ET AL.

**(Supreme Judicial Court of Maine, 1823. 2 Greenl. 191, 11 Am. Dec. 59.)**

Assumpsit on a joint promissory note, made by the defendants to the plaintiffs' testatrix. The defendant Ham not being to be found in this state, and having no domicile here, no service was made on him. The Defendant Chick appeared, and pleaded in bar a judgment of the Court of Common Pleas for Strafford county in the state of New Hampshire, recovered by the testatrix against Ham, in an action on the same note, Chick having no domicil nor property in that state; on which judgment a writ of execution had been issued and returned without satisfaction. To this plea the plaintiff demurred.

MELLEN, C. J.[22] * * * If one of two joint promisors be sued, it is well known that unless he plead the non-joinder of his co-promisor in abatement, he is liable to a several judgment in the action. The judgment in New Hampshire was rendered on default; and if that action had been sued in this state, and against Ham only, such a judgment would have been regular. In those cases where the promisors in a joint note live in different states, no joint action can be maintained and pursued to a judgment; and unless a suit can be sustained against one of the

[21] In concurring, Lopes, L. J., said: "The question, therefore, is whether the cause of action in respect of the check was the same as that in respect of the guarantee. It seems obvious that the two causes of action are entirely different. The pleadings would be different and different questions of law and fact might arise and have to be determined, in the two actions respectively. It is to be observed that in the action on the check Thomas could not have claimed that the defendant should be joined as a co-defendant, whereas in an action on the guarantee he could" (pp. 114-115), and Rigby, L. J., said: "In order that the doctrine of merger may apply, the causes of action must be the same in each case, i. e., not only must they be concerned with the same subject-matter, but the parties to them must be the same. On the question of merger, therefore, I entertain no doubt that the joint cause of action against the guarantors was not merged in the judgment on the separate cause of action against one of them in respect of the check" (pp. 116-117).

[22] Parts of the opinion are omitted.

promisors alone, no remedy can be had by the promisee. These inconveniences are considered in the case of Tappan v. Bruen, 5 Mass. 193, and seem to be the basis of that decision. It is there decided that in such a case according to immemorial usage an action may be maintained against the promisor who lives in the state, where no service could be made on the other living without the state. The same principle is recognized in a note to the case of Call v. Hagger et al. 8 Mass. 423. It is true that in Ward v. Johnson, 13 Mass. 143, the court decided that, as the plaintiff had in a former action recovered a judgment against one of the defendants, such judgment disproved the joint promise on which the plaintiff relied, and formed a bar to the action. In two respects, however, that action differs from this. There, the former judgment was recovered in Massachusetts against one of the promisors; and the writ in the latter was served on both the promisors, and they both joined in pleading the several judgment in bar. In the case before us, the writ was served on Chick only, and he only appears and pleads the New Hampshire judgment. Can he avail himself of a judgment recovered against another person, merely because he was a joint promisor? It is a general rule that no person is bound by a judgment or can avail himself of it, unless he be a party or privy to it. In this case the plea does not contain any averment that the former judgment has been satisfied. The justice of the case is so clearly with the plaintiffs, that unless some unquestioned principle sanctions the defense, we are disposed to render judgment in their favor. * * *

We do not perceive any technical rule of law by which the plea in this action can be considered a good bar; and for the reasons given we are of opinion that the plea in bar is insufficient.

*Judgment for the plaintiffs.*[23]

[23] For a decision under a Massachusetts statute, see Odom v. Denny, 16 Gray (Mass.) 114 (1860).

"It is a well settled rule, that in actions for the breach of a contract, whether in assumpsit, covenant, debt, or case, a verdict or judgment cannot generally be given in a joint action against one defendant without the other. 1 Chit. Pl. 31; 1 Bos. & Pul. 73; 12 East 93; and it is said that where three contract jointly and separately, and the plaintiff sues two, without objection to judgment, he cannot afterwards sue the other, having elected to consider the agreement a joint one. Hammond on Parties to Actions, 230; also, if judgment is obtained against one of two or more persons, jointly liable, on a separate action against him on said contract, the plaintiff cannot afterwards proceed against the parties omitted, but must lose their security. 1 Ch. Pl. 29; 4 Com. Dig. Action K, 4; 13 Mass. 148, Ward v. Johnson, et al.

"But these cases are all subject to exceptions wherever the necessity of the case requires a separate suit to be brought. In the present instance a sufficient excuse * * * arises from the fact that but one of the defendants was within the jurisdiction of the government when the first suit was brought." Upham, J., in Olcott v. Little, 9 N. H. 259, 261-262 (1838).

But *contra*, see Fleming v. Ross, 225 Ill. 149 (1907).

## THE PRESIDENT & C. OF THE BANGOR BANK, *v.* TREAT ET AL.

**(Supreme Judicial Court of Maine, 1829. 6 Greenl. 207, 19 Am. Dec. 210.)**

MELLEN, C. J. This is an action of assumpsit, and the declaration states that the note was signed by the defendants and Allen Gilman, jointly and severally; and that a judgment had been recovered on the note against Gilman in a several action against him. The defendants have moved in arrest of judgment on account of the joinder of them in the present suit. When three persons by bond, covenant or note jointly and severally contract, the creditor may treat the contract as joint or several at his election; and may join all in the same action or sue each one severally; but he cannot, except in one case, sue two of the three, because that is treating the contract neither as joint or several. But if one of the three be dead, and that fact be averred in the declaration, the surviving two may be joined. In the present case, Gilman is living. The plaintiffs contend that as judgment had been recovered against him, such judgment entitled them to join the other two in the same manner as though he was dead. This is not so. When they sued Gilman alone, they elected to consider the promise or contract as several; and having obtained a judgment they are bound by such election. In case of death, the act of God has deprived the party of the power of joining all the contractors; but he may still consider the contract as joint, and sue the surviving two. The plaintiffs have disabled themselves from maintaining this action by their former one. 1 Saund. 291, e. The objection is good in arrest of judgment, where the fact relied on by the defendants appears on the record, as in the present case.

*Judgment arrested.*[24]

[24] But in In re Davison, 13 Q. B. D. 50, 53-54 (1884), Cave, J., said: "Is the separate cause of action merged in the joint judgment? Take the illustration of a joint and several note against A, B and C, which is usually comprised in one document. The result is the same as if three separate notes were given as well as the joint note. If A is sued to judgment on his separate note, is the joint note of A, B and C merged in the judgment? On principle, why should it be? The object of taking a joint and several note is to have the separate liability of each promisor as well as the joint liability of all, and why should the fact that the separate liability of one promisor has merged in a separate judgment against his prove a bar to an action on the joint note?"

And in People v. Harrison, 82 Ill. 84 (1876), though the argument was not necessary for the actual decision, Craig, J., said:

"Contracts which are joint and several may be regarded as furnishing two distinct remedies: one by a joint action against all the obligors, the other by a several action against each. Freeman on Judgments, § 335. If this be correct, an action against all the obligors on the joint liability would not be a bar to an action against each one on the several liability.

"As was held in Moore v. Rogers, [19 Ill. 347] *supra*, where the contract is joint and several, its legal effect is double, equivalent to independent contracts founded upon one consideration, for performance severally and also for performance jointly; and distinct remedies upon the same instrument, treating

## CONNECTICUT FIRE INS. CO. *v.* OLDENDORFF ET AL.

(United States Circuit Court of Appeals, Ninth Circuit, 1896. 73 Fed. 88, 19 C. C. A. 379.)

HAWLEY, J.[25] This is an action at law, brought by the plaintiff in error against the defendants in error upon a joint bond, given by E. Oldendorff & Co., as principal, and Frank Botefuhr and John Brendle, as sureties, for the faithful performance of the duties of the principal in the bond as the agent of the plaintiff in error for Multnomah county, Or. The defendants Mary Tynan and August Stoldt are the personal representatives of John Brendle, deceased. E. Oldendorff, the principal

it as a joint contract and as a several contract, may be pursued until satisfaction is fully obtained." See also Turner v. Whitmore, 63 Me. 526 (1874).

In line with the decision in the principal case, however, it has been said:

"That a judgment for or against one of the makers of a joint obligation, is a bar to an action afterwards brought against another, was settled upon a full review of all the authorities, in Sloo v. Lea, 18 Ohio 279. The reasons upon which the doctrine rests are somewhat technical; but the decision seems to have been the necessary consequence of the common law rules of pleading applicable to the question, and the legal effect of the contract upon which the action was brought.

"But the case is entirely different when the obligation is, in terms, joint and several. In such case the creditor has the election to treat the obligation as joint *or* several, and he may sue and recover against each one of the makers separately, or all jointly; but he can not do both, and hence the recovery of a joint judgment is a bar to separate actions, and separate judgments equally so to a joint action.

"This, we think, is the fair result of the teachings of the elementary books and adjudged cases, from the earliest times. Indeed, we know not where it has ever been doubted, except in the case of The United States v. Cushman, 2 Sum. 436, where Judge Story has labored at much length to establish the position, that a joint judgment is no bar to a separate suit against one of the obligors, on a joint and several bond; that the joint judgment only bars the joint remedy and in nowise affects the several remedy, and that the two may be consequently pursued. The whole of the reasoning of the learned judge is based upon what he considers the legal effect of the contract; by which, he insists, each of the obligors has agreed 'that he will be liable to a joint action, and to a several action, for the debt'; and that the supposition, that the obligee has an election only of the one remedy, or the other, and that by electing a joint suit he waives his right to maintain a several suit, 'is not a sound legal interpretation of the contract.' If this reasoning is sound, then all that is said in the books about an election of remedies, is wholly unmeaning. It is very true, that each obligor has bound himself to submit to either form of remedy; but it is equally true, that he bound himself but by one instrument, and for one debt; and whenever, by the pursuit of either remedy, the debt is carried into judgment, the instrument is necessarily extinguished, or merged in the higher security, and is no longer capable of laying the foundation for another recovery. This seems to us quite conclusive of the strictly legal aspects of the question; but when viewed in a broader light, and as a matter of governmental policy in furnishing adequate remedies for the enforcement of rights, no possible reason can be given for vexing the defendant with two suits, when one judgment, in either form, is just as effective for reaching all his property, whether held jointly or severally, as the two could be. We are therefore of the opinion that the creditor, in such a contract, is put to his election which

in the bond, made default but no judgment has been entered against him. The case was regularly tried before a jury as to the other defendants, and a verdict rendered in their favor. Separate judgments for costs were entered in favor of defendant Botefuhr on the 27th day of June, 1894, and for defendants Mary Tynan and August Stoldt on July 11, 1894. On January 5, 1895, a petition for a writ of error was filed, setting forth the judgment in favor of defendants Mary Tynan and August Stoldt, and praying for the issuance of a writ of error therefrom to this court. The writ of error was, on the same day, allowed as prayed for in the petition.

The defendant Botefuhr moves to dismiss the writ of error upon several grounds, among others, that he is not a party named in the petition for writ of error, that he is not a party to the judgment certified to this court, that a judgment was entered in his favor on June 27, 1894, and that the writ of error herein was not sued out within six months after the entry of said judgment in the circuit court. It is therefore perfectly clear that there is no writ of error as against the judgment rendered in favor of Frank Botefuhr. None could have been sued out against said judgment upon the date when the petition for the writ was presented, because more than six months had elapsed after the entry of said judgment. * * * The motion to dismiss as to Botefuhr is well taken, and must be allowed.

The granting of this motion as to Botefuhr necessitates like action as to the motion of defendants Tynan and Stoldt, which is based upon the ground, among others, that a release as to one of the joint obligors upon the bond releases all. The failure of the plaintiff to sue out its writ of error within six months after the entry of the judgment against Botefuhr makes that judgment final, and operates as a release to Botefuhr from all liability upon the bond. If the plaintiff had brought all the defendants before the court, to correct the judgments which were adjudged in favor of defendants severally, within the time allowed by statute, the action of the court below could have been reviewed; but the writ of error seeks only to review the judgment as to two of the defendants. The action being joint as to all, the defendants before the court have the right to object to any review of the case on the merits, upon the ground that their co-defendant has not been brought before the court to share in the costs, if any were to be adjudged against them. The objection here made stands substantially upon the same plane, and is based upon the same reason, as if, though the action had been originally

of the remedies, that the law provides him, he will pursue. But the question still remains: What acts of the creditor will determine his election?" Ranney, J., in Clinton Bank of Columbus v. Hart, 5 Oh. St. 34, 34-36 (1855). The case holds that election is not final until judgment upon the merits on one remedy.

But is not the difficulty that the talk is of election and of merger, when the public policy against unnecessary double vexation can operate to present the needless extra litigation without having the operation classed as either?

brought against the two defendants, or had been brought against all, and a judgment had thereafter been rendered against one of the joint obligors. In either event, objections based upon the ground that all the joint obligors must be proceeded against jointly would have to be sustained. * * *

In the present case, the plaintiff, by its own act, has released one of the joint obligors of all liability, and is now seeking to enforce its rights against the others after the cause of action has been released as to one "by operation of law, and at the instance and by the act of the creditor." The general rule that a release of one of several joint obligors operates as a release of all is well settled. 20 Am. & Eng. Enc. Law, 751, and authorities there cited. There are several exceptions to this general rule, which need not be noticed, as this case does not come within any of the recognized exceptions of the adjudged cases.

The motion of Tynan and Stoldt is sustained. The writ of error is dismissed.[26]

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## BAYLY *v.* GARFORD.

(Court of Common Pleas, 1642. March N. C. 125.)

Bayly brought an action of debt upon a bond against Garford, executor of another; the defendant pleaded *non est factum* of the testator,

[26] In Cowley v. Patch, Executor, 120 Mass. 137, 138-139 (1876), Gray, C. J., said: "In order to maintain an action on a joint contract, whether the action is brought against one or against both of the joint contractors, it is necessary to prove the liability of both; for if one only is or ever was liable, there is not a joint, but only a several liability, and a variance from the cause of action declared on. For example, if one joint contractor is sued alone, and does not plead in abatement the non-joinder of the other, and judgment is rendered against the one sued, it merges the cause of action against him, and (unless otherwise provided by statute) as the two are no longer jointly liable, prevents a subsequent recovery against the other joint contractor. Ward v. Johnson, 13 Mass. 148; King v. Hoare, 13 M. & W. 494; Mason v. Eldred, 6 Wall. 231. So if, in such an action, the judgment is for the defendant, upon the ground that there is no joint liability, it is a bar to a subsequent action against the other contractor upon the joint contract. Phillips v. Ward, 2 H. & C. 717," and that the same rule must be applied, although by reason of the death of one joint contractor, and the provision of the state statute, "enabling an action to be maintained against his administrator as if the contract had been originally joint and several, the plaintiff might maintain one action against the survivor, and another against the administrator of the deceased," for "the severance is merely for purposes of remedy, and the plaintiff must still, in either action, prove that the original liability was joint, and that, so far as concerns that question, both the survivor and the administrator of the deceased are liable."

In Kirkpatrick v. Stingley, 2 Ind. 269 (1850), there was a joint and several obligation claimed by plaintiff against Kirkpatrick, Bush and Patton and a

upon which a special verdict was given, viz., that the testator was bound in that bond with two others jointly and severally, and that afterwards the seals of the two others were eaten with mice and rats; and whether now that were the bond of the testator or not was the question which the jury referred to the court.

Note, the court, viz., Foster, Reeve, Crawley and Bankes Chief Justice did strongly incline that judgment ought to be given for the defendant; and their reason was, that if the obligee by his act or own lachess discharge one of the obligors where they are joyntly and severally bound, that the same discharges them all; but gave day for the further debating of the case, for that this was the first time it was argued.[37]

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## PETTIGREW MACHINE CO. *v.* HARMON.

(Supreme Court of Arkansas, 1885. 45 Ark. 290.)

COCKRILL, C. J. The appellant sued Reynolds, Doughty, Chase, Owens and Harmon on a promissory note executed by Reynolds, Doughty & Co., alleging that the parties sued were partners doing business under that style when the note was executed. The court tried the case without the intervention of a jury, after the issues were made, and found the facts to be that Reynolds, Doughty and Harmon, alone, composed the firm of Reynolds, Doughty & Co., and that they had executed the note sued on; that afterwards Reynolds and Doughty failed in business and

judgment that Kirkpatrick and Patton were not jointly liable with Bush. Then this action was brought against Kirkpatrick and the judgment for defendants in the former action was pleaded in bar. The court held that the former judgment simply determined that there was no joint liability and left the question of several liability open, for the defendant "might be liable alone and yet not jointly. The judgment is not, in a legal sense, between the same parties nor upon the same contract" (p. 274).

[37] See Seaton v. Henson, 2 Lev. 220 (1679), where it was held that an obligation wherein three were jointly and severally bound was made void as to all by the seal of one being torn off.

But in Mathewson's Case, 5 Co. 22b (1597), it was held that where covenants were joint as to some and several as to others, the fact that the seal of one of those covenanting severally "was broke from the deed" did not avoid the deed against any except him. See Collins v. Prosser, 1 B. & C. 682 (1823). And where a seal on a bond was eaten by mice after issue joined on a plea of *non est factum* in debt on the bond, judgment on the bond was not denied in Nichols v. Haywood, 1 Dyer 59a (1545). A deed of conveyance, having passed title, was held in Argoll v. Cheney, Palmer 402, 403 (1624) not to lose its effect because a little boy tore off the seals.

In England decisions as to spoliation still go on the ground that "a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state" (Davidson v. Cooper, reported, *post*, p. 1454), but except under § 124 of the Uniform Negotiable Instruments Law, that is not true in general in the United States.

made an assignment to one Hunt for the benefit of their creditors; that Hunt accepted the trust, and while acting as assignee, and also as agent for Reynolds and Doughty, to obtain their discharge from appellant's claim, he paid the appellant twenty cents in the dollar on their debt out of the assets held by him as assignee, and took from them the following instrument in writing, viz:

"Received of J. B. Hunt, assignee of Reynolds and Doughty, thirty-three and 87-100 dollars ($33.87) in full of my claim against them for one hundred and sixty-nine and 37-100 dollars, principal and interest. This receipt is not to be construed as releasing any other party whomsoever, responsible on the said note as partners or otherwise."

The court declared the effect of this to be a release to Reynolds and Doughty of the debt, and that the release of them inured to the benefit of their co-obligor, Harmon, and accordingly gave judgment for the appellees.

It is very clear that the mere payment by a debtor to his creditor of a less sum than the amount of the debt due, though received as full satisfaction, is not an extinguishment of the demand. An agreement to accept from a third person in behalf of the debtor, however, a less amount for the whole, is binding upon the creditor, and will discharge the debt, Gordon v. Moore, 44 Ark. 349.

In the case before us the payment was made at the instance of Reynolds and Doughty, but by a third person, and out of a fund over which they had no control. The assignment to Hunt vested the title to their assets in him, subject to the trust, and placed the same beyond their reach. There was no hope of a surplus remaining after the debts were paid, and until that was done they had no legal or equitable interest in the proceeds, that they could control or dispose of in any manner. Bartlett, et al. v. Tea, 1 McCrea 176. The assignment had not been closed, and it was not known what percentage of their debts the creditors would receive. It was not believed that it would exceed twenty per cent on a final distribution. The appellant accepted this percentage before the distribution was made. It is immaterial that the assignee may have exceeded his authority in making the payment. No one has complained of this; the appellant enjoys the benefit and must stand to his agreement to discharge Reynolds and Doughty. Does this also relieve Harmon, the third partner?

The general rule is, that the release by a creditor of one of several persons who are jointly, or jointly and severally bound to him, is a discharge of all. Vandever v. Clark, 16 Ark. 331; Gordon v. Moore, 44 Ark. 356. And a release to one partner is a release to all.

The reasons given for the rule are, that there is but one debt, and that being once received by the party entitled to it, he has no further claim; or that the debtors have the right of contribution among themselves, and that the releasing creditor ought not to be allowed to enforce

his claim against one whose remedy he has taken away.[28] A release to have this effect, however, must contain a plain and distinct remission of the claim, and in that event parol testimony cannot be heard to show a contrary intention. Shaw v. Pratt, 22 Pick. 205; Burk v. Noble, 48 Penn. St. 168; Ellis v. Essen, 50 Wis. 138.

If the parties to the instrument cannot reasonably be supposed to have intended a release it will be construed only as an agreement not to charge the person to whom the release is given, and will not be permitted to have the effect of a technical release, 1 Pars. Cont. 23, 162; 1 Whart. Cont. § 1037; Lindley Part. 433-4; Addison on Cont. 1076; McAllister v. Sprague, 34 Me. 296; Bonney v. Bonney, 29 Ia. 448.[29]

It is manifest from the terms of the instrument relied upon as a release here that the appellant did not intend to discharge the debt. It expressly reserves the right of the appellant to proceed against any other person whose liability for its payment could be shown. Reynolds and Doughty accepted the discharge subject to this qualification. Their assent to the reservation of the creditor's rights against their co-debtor, raises an implied agreement on their part that the right of the co-debtor to contribution against them, if it existed at all, should remain unimpaired. Bennett v. Pardieu, 63 Cal. 155; Parmelee v. Lawrence, 44 Ill. 405; Solly v. Forbes, 6 Eng. Com. Law 27; North v. Wakefield, 13 Q. B. 541.

Since the instrument does not release the debt or impair the obligation of the co-obligors among themselves, the reason of the rule, that a discharge of one is a discharge of all, fails and the rule itself ceases. The instrument, in effect, is only a covenant to discharge the parties

[28] But of course the creditor could not deprive one debtor of the latter's right to contribution from another by releasing that other.

[29] See Samuel Williston, Releases and Covenants Not to Sue Joint, or Joint and Several, Debtors, 25 Harv. L. Rev. 203.

As to the release of one joint obligor releasing the others, it has been said: "The reason why a simple release of the principal debtor discharges the surety is that it would be a fraud on the principal debtor to profess to release him, and then to sue the surety, who in turn would sue him." Mellish, L. J., in In re Natal Investment Co., Nevill's Case, L. R. 6 Ch. App. 43, 47 (1870).

As to the release of one joint and several obligor releasing the others, the holding the same way, is harder to understand. However, "It is too late now to question the law that where the obligation is joint and several, the release of one of two joint debtors has the effect of releasing the others." Collins, L. J., in In re E. W. A. [1901] 2 K. B. 642, 648.

A similar problem exists as to torts. On some of the reasons for the rule that a release or discharge of one or more joint tort feasors for a consideration is a release of all, see Dwy v. Connecticut Co., 89 Conn. 74, 77-80 (1915). In some states a release to one tort feasor reserving rights against the others operates as a release of all. Flynn v. Manson, 19 Cal. App. 400, 126 Pac. 181 (1912); Ducey v. Patterson, 37 Col. 216 (1906); McBride v. Scott, 132 Mich. 176 (1903). For reasons for that minority view see Matheson v. O'Kane, 211 Mass. 91 (1912) and 1 Williston on Contracts § 338a.

named, and the general rule again is that this does not release their co-obligors. Bozeman v. State Bank, 7 Ark. 328; 2 Whart. Cont. § 1033.

The following cases are authority to the effect that a discharge of one partner is not a release of others when the instrument of discharge was not so intended. Bennett v. Pardieu, 63 Cal. sup; Parmelee v. Lawrence, 44 Ill. 405; Seymour v. Butler, 8 Ia. 304; Solly v. Forbes, 6 Eng. Com. 27; See 1 Lindl. Part. 434-5.

The payment made by Reynolds and Doughty inured, of course, to the benefit of Harmon, because the debt, to that extent was extinguished, but he can take no other benefit from the transaction.

Let the judgment be affirmed as to all the appellees except Harmon; as to him let the judgment be reversed and the case remanded for a new trial.[80]

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## OSBORN *v.* MARTHA'S VINEYARD RAILROAD CO.

**(Supreme Judicial Court of Massachusetts, 1886. 140 Mass. 549, 5 N. E. 486.)**

GARDNER, J. This action was originally commenced by Samuel Osborn, Jr., one of the plaintiffs. After the trial of the case, Osborn moved to amend his writ by adding, as joint plaintiffs with him, Shubael L. Norton and Nathaniel M. Jernegan, which motion was allowed. The action then proceeded upon the allegation in their declaration, that the defendant owed the three plaintiffs $600, according to the account annexed, which was for 20 tons of iron rails at $30 per ton, giving credit for $400, paid to Norton and Jarnegan.

The first question which arises is whether the contract made by the plaintiffs with the defendant was joint or several. The report finds that the three plaintiffs purchased 20 tons of iron rails in their own names, giving a promissory note, signed by the three, to the vendor thereof. In this purchase, there was no reference to any separate interest of the purchasers in the iron rails, and they became joint owners thereof. They then sold the rails to the defendant, making no reservation of any single interest in any one of the vendors. The defendant promised jointly, not separately, to pay the three plaintiffs the price therefor. This contract was joint, the several payees having therein a joint interest, so that no one could sue for his proportion. When they jointly undertook to sell the rails in one mass to the defendant, they held themselves out to be joint owners, voluntarily assuming that relation to the property sold to the defendant. The contract became a joint contract, the plaintiffs being joint creditors, not several, of the defendant. 2 Chit. Cont. (11th Am. Ed.) 1340. The three owners represented, in effect, that they had a common interest in the property,

[80] See In re E. W. A., a Debtor [1901], 2 K. B. 642, where, however, the court found that the document was a release and not an undertaking not to sue.

without any difference in their respective interest and possessions, and that payment was to be made of the entire sum.

The two plaintiffs, Norton and Jarnegan, in behalf of themselves and of Osborn, settled with the defendant for the amount due, in full payment and satisfaction of their demand, receiving as payment in part money and in part shares of stock in the defendant corporation. The plaintiff Osborn insists that he is not bound by this settlement; and that, in the name of the three vendors, he can recover in money that portion of the original indebtedness to which, as between himself and his associates, he was entitled.

The interest of the three plaintiffs in their joint claim against the defendant was such that each had an interest in the entire claim. One of them had not only an interest in the third which might be his share, but also in the two-thirds belonging to the others. It has been settled in this action that one cannot maintain an action for his share; the three must join in the suit, because each one has a joint interest in the entire amount due them, and in every part thereof. Osborn is debarred from bringing suit for his third part, because Norton and Jernegan own that third as fully as does Osborn. Each having such an interest in the debt due, one being unable to sue for the whole or his share thereof, it follows that each one, being interested in the entire claim, can settle it with the defendant. Each of the three, by the manner of their dealing with the defendant and with the property, has effectually authorized his partners in the contract to dispose of his interest by payment, settlement, or accord and satisfaction, and to release the defendant from its obligation under the contract. 1 Pars. Cont. 25.

In this case, there was no formal release by writing under seal. The plaintiffs Norton and Jarnegan, upon the settlement, "gave to the defendant a receipted bill of the demand for the price of the rails and interest." The delivery of the shares of stock by the defendant to the plaintiffs, and the payment of the money, were accepted in satisfaction and payment of the debt. It was an accord and satisfaction unconditional, actually executed, and accepted. This operates to release the defendant from further liability upon the contract. No particular form of words is necessary to constitute a valid release. "Any words which show an evident intention to renounce the claim upon, or to discharge, the debtor are sufficient." 2 Chit. Cont. (11th Am. Ed.) 1146. The plaintiff Osborn in his argument has not urged that this settlement was not in effect a release. If this transaction between the parties, if assented to by all who participated in it, was such as to release the defendant from all liability to Norton and Jernegan, of which there is no contention, then it follows that the release of two was the release of all. When there is such a unity of interest as to require a joinder of all the parties interested in a personal action, the release of one is as effectual as the release of all. Austin v. Hall, 13 Johns. 286; Decker v. Livingston, 15 Johns. 479.

In this case, fraud is not set up, nor is there any suggestion of fraud in the transaction. The settlement was in effect an accord and satisfaction, which operates as a release. Wallace v. Kelsall, 7 M. & W. 264, 272.

The settlement made by Norton and Jernegan with the defendant released the defendant from further liability upon its contract with the plaintiffs, and the action cannot be maintained. By the terms of the report, there must be

*Judgment for the defendant.*[31]

[31] See Lyman v. Gedney, 114 Ill. 388 (1885).

Conversely, where there are joint and several debtors, an accord and satisfaction with one has been held to prevent proof of the claim in bankruptcy against another. In re E. W. A., [1901] 2 K. B. 642.

"But although an agreement to pay a sum of money to two or more persons cannot be enforced at the suit of one or another of them, it seems nevertheless to be the law that a release or an accord and satisfaction by one of these creditors is a bar to an action on the promise by the others. [Wallace v. Kelsall, 7 M. & W. 264]. It is suggested, with deference, that this is not in accordance with principle. The reasons given for the decision are that the other creditors cannot sue without making the releasing creditor co-plaintiff, and he cannot undo his own act by becoming one." W. H. Griffith, Joint Rights and Liabilities, p. 34.

On the chancery attitude, see Steeds v. Steeds, reported, *post*, p. 1424.

In Buster v. Fletcher, 22 Ida. 172 (1912) where 44 persons employed the plaintiff to build, construct and equip a butter factory and feed mill for them, each of those employing agreeing to pay the plaintiff $100 of the $4,000 to be paid him on the completion of the work, the court held that the employment was joint and the payments were to be several, and the joint employment could not be terminated and the contract canceled or rescinded by a majority or any number less than all of the 44. See also Gibbons v. Bente, 51 Minn. 499 (1892). The same thing would have been held, presumably, of an accord and satisfaction with a majority only.

STATUTE OF LIMITATIONS. Despite Lord Mansfield's opinion in Whitcomb v. Whiting, 2 Doug. 652 (1781), the great weight of authority is that a new promise or part payment by one joint or joint and several debtor, not actually or ostensibly authorized to act for the others, will not raise the bar of the statute as to the others if it has fallen. State Loan, etc. Co. v. Cochran, 130 Cal. 245 (1900), Kallenbach v. Dickinson, 100 Ill. 427 (1881); Bottles v. Miller, 112 Ind. 584 (1887); Omaha Sav. Bank v. Simeral, 61 Neb. 741 (1901). Local statutes should be consulted, as they fix the rule in some states. By statute the rule of Whitcomb v. Whiting, *supra*, has ceased to be law in England except so far as the new promise or the part payment is by authority of the one to be affected. Re Tucker [1894] 3 Ch. 429. See 37 L. R. A. (N. S.) at 278, N. If the bar of the statute has not fallen at the time of the new promise or part payment by one, the jurisdictions divide on the question whether a new statutory period starts as to all. That a new period starts as to all see Fendley v. Shults (Ark.), 218 S. W. 197 (1920); Van Staden v. Kline, 64 Ia. 180 (1884); Hayman v. Lambden, 97 Md. 33 (1903); Clinton County v. Smith, 238 Mo. 118 (1911). That a new period starts for only the one promising or paying, see Rogers v. Burr, 105 Ga. 432 (1898); Boynton v. Spafford, 162 Ill. 113 (1896); Mozingo v. Ross, 150 Ind. 688 (1898); Hoover v. Hubbard, 202 N. Y. 289 (1911); Cowhick v. Shingle, 5 Wyo. 87 (1894).

## CHAPTER VII.

## THE PERFORMANCE OF CONTRACTS.

### Section 1. The Classification and History of Conditions Relating to Performance.[1]

### NICHOLS *v.* RAYNBRED.

(Courts of Common Pleas and King's Bench, 1615. Hobart, 88.)

Nichols brought an assumpsit against Raynbred, declaring that, in consideration that Nichols promised to deliver the defendant to his own use a cow, the defendant promised to deliver him fifty shillings. Adjudged for the plaintiff in both courts, that the plaintiff need not to aver the delivery of the cow, because it is promise for promise.[2] Note,

[1] Conditions going to the existence of contracts should be mentioned. They may be either precedent or subsequent, but usually are precedent. See Massachusetts Biographical Soc. v. Howard, Mass., 125 N. E. 605 (1920), where the defendant signed and delivered to an authorized solicitor of the plaintiff a written memorandum of contract which was not to have effect as a binding obligation until defendant should notify the plaintiff whether he would be bound or not, and where it was held that a notice that he would not be bound prevented a contract. For a case where failure to give notice will operate on principle as a condition subsequent terminating a contract, see Bishop v. Eaton, reported, *ante*, p. 171.

"Where a written instrument, though in form it is a complete contract, and though possession of it is given or exchanged by the parties who sign it, is, when it is signed and possession of it is given, by agreement of the parties, made to depend, as to its going into operation, on an event thereafter to occur, it is not effective or binding as a contract prior to the occurrence of such event, and the fact that the parties who signed a written instrument so agreed may be proved by parol evidence. Ware v. Allen, 128 U. S. 590; Burke v. Delaney, 153 U. S. 228; 3 Jones, Commentaries on Evidence, § 471." Walker, J., in Gateway Produce Co. v. Farrier Bros., 268 Fed. 513, 515 (1920).

In the case of insurance contracts, where an oral contract of insurance may precede the formal policy which displaces it, conditions precedent to the existence of the contract are quite common.

"The rule is not, therefore, that *every* contract of insurance will authorize recovery in case of loss in the absence of a policy, independent of other agreements or conditions. The agreement itself, or the application, may show that the contract was not one for present insurance but for insurance to take effect in the future, depending upon some condition, such as the acceptance of the application, or delivery of the policy, or upon the performance of some act, such as the payment of premium." Potter, J., in Summers v. Mutual Life Ins. Co., 12 Wyo. 369, 384 (1903).

See Arthur L. Corbin, Conditions in the Law of Contracts, 28 Yale L. J. 739.

[2] Originally in the common law there were no conditions except express ones. This seems to have remained true until after simple bilateral contracts

here the promises must be at one instant, for else they will be both *nuda pacta*.

## CONSTABLE *v.* CLOBERIE.

(Court of King's Bench, 1626. Palmer, 397, as translated in Langdell's Cases on Contracts, 1st ed., 853.)

Covenant upon a charter party. The plaintiff covenanted that his ship should go a voyage to Cadiz with the next wind; and the defendant covenanted that if the ship went the intended voyage, and returned to the Downs, the plaintiff should have so much for the voyage. The defendant traversed that the ship went with the next wind, and upon demurrer the traverse was overruled; for the substance of the covenant was that the ship should go, and not that she should go with the next wind, for that may change every hour; and this is proved by the covenant of the defendant, viz., "if the ship went the intended voyage;" and this was the primary intention of the parties, and not that she should go with the next wind. But, per Justice Jones, if the defendant had covenated that if the plaintiff went to Cadiz with the next wind, he would pay, &c., there the plaintiff ought to aver that he went with the next wind.[3] * * *

were enforced. But as justice demanded the finding of conditions, the courts would scrutinize contracts under seal containing mutual covenants for express conditions, and they did so even before simple bilateral contracts were recognized. "This gave great importance to the precise terms in which mutual covenants were expressed and it not infrequently happened that a single word turned the scale. Thus if A covenanted with B to give or do something *for* something else which B covenanted to give or do in return, it was commonly held that the word 'for' made A's covenant dependent upon B's." Langdell's Summary of Contracts, sec. 140. This undue emphasis on such a word as "for" as importing an express condition was the result of the feeling of the judges that performance should be conditional on performance at a time when the judges had not yet reached the conception of conditions as capable of implication. When simple bilateral contracts established a footing, the old analogies seem to have prevailed and at first only express conditions were recognized in such contracts. That is the explanation of Nichols v. Raynbred, *supra*.

[3] "The contract says that, if 'by any cause' the Willys-Overland is unable to complete all its contracts, it may prorate among its various customers, including complainant. It cannot be that any conceivable cause would justify a default.

"We feel that the construction to be given to the term 'by any cause' is that the cause must be one reasonably beyond the power of the Overland to prevent." Killits, J., in Daily-Overland Co. v. Willys-Overland, 263 Fed. 171, 181 (1919).

In Liverpool and London & Globe Ins. Co. v. Kearney, 180 U. S. 132 (1900-1901), plaintiffs were allowed to recover on a policy of fire insurance under which they covenanted to keep a set of books with proper entries and the

## THOMPSON AND OTHERS v. GILLESPY.

**(Court of Queen's Bench, 1855. 5 Ellis & Blackburn, 209.)**

LORD CAMPBELL, C. J.[4] This was an action by the owners of a ship on a charter-party, whereby it was agreed between them and the defendant that the ship, being tight, staunch, and strong, and every way fitted for the voyage, should at Sunderland load from the factors of the defendant a full cargo of coals, and, being so loaded, should therewith proceed to Constantinople for orders, and deliver the cargo there or at some port in the Black Sea, being paid freight on the quantity delivered at certain stipulated rates: "one-fourth of the freight to be advanced to the owner's agent in London, on the ship having sailed, less five per

last inventory in a fire-proof safe, or in some secure place not exposed to a fire which would destroy the house where the business was carried on, and to produce the books and inventory in case of loss, although the policy provided that "in the event of the failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss," and although the last inventory was not produced because in the hurry and confusion of moving the books from the safe when the building was on fire it was either left behind and destroyed or otherwise lost. The court said that a "fire-proof safe" did not mean one absolutely sufficient against every fire that might occur but one commonly used and in the judgment of prudent men in the locality sufficient, nor did "some secure place not exposed to a fire" mean a place absolutely secure against any fire that would destroy the house, but a place selected in good faith and with such care as prudent men ought to exercise under like circumstances; and that plaintiffs owed a duty to the defendant to remove the books and inventory if that seemed reasonably prudent under the circumstances. On these propositions as a basis, the court said, per Harlan, J., "We are of opinion that the failure to produce the books and inventory, referred to in the policy, means a failure to produce them if they are in existence when called for, or if they have been lost or destroyed by the fault, negligence, or design of the insured. Under any other interpretation of the policies, the insured could not recover if the books and inventory had been stolen, or had been destroyed in some other manner than by fire, although they had been placed 'in some secure place not exposed to a fire' that would reach the store. If the plaintiffs had the right, under the terms of the policy, as undoubtedly they had, to remove their books and inventory from the safe to some secure place not exposed to a fire which might destroy the building in which they carried on business, surely it was never contemplated that they should lose the benefit of the policies if, in so removing their books and inventory, they were lost or destroyed, they using such care on the occasion as a prudent man, acting in good faith, would exercise. A literal interpretation of the contracts of insurance might sustain a contrary view, but the law does not require such an interpretation. In so holding the court does not make for the parties a contract which they did not make for themselves. It only interprets the contract so as to do no violence to the words used and yet to meet the ends of justice."

That a condition is express and apparently iron-clad does not preclude reasonable interpretation. But once it has been interpreted, it must be lived up to literally as interpreted. See Shadforth v. Higgins, 3 Campbell 385 (1813); The Austin Friars, 71 L. T. 27 (1894).

[4] The statement of the pleadings is omitted.

cent thereon for insurance, interest, and commission." The declaration alleged that the defendant caused the ship to be loaded with a cargo of coals, and "that the said ship, being so loaded, sailed, to wit, for Constantinople, pursuant to the said charter-party;" and that, although the plaintiffs had done everything to entitle them to an advance of one-fourth of the freight, amounting to 214*l.*, the defendant had not paid the same or any part thereof to their agent in London.

The second plea was, "That the said ship was not, at the commencement of the said voyage, tight, staunch, and strong, and every way fitted for the voyage; and that by reason of the premises, the said ship and the said cargo of coals were wholly lost." To this plea there was a demurrer. * * *

We are of opinion, however, that this plea is a bar to the action, on the ground that it shows that the advance of freight had never become payable.

Freight, generally speaking, is not payable till the goods have been delivered at the port of destination. Here, by special stipulation, one-quarter of the amount was to be paid in advance on a certain event, viz., the ship having sailed from Sunderland for Constantinople, in pursuance of the charter-party. The charter-party required that when she sailed, she should be "tight, staunch, and strong, and every way fitted for the voyage." If she sailed on the voyage in a seaworthy condition, the merchant was to advance one-fourth of the freight, which he could not recover back if the ship, having so sailed, should afterwards be lost by the perils of the sea without having delivered any part of her cargo. *Pro tanto* the risk was transferred from the shipowners to the merchant; and the arrangement between them was that the amount to be advanced was to be insured by him, as appears clearly from the deduction of five per cent for insurance, interest, and commission. By a policy of insurance, the merchant was to be indemnified to the extent of the sum he was to advance. But he could not have the benefit of this indemnity unless, at the commencement of the voyage, the ship was seaworthy. He must be considered to have promised to pay one-fourth of the freight in advance, if, when the ship sailed, she was in such a condition as that a policy of insurance on the freight would attach, and enable him to recover the money back in case of a subsequent loss. But the plea avers that the ship was not seaworthy at the commencement of the voyage, and that, by her unseaworthiness, the cargo of coals was wholly lost. It was argued, for the plaintiff, that the loss after the sailing is for this purpose immaterial, and that, although unseaworthy when she sailed, she might have completed the voyage and delivered the cargo in safety. In that case the full freight certainly would have been earned, and would have been payable; but still the conjuncture never would have arisen upon which a part of the freight was to be paid in advance. For these reasons we think that the second plea is sufficient.

There is a third plea, upon which, as it is demurred to, we are bound to give our opinion. This plea has some introductory observations about the ship having been sent to sea in an unseaworthy state, but it contains no allegations to that effect, and we consider the substance and gist of the plea to be that, after the ship sailed and while she was on the high seas (near to the sea shore) the plaintiffs were guilty of negligent and improper conduct with regard to the management of the ship, in permitting her to be for a great length of time without a master and without a proper and sufficient crew to manage and navigate her, by reason whereof the ship and cargo were wholly lost. This plea, we think, is bad, as it admits that the ship sailed on the voyage from Sunderland in pursuance of the charter-party. If this be true, one-fourth of the freight thereupon became payable in advance; and any subsequent default or misconduct of the plaintiffs would only be the subject of a cross-action.

*Judgment for defendant on the second plea; for the plaintiffs on the third.*[5]

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## ANONYMOUS.

(Court of King's Bench, 1621. Palmer 160.)

Nota. A sur receipt de 1*s.* de B assume & promise, que si B poit prove, que A ad beat luy in le chancel de tiel esglise, que il payera a luy 20*l.* B port assumpsit sur cest promise. A plead non assumpsit, & issue fuit trove ove le plaintiff. Et fuit move in arrest de judgment, quod port cest action devant que fuit ascun duty accrew a luy: car ne fuit ascun duty devant que ad prove un battery in le chancel; & si ceo soit trove, donque action accrue a luy.

Mes Dodderidge & Chamberlaine, absentibus l'auters justices teigne cleerment, que action gist devant, & cest trial & prover de battery serra per mesme jury try, q'try le assumpsit. Auterment si ust dit, que after that you have proved that I struck you, &c., then I do assume to pay you 20*l.* Et fuit dit que issint fuit 18 E. 4 & que issint fuit adjudge in cest court; et le clerk del court issint affirm, que fuit rule in cest court.[6]

[5] See Langdell's Summary of Contracts, § 119.

[6] "*Nota.* A, upon receipt of 1*s.* from B, assumed and promised that, if B could prove that A had beaten him in the chancel of such a church, he would pay him 20*l.* B brought assumpsit upon this promise. A pleaded *non assumpsit*, and the issue was found for the plaintiff. And it was moved in arrest of judgment that he brought the action before any duty accrued to him: for there was no duty before he had proved a battery in the chancel; and if that be found, then an action accrues to him. But Dodderidge and Chamberlaine (*absentibus* the other justices) held clearly that the action lies before, and this trial and proof of the battery shall be by the same jury which tries the

## TURNER *v.* GOODWIN.

(Court of King's Bench, 1714. Fortescue 145.)

This was an action of debt on bond for 3000*l*, for the payment of 1500*l*. The condition of the bond recites, that whereas John Dibble was indebted to the plaintiff in a bond for 3000*l*, for payment of 1500*l*, and had recovered judgment for this money; the defendant Goodwin, in consideration that the plaintiff would forbear suing out execution against Dibble, promised to pay the money to the plaintiff on request, he assigning the said judgment. The defendant pleads that the plaintiff had not assigned the said judgment; the plaintiff replies, he was ready to assign, and the defendant demurs.

PARKER, C. J.[7] The question is, whether the plaintiff's assignment be the first act to be done, or not. * * * Here are no words that expressly show the priority of the act. The defendant would have assigning to be first assigning, and the plaintiff would it assigning thereupon; that is, after payment. This is supplying words supposed to be understood, for here are no express words. * * *

We are all of opinion that there is one way that will solve all these difficulties and that is, that the assignment shall neither precede nor wait, but shall accompany the payment, and both be done at the same time.

The defendant ought to find out the plaintiff, to tender him the money, and at the same time to demand an assignment; and then if the plaintiff refuse, the defendant will be excused. He is not to tender the money absolutely, because he is not bound to pay it absolutely, but he is to tender it *sub modo*, on the same terms he is to pay it. * * *

He that pleads a tender and refusal, that is not enough, unless he plead that he was always ready; for this is only an excuse for non-payment. The payment required in this case is a special payment upon

assumpsit. Otherwise if he had said, 'After that you have proved that I struck you, etc., then I do assume to pay you 20*l*.' And it was said that it was so in 18 E. 4, and that it was so adjudged in this court; and the clerk of the court so affirmed that it was ruled in this court." 1 Williston's Cases on Contracts (1904), p. 186, n.

See Traver v. ————, 1 Siderfin 57 (1661), where the condition of a widow's promise to pay her husband's debt was if the creditor would prove that the husband owed it, and it was held that proof in the action against her was enough.

The question is one of construction of the word "prove." Where the condition is, "If you will prove such a thing," that may mean "prove in a legal trial," and, if it does, the proof could not be deemed a condition precedent to the bringing of the action. That such is the normal meaning of proving the existence of a debt, the commission of a tort, etc., where the promise to pay is conditioned on proof, see also, Butcher v. Vale, 1 Siderfin 313 (1667); Beayne v. Beal, 3 Lev. 240 (1685.)

[7] The statement of facts is abbreviated and parts of the opinion are omitted.

terms, and not a general one; and being obliged to make a special tender, there must be a special refusal, and it must be pleaded in the same manner as a general tender. * * * He must plead he has done all of his part possible, but here he has done nothing at all.

Here is no inconvenience, 'tis in assistance of justice, therefore we are all of opinion that the plaintiff should have judgment.

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## PORDAGE *v.* COLE.

**(Court of King's Bench, 1669. 1 Saunders, 319.)**

Debt upon a specialty for £774 15*s*. The plaintiff declares that the defendant, by his certain writing of agreement made at, etc., by the plaintiff by the name, etc., and the defendant by the name, etc., and brings the deed into court, etc., it was agreed between the plaintiff and defendant in manner and form following—viz., that the defendant should give to the plaintiff the sum of £775 for all his lands, with a house called Ashmole House thereunto belonging, with the brewing vessels remaining in the said house, and with the malt-mill and wheelbarrow; and that, in pursuance of the said agreement, the defendant had given to the plaintiff 5*s*. as an earnest; and it was by the said writing further agreed between the plaintiff and defendant, that the defendant should pay to the plaintiff the residue of the said sum of £775 a week after the feast of St. John the Baptist then next following (all other movables, with the corn upon the ground, except). And although the defendant has paid 5*s*., parcel, etc., yet the said defendant, although often requested, has not paid the residue to the damage, etc. The defendant prays oyer of the specialty, which is entered *in hoec verba*, to wit: "May 11th, 1668. It is agreed between Dr. John Pordage and Bassett Cole, Esq., that the said Bassett Cole shall give unto the said doctor £775 for all his lands, with Ashmole House thereunto belonging, with the brewing-vessels as they are now remaining in the said house, and with the malt-mill and wheelbarrow. In witness whereof we do put our hands and seals, mutually given as earnest in performance of this 5*s*., the money to be paid before midsummer, 1668; all other movables, with the corn upon the ground excepted." And upon oyer thereof the defendant demurs.

But it was adjudged by the court, that the action was well brought without an averment of the conveyance of the land; because it shall be intended that both parties have sealed the specialty. And if the plaintiff has not conveyed the land to the defendant, he has also an action of covenant against the plaintiff upon the agreement contained in the deed, which amounts to a covenant on the part of the plaintiff to convey the land; and so each party has mutual remedy against

the other. But it might be otherwise if the specialty had been the words of the defendant only, and not the words of both parties by way of agreement as it is here. And by the conclusion of the deed it is said that both parties had sealed it, and therefore judgment was given for the plaintiff, which was afterward affirmed in the Exchequer Chamber, Trin. 22 of King Charles the Second.[8]

## THORP *v.* THORP.

(Court of King's Bench, 1702. 12 Modern, 455.)

Error from the Court of Common Pleas of a judgment in an action on the case, wherein the plaintiff declared, that the defendant had and held of him by way of mortgage two closes of copyhold lands; and that there was a discourse between them concerning the plaintiff's releasing his equity of redemption therein to the defendant, and concerning divers sums of money due from the plaintiff to the defendant upon the said mortgage; upon which the plaintiff did agree with the defendant that he would release to him the said equity of redemption, in consideration of which the defendant did agree with the plaintiff to pay him seven pounds above all that was due; and that, in consideration that the plaintiff promised the defendant to perform all of his side, the defendant promised the plaintiff to perform of his side; and avers that he did perform all on his, the plaintiff's side, but that the defendant paid one pound seven shillings of the said seven pounds, and no more, &c.

To this the defendant pleads in bar, that long after the promise, viz., 29th July, 1694, the plaintiff did, by indenture made between him and the defendant, release to the defendant "all manner of actions, suits, debts, duties, sum and sums of money, and all demands whatsover, which ever he had, or he, his heirs, executors, or assigns ever should have, for or by reason of any thing, matter, or demand whatsoever."

Upon *oyer* of this deed of release, it recited the said mortgage, and released "all provisos therein, and all his estate, right, title, and interest in the said close, both in law and equity;" and then follows the foregoing clause.

And upon this the plaintiff demurred, and judgment for the plaintiff in the Court of Common Pleas.

HOLT, C. J.[9] We all agree that the promise was not discharged by this release. It was argued at the bar by Cowper [counsel for the plaintiff in error] that if the plaintiff might have founded an action

[8] See Serjeant Williams' Rules on Conditions in Contracts in his note to this case, reprinted *post*, p. 700.

[9] Parts of the opinion are omitted.

upon the mutual promise and agreement before any performance on his part, that certainly this release would have barred him; and the consequence is very true and necessary, if that were the case. And by the same reason, if he could not bring an action before such time as he had made a release, there is no color for the release to bar him, for till he makes the release in this case, if he has no title to the £7, then till release there is no right of action; and then they do not lie in demand till release, and that a release of "all demands" will not release a thing that does not lie in demand at that time. See 2 Cro. 171; 5 Co. 70; Hoe's Case. * * *

So the whole question will be here whether the plaintiff could have an action before the release. * * * If in this case there were a positive promise that one should release his equity of redemption, and on the other side that the other would pay £7, then the one might bring his action without any averment of performance; but this agreement is not so, but that the plaintiff should release his equity of redemption, in consideration whereof the defendant was to pay him £7, so that the release is the consideration, and therefore being executory is a condition precedent which must be averred. And whereas there seems to be a variance in the books upon this learning, it will be fit on this occasion to settle it; and I agree the case in Hob. 58 to be good law, for there is a positive agreement that one shall deliver a cow to the other, and that the other shall give him so much money, and therefore the action lies for either side without performance of his promise; but if by the agreement A were to deliver B a cow, and that for it B were to deliver him a horse, there the delivery of the cow would be a condition precedent, and therefore ought to be performed before A can bring his action, and upon this diversity the books are reconcilable. 15 Hen. 7, 10, pl. 17. If A covenant with B to serve him for a year, and B covenant with A to pay him £10, there A shall maintain an action for the £10 before any service; but if B had covenanted to pay £10 for the said service, there A could not maintain an action for the money before the service performed. And there is great reason for this diversity, for when one promises, agrees, or covenants to do one thing for another, there is no reason he should be obliged to do it till that thing for which he promised to do it be done, and the word "for" is a condition precedent in such cases. But upon this head some diversities are to be observed.

First, if there be a day set for the payment of money, or doing the thing which one promises, agrees, or covenants to do for another thing, and that day happens to incur before the time the thing for which the promise, agreement, or covenant is made, is to be performed by the tenor of the agreement; there, though the words be "that the party shall pay the money," or "do the thing for such a thing," or "in consideration of such a thing," after the day is past the other shall have an action for the money or other thing, although the thing

for which the promise, agreement, or covenant was made be not performed; for it would be repugnant there to make it a condition precedent, and therefore they are in that case left to mutual remedies on which, by the express words of the agreement, they have depended. See 48 Edw. 3, 2-3, cited in Ughtred's Case, 7 Co. 10*b*, where the diversity is taken when there are mutual remedies and not; it is thus put in that book: Sir Richard Pool covenants with Sir Ralph Tolcelser to serve him with three esquires in the wars of France; Sir Ralph Tolcelser covenants, in consideration of those services, to pay him so much money; and there it is said action will lie for the money without any services performed. But if you look into the book at large, you will find it was upon the diversity which I have taken, for the case in 48 Edw. 3, 2-3, is, Richard Pool covenants with Ralph Tolcelser to serve him with three esquires in the wars of France, and Ralph Tolcelser covenanted with him to pay him so much money for the service; and it was further agreed that twenty marks of the money should be paid in England, at a day certain, before they went for France, and the rest by quarterly payments, which might likewise incur before the service; and upon action brought by Sir Richard Pool it was objected that the service was not performed, but there was no room for that objection upon the diversity which I have taken, the money, by the agreement, being made payable at a day certain before the service was to have been performed. 1 Vent. 147. * * *

Secondly, if there be a day for the payment of the money or doing of other act for another, and that day is to be after the performance of the thing for which the promise, etc., was made, there, if the agreement be to pay the money, or do other thing "for" or "in consideration," or such other words that would make a condition precedent, there such things, for the doing or performing of which the other agrees to pay the money, or do other thing, must be averred to maintain an action, and for this Sir W. Jones, 318. The executor of A brought an action on the case against B declaring that in consideration A in his lifetime did promise to assure certain lands to B before Michaelmas next, B promised to pay him so much money for the land; so the assurance was to be made before Michaelmas, and the money was to be paid for the land, and consequently after Michaelmas, for A had time till Michaelmas to make the assurance; and because the assurance was to have been made first, and the money by agreement to be paid for the land, though there were mutual promises, yet it was adjudged the action would not lie for the money without making the assurance first. This case, as it is there reported, is intricate, and requires consideration to make this construction upon it; but upon examination it is a full authority in point. Dy. 76 pl. 8. A agrees to deliver B. a hawk at midsummer, for which he agrees to pay him a horse at Michaelmas; there if a hawk be not delivered at mid-

summer, there shall be no horse delivered at Michaelmas, nor any remedy for it. * * *

But let us now see the reason of the thing. What is the reason that mutual promises shall bear an action without performance? One's bargain is to be performed according as he makes it. If he make a bargain, and rely on the other's covenant or promise to have what he would have done to him, it is his own fault. If the agreement be that A shall have the horse of B, and A agree that B shall have his money, they may make it so, and then there needs no averment of performance to maintain an action on either side; but if it appear by the agreement that the plain intent of either party was to have the thing to be done to him performed, before his doing what he undertakes of his side, it must be then averred, as where a man agrees to give so much money for a horse, it is plain he meant to have the horse first, and therefore he says the money shall be given for the horse. * * *

But in our case the money was to be paid for the release, and a vast difference. And the £7 being to be paid in consideration of making the release, the words "in consideration" make a condition precedent, which till performed does not entitle the plaintiff to action. Then the £7 were not demandable here, and consequently not dischargeable by the general release of all demands.

Another objection was that the plaintiff had not averred a release given or tendered by him, as he ought to have done. But here sufficient appears that it was done, for he avers performance of all that was to be done on his side; and that general averment, though informal, and beside wants time and place, for which it had been bad on demurrer, is helped by the defendant's passing it over and pleading a release, whereby he admits the plaintiff had a cause of action. And there are stronger cases than this in the books, where pleading over has helped an insufficient declaration. * * * So we all agree the judgment ought to be affirmed, for there was no money due to the plaintiff till release of the equity of redemption, and therefore none demandable till then, and consequently a release of all demands could not bar it.

[*Judgment affirmed.*]

Note: In this case Cowper offered this diversity in relation to mutual promises, that where the promise is of a valuable thing to the defendant, there such promise, without any performance, may be a good consideration; but where the promise is not of a thing valuable, but may be a consideration, because a trouble to the party promising; there such promise, without a performance, cannot be a consideration, because such promise cannot be a trouble.

But per Holt, C. J., no diversity at all, but the cases are the same upon the learning laid down above.

## LOCK *v.* WRIGHT.

(Court of King's Bench, 1723. 1 Strange, 569.)

The plaintiff declares, that the defendant by his writing indented agreed with the plaintiff, that he, the defendant, would accept of the plaintiff £500 fourth subscription so soon as the receipts should be delivered out by the company, and would pay for the same £950 on November 5th next after the date of the writing. Then he avers, that the defendant did not pay the money at the day.

The defendant demurs generally.

PRATT, C. J.[10] This is an action upon a deed poll made by the defendant, and whereby he covenants to accept so much stock, and to pay for the same, and the plaintiff in an action for the money has not averred a delivery or tender of the stock, and for this fault we are all of opinion the declaration is not good.

The intent of the parties appears to be, that one should have the money, and the other the stock; and not that either should perform his part of the agreement, and lay himself at the mercy of the other for the equivalent. This is not a covenant entered into by both parties, upon which each will have his mutual remedy; but it is the deed poll of the defendant only, and, therefore, though upon delivery or tender of the stock the plaintiff will have his remedy for the money, yet the defendant on the other side upon payment of the money will have no remedy to compel the delivery of the stock; and having no such remedy he shall not be obliged to pay the money, till the consideration for which it is payable is performed.

The word *pro* will be either a condition precedent or subsequent, as will best answer the intent of the parties; in this case it must be a condition precedent, because otherwise the intention of the defendant to have the stock for his money can never take effect, and this is proved by 7 Co. 10, and 1 Inst. 204, where the annuity *pro una acra,* says the book, supposes the acre to be first granted. * * *

The resolutions that were mentioned at the bar of the case of Thorp v. Thorp are all founded on great reason, and the first of them is agreeable to the resolution of this case, which is an executory contract, where one is to do the act, and for the doing thereof the other is to pay.

And this difference between a mutual covenant and a deed poll is likewise taken and allowed in the case of Pordage v. Cole, 1 Saund. 320, where the court were of opinion the defendant had his remedy, "otherwise (says the book) it would have been, if the deed had been the words of the defendant only," which is this case.

For these reasons we are all of opinion the defendant must have judgment.

[10] Part of the opinion is omitted.

## KINGSTON *v.* PRESTON.

(Court of King's Bench, 1773. 2 Douglas, 689.)[11]

Action of debt for non-performance of covenants contained in certain articles of agreement between the plaintiff and the defandant. The declaration stated: That, by articles made the 24th of March, 1770, the plaintiff, for the considerations thereinafter mentioned, covenanted with the defendant to serve him for one year and a quarter next ensuing, as a covenant servant, in his trade of a silk-mercer, at 200*l.* a year, and, in consideration of the premises, the defendant covenanted that, at the end of the year and a quarter, he would give up his business of a mercer to the plaintiff, and a nephew of the defendant, or some other person to be nominated by the defendant, and give up to them his stock in trade, at a fair valuation; and that, between the young traders, deeds of partnership should be executed for fourteen years, and from and immediately after the execution of the said deeds the defendant would permit the said young traders to carry on the said business in the defendant's house. Then the declaration stated a covenant by the plaintiff, that he would accept the business and stock-in-trade, at a fair valuation, with the defendant's nephew, or such other person, &c., and execute such deeds of partnership, and, further, that the plaintiff should and would, at and before the sealing and delivery of the deeds, cause and procure good and sufficient security to be given to the defendant, to be approved of by the defendant, for the payment of 250*l.* monthly to the defendant, in lieu of a moiety of the monthly produce of the stock in trade, until the value of the stock should be reduced to 4000*l.* Then the plaintiff averred that he had performed, and been ready to perform, his covenants, and assigned for breach, on the part of the defendant, that he had refused to surrender and give up his business, at the end of the said year and a quarter. The defendant pleaded, first, that the plaintiff did not offer sufficient security; and, second, that he did not give sufficient security for the payment for the 250*l.*, etc. And the plaintiff demurred generally to both pleas.

LORD MANSFIELD. There are three kinds of covenants: First, such as are called mutual and independent, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff; second, there are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed the other party is not liable to an action on his covenant; third,

[11] This report of the case is its statement by Le Blanc, in the course of his argument as counsel for the plaintiffs in Jones v. Barkley, 2 Doug. 684, at 689 (1781).

there is also a third sort of covenants, which are mutual conditions to be performed at the same time; and in these, if one party was ready, and offered, to perform his part, and the other neglected, or refused, to perform his, he who was ready, and offered, has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act.

His lordship then proceeded to say that the dependence or independence of covenants was to be collected from the evident sense and meaning of the parties, and that however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance. That in the case before the court it would be the greatest injustice if the plaintiff should prevail. The essence of the agreement was, that the defendant should not trust to the personal security of the plaintiff, but, before he delivered up his stock and business, should have good security for the payment of the money. The giving such security, therefore, must necessarily be a condition precedent. Judgment was accordingly given for the defendant, because the part to be performed by the plaintiff was clearly a condition precedent.[12]

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## GOODISSON *v.* NUNN.

(Court of King's Bench, 1792. 4 Term Reports, 761.)

This was an action of debt to recover 21*l.* on certain articles of agreement, the substance of which was stated in the declaration. The defendant craved oyer of the agreement, by which the plaintiff agreed that he would, on or before the 2d of September then next, "by such conveyances, surrenders, assurances, ways, and means in the law, shall reasonably devise, advise, or require,[13] well and sufficiently grant, sell, release, assign, and surrender, or otherwise convey to the defendant all that copyhold tenement, lying," &c. In consideration whereof the defendant covenanted to pay to the plaintiff the sum of 210*l.* on or before the second day of September next ensuing; on failure of complying with the before-mentioned agreement the defendant was to pay to the plaintiff the sum of 21*l.*; and if the plaintiff did not deliver the estate according to the before-mentioned agreement, then he was to pay to the defendant the sum of 21*l.* It was further agreed between the par-

[12] "You can always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore, not capable of founding exact logical conclusions." Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 466.

[13] The agreement was drawn in this inaccurate manner.—Reporter's note.

ties that the plaintiff should take up the copyhold as follows, that is to say: "That the plaintiff should take it up either for the defendant or his wife, as they should agree at the time; that the plaintiff should take it up for himself; that each party should pay share and share alike towards the expenses attending the taking it up." The defendant then pleaded, 1st, *Non est factum*. 2d, That the plaintiff did not, on or before the second day of September next, &c., by such conveyances, assurances, surrenders, ways and means as the law, reasonably devised, advised, and required, well and sufficiently grant, sell and release, assign and surrender, or otherwise convey to the defendant the said premises in the said articles of agreement mentioned, &c. 3d, That the plaintiff did not on or before the second day of September, &c., or at any time since, well and sufficiently grant, sell, and release, assign and surrender, or otherwise convey to the defendant the said premises, &c. 4th, That the plaintiff at the time of the making of the articles, &c., had nothing in the said premises whereby he could be enabled to grant, &c., to the defendant the said premises, &c.

To the three last pleas the plaintiff demurred generally.

LORD KENYON, C. J.[14] This case is extremely clear, whether considered on principles of strict law or of common justice. The plaintiff engaged to sell an estate to the defendant, in consideration of which the defendant undertook to pay 210*l.*; and if he did not carry the contract into execution, he was to pay 21*l.* And now, not having conveyed his estate, or offered to do so, or taken any one step towards it, the plaintiff has brought this action for the penalty. Suppose the purchase-money of an estate was 40,000*l.*, it would be absurd to say that the purchaser might enforce a conveyance without payment, and compel the seller to have recourse to him, who perhaps might be an insolvent person. The old cases cited by the plaintiff's counsel have been accurately stated; but the determinations in them outrage common sense. I admit the principle on which they profess to go; but I think that the judges misapplied that principle. It is admitted in them all that where they are dependent covenants no action will lie by one party, unless he have performed or offered to perform his covenant. Then the question is whether these are or are not dependent covenants? I think they are; the one is to depend on the other; when the one party conveyed his estate, he was to receive the purchase-money; and when the other parted with his money he was to have the estate. They were reciprocal acts to be performed by each other at the same time. It seems, from the case in Strange [Blackwell v. Nash], that the judges were surprised at the old decisions; and, in order to get rid of the difficulty, they said that a tender and refusal would amount to a performance: it is true they went farther, and said that "in consideration of the premises" meant only in consideration of the covenant to transfer, and not in

[14] The opinions of Buller, J., and Grose, J., are omitted.

consideration of the actual transferring of the stock; but to the latter part of that judgment I cannot accede. It is our duty, when we see that principles of law have been misapplied in any case, to overrule it. The principle is admitted in all the cases alluded to that, if they be dependent covenants, performance, or the offer to perform, must be pleaded on the one part, in order to found the action against the other. The mistake has been in the misapplication of that principle in the cases cited. And I am glad to find that the old cases have been overruled, and that we are now warranted by precedent as well as by principle to say that this action cannot be maintained.

*Judgment for the defendant.*[15]

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## BOONE *v.* EYRE.

(Court of King's Bench, 1776. 1 Henry Blackstone, 273, note a.)

Covenant on a deed, whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of £500 and an annuity of £160 per annum for his life; and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted

[15] "Where there is a contract by one party to sell an article and by the other party to pay for it, no time being named, it would be a strong thing to say that the buyer shall pay the money before he gets the consideration. The effect of the agreement set out in the plea is that the plaintiffs are to buy the mines and minerals from the defendant and the defendant is to take all the coals he may require from the plaintiffs. These clearly are concurrent acts." Erle, C. J., in Bankart v. Bowers, L. R., 1 C. P. 484, 489 (1866).

"Several conditions must occur, however, to make mutual dependency [concurrent conditions] possible and appropriate. 1st. Each of the covenants or promises must be capable of performance in a moment of time; for otherwise it would not be possible for them to be performed concurrently. 2dly. The object of the covenants or promises must, it seems, be the exchange of some property or right for some other property or right; otherwise mutual dependency will be inappropriate. For this reason as well as the former, two covenants or promises can seldom, if ever, be mutually dependent, unless they both consist in giving *(dando)* as distinguished from doing *(faciendo)*. In particular, mutual covenants or promises which are entered into for the promotion of some object common to both parties can never, it seems, be mutually dependent. 3rdly. The exchange contemplated by the covenants or promises must be between the parties thereto; otherwise it cannot, in legal contemplation, be made in an instant of time. Mutual promises, therefore, between A and B that A shall give something to B and B shall give something to C will not be mutually dependent [unless expressly made so]. 4thly. The covenants or promises must be capable of being performed at the same place; otherwise they cannot be performed at the same time." Langdell's Summary of Contracts, sec. 133.

that the plaintiff well and truly performing all and everything therein contained on his part to be performed, he, the defendant, would pay the annuity. The breach assigned was the non-payment of the annuity. Plea: that the plaintiff was not at the time of making the deed legally possessed of the negroes on the plantation, and so had not a good title to convey.

To which there was general demurrer.

LORD MANSFIELD. The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action.

. . . . . *Judgment for the plaintiff.*[16]

[16] In Campbell v. Jones, 6 T. R. 570, 573 (1796), Lord Kenyon, C. J., reports Mr. Justice Ashland as adding in Boone v. Eyre, after Lord Mansfield's opinion: "There is a difference between executed and executory covenants; here the covenants are executed in part, and the defendant ought not to keep the estate because the plaintiff has not title to a few negroes."

In view of the facts before the court, it seems clear that Lord Mansfield's language in Boone v. Eyre was intended as a general statement to the effect that if a breach by one party to the contract does not go to the essence of the contract, the other party is bound to perform on his part, though he has an action for the damages due to the breach, but that if the breach is so material as to go to the essence of the contract, such other party is excused from performing.

In Bank of China, etc. v. American Trading Co., [1894] A. C. 266, 271, Lord Watson said: "The circumstance that one of the conditions of a contract only affects part of the consideration is not *per se* sufficient to make it collateral to the main contract. It is capable of being so construed, but cannot be so regarded, unless it also appear that the condition was not intended by the parties to go to the root of the whole contract."

In explaining Lord Mansfield's language, Sanborn, J., in Kauffman v. Raeder, 108 Fed. 171, 179 (1901), said: "The breach of a covenant of the first class—a dependent covenant, one which goes to the whole consideration of the contract, gives to the injured party the right to treat the entire contract as broken and to recover damages for a total breach [citations]. But a breach of a covenant of the second class, an independent covenant, a covenant which does not go to the whole consideration of the contract and is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract, does not authorize the injured party to rescind the agreement, but he is still bound to perform his part of it and his only remedy is a recovery of damages for the breach." See also Palmer v. Meriden Brittania Co., 188 Ill. 508 (1901). As was said by Goode, J., in Koerper v. Royal Inv. Co., 102 Mo. App. 543, 77 S. W. 307, 309 (1903). "By no means every breach of a contract by a party entitles the other to regard it as abandoned, and it is not always easy to tell what breach is sufficient to do so. One rule is that, when the failure or refusal to perform substantially deprives the innocent party of the benefit that would arise from performance—in other words, goes to the entire consideration that

## SERJEANT WILLIAMS' RULES ON CONDITIONS IN CONTRACTS.[17]

"It is justly observed, that covenants, etc., are to be construed to be either dependent or independent of each other, according to the intention and meaning of the parties, and the good sense of the case; and technical words should give way to such intention. [Citations.] In order, therefore, to discover the intention, and thereby to learn, with some degree of certainty, when performance is necessary to be averred in the declaration, and when not, it may not be improper to lay down a few rules, which will perhaps be found useful for that purpose.

"1. If a day be appointed for payment of money or part of it, or for doing any other act, and the day *is* to happen or may happen *before* the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act *before* performance; for it appears that the party relied upon his *remedy*, and did not intend[18] to make the *performance*

induced him to make the contract—he may treat it as abandoned by the non-performing party."

But because of its ambiguity, the language of Boone v. Eyre, has been twisted so as to suggest the application of part of it to divisible contracts in a way that may be proper in England but not generally in this country. In 2 Parsons on Contracts (9 ed.), 682, for instance, we find this language: "It is said that where the clause in question goes to the whole of the consideration it should be read as a condition. The meaning of this must be that if the supposed condition covers the whole ground of the contract and cannot be severed from it, or from any part of it, a breach of the condition is a breach of the whole contract, which gives to the other party the right of avoiding or rescinding it altogether. But where the supposed condition is distinctly separable, so that much of the contract may be performed on both sides as though the conditions were not there, it will be read as a stipulation, the breach of which only gives an action to the injured party." Such loose paraphrasing seems to turn every divisible contract into as many separate and independent contracts as there are apportioned performances, which, of course, is wholly contrary to our general American doctrine. The fact of the matter is that Lord Mansfield's language in Boone v. Eyre, is unintelligible until it is translated, and yet is so likely to be translated incorrectly that wherever possible it should be avoided. If the language is to be retained in use, it must be modified to provide for conditions concurrent.

[17] Any discussion of conditions implied by law would be incomplete that did not refer to Sergeant Williams' Rules on Conditions contained in his note to Pordage v. Cole, 1 Williams' Saunders, 319 (1669). Those rules were originally published in 1799, but are copied here from volume 1, pp. 550-556, of the 1871 edition of "Notes to Saunders' Reports by the late Sergeant Williams, continued to the present time by the Right Hon. Sir Edward Vaughan Williams."

[18] The theory that implied in law conditions are found solely by construction, which is here accepted by Serjeant Williams, is not to be approved. Construction of the contract there must be and intended conditions must often be enforced, but in many cases conditions are implied by law to meet a situation which everybody knows the parties never contemplated because, if they

a condition precedent; **and so it is where no time is fixed for performance of that which is the consideration of the money or other act.**[19] [Citations.]"

"2. But when a day is appointed for the payment of money &c., and the day is to happen after the thing which is the consideration of the money &c., is to be performed, no action can be maintained for the money, &c., before performance.[20]

"3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration.[21]

"4. But where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred.

had, what should be done in that situation would have been expressly stipulated. To deduce what they *would have* provided if they had thought of the situation—a process which in the law of wills passes perforce as construction—is not nearly as satisfactory in the law of conditions in contracts as to frame a rule which they *ought to have* provided. See 33 Harv. L. Rev. 384, n. 16.

[19] Rule 1 is borrowed from Lord Holt's opinion in Thorp v. Thorp, reported, *ante*, p. 690, but with changes introduced to support Pordage v. Cole, reported, *ante*, p. 689. Those changes are indicated above by the larger type.

In explaining his first rule, Serjeant Williams said: "This seems to be the ground of judgment in this case of Pordage v. Cole, the money being appointed to be paid on a *fixed day*, which might happen *before* the lands were, or could be, conveyed." 1 Notes to Saunders' Reports (1871 ed.), 551. But if Pordage v. Cole were up for decision today it would be held to be a case of concurrent conditions, so it cannot be supported.

Professor Williston by a simple illustration has shown the error of the rule as framed by Serjeant Williams. He says:

"This rule still occasionally finds judicial support [citing Busch v. Stromberg-Carlson Telephone Mfg. Co., 217 Fed. 328; Loud v. Pomona Land & Water Co., 153 U. S. 564, 578], though a simple concrete case would show how far removed it is from modern ideas. If one makes a contract with his tailor to make a suit of clothes and promises to pay on January 1, as no time is fixed for the making of the clothes, the promises are independent, and the tailor may sue for the money though he never has made the clothes and a reasonable time for so doing has elapsed. So said Serjeant Williams, and such may have been the law once, but it is not now." 2 Williston on Contracts, § 821, pp. 1572-1573.

As for the rest of rule 1, it has been said, that "It requires no acuteness to discern that if A covenants to pay B a sum of money on the first of April and B on his part agrees, in consideration of the said stipulation, to convey to A a tract of land on the first of May succeeding, the money was intended to be paid before performance of the consideration." Hosmer, C. J., in Bean v. Atwater, 4 Conn. 3 (1821).

[20] "Serjeant Williams' second rule follows as a necessary corollary from his first." 2 Williston on Contracts, § 821, p. 1573.

[21] Serjeant Williams' Rules 3 and 4 are taken from the brief opinion of Lord Mansfield in Boone v. Eyre, reported, *ante*, p. 698. See footnotes to that case, *ante*.

"5. Where two acts are to be done at the same time, as, where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay A. a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale."

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JAMES WOODS, PLAINTIFF IN ERROR *v.* DAVID DIAL, for the Use of JOHN WILLIAMS, DEFENDANT IN ERROR.

(Supreme Court of Illinois, 1850. 12 Ill. 72.)

Judgment for the plaintiff for $40 and costs. Writ of error brought by defendant.

TRUMBULL, J. This record shows, that Woods agreed with Dial to give him forty dollars in trade, for his improvements on Congress land —Dial to keep possession of the place for one year—that he left the premises in the Spring, and brought suit for forty dollars for which he had judgment. The agreement was by parol, and the evidence of its terms, as shown by the record, is exceedingly meagre. Neither the kind of trade, the time or place for its delivery, the residence of the parties, except that one of them resided on Congress land, nor the business that either of them followed appears in the case. The Circuit Court refused to instruct the jury that proof of a demand was necessary to entitle appellee to recover.

The courts have felt some difficulty in construing contracts of this character, and their decisions are somewhat conflicting.

In this state, we have a statute regulating the place of delivery of personal property in certain cases, when the contract is in writing and payable at a particular time. The statute however has no application to this case, as the contract is not in writing.

When the contract is payable in trade generally, and no time or place is specified for its delivery, it is but reasonable that the promisee, before bringing suit, should notify the promisor what kind of trade he will have, and when he is ready to receive it, or show some excuse why he has not done so.

A contract payable in trade without time or place is payable on demand, or within a reasonable time thereafter, according to the nature of the thing demanded. Upon a contract payable in farm produce, it was held in the case of Lobdell v. Hopkins, 5 Cowen, 516, that a special demand was necessary. The case of Vance v. Bloomer, 20 Wend. 196, is to the same point.

We are disposed to adopt the rule as settled in New York, and hold that a special demand was necessary in this case.

In the absence of all testimony to show where the contract was made, or where the parties resided, the presumption is, that they resided in the county where the suit was brought. In such case the demand should be made at the debtor's residence or place of doing business. If he had no fixed place of residence or doing business, or was a non-resident, the rule would be different and perhaps in some instances the demand might be dispensed with.

The creditor in this case undoubtedly had the right to select the kind of trade he would have, confining himself however to such articles as the parties had in view at the time of making the contract. If the case showed that the debtor was a merchant, there could be no question that the creditor would be confined in his selection to such articles as the debtor usually traded in, and that he would be bound to make the demand and receive the goods at his store, and at the usual prices. 2 Kent's Com., 505; 2 Greenl. Ev. § 609.

The subject matter of the agreement is however the only circumstance that appears in this record, from which to ascertain what the parties meant by trade. In such a case the custom and usage of those who enter into similar contracts ought to govern its construction.

A debtor who wished to discharge such a contract would have the right to call upon his creditor to select the property and name a time and place for its delivery, and upon his failure to do so, it would then be the right of the debtor to select property subject to the same restrictions as the creditor would have been under, had he made the selection, and tender the same at some reasonable time and place in discharge of his obligation.

As the case will have to be reversed, on account of the refusal of the court to instruct the jury that a special demand was necessary, and it is probable that further testimony will be adduced upon another trial, it is unnecessary to pursue this discussion further. Judgment reversed and cause remanded.

*Judgment reversed.*[22]

[22] "Where circumstances, left uncertain by the contract, are of such a nature that one party cannot perform his part of the contract until they are fixed, the other party, insisting on the contract, ought to fix those particulars." Coleridge, J., in Armitage v. Insole, 14 Q. B. 728, 731 (1850).

Compare Cadwell v. Blake, 6 Gray (Mass.) 402 (1856), where the contract for the sale of machinery and fixtures and of a right to manufacture paper by a secret process provided that the sellers should instruct the buyers in the art and mystery of manufacturing the paper and that the buyers should pay for the machinery and fixtures in paper manufactured according to the process, and where the court held that the instruction must precede any recovery for the machinery and fixtures.

See also American Realty Co. v. Curran, 258 Fed. 118 (1919).

## MAKIN *v.* WATKINSON.

(Court of Exchequer, 1870. L. R., 6 Ex., 25.)

Declaration upon a covenant contained in a lease of a mill, and other buildings, with machinery and fixtures, by which the lessors (of whom the defendant was one) covenanted with the plaintiff (the lessee), that they would, at all times, during the demise, at their own expense, maintain and keep the main walls, main timbers, and roofs of the said buildings in good and substantial repair, order, and condition; alleging performance of conditions precedent, and a default in repairing, whereby, &c.

Plea: That the plaintiff gave no notice to the lessors of any want of repair in the main walls, main timbers, and roofs, nor that the same were not in good and substantial order and condition.

Demurrer and joinder.

CHANNELL, B.[23] I am of opinion that this is a good plea. The declaration is good, because it avers the performance of conditions precedent, which would include a request if a request is necessary. The question is, whether the plea denying the giving of notice is a good defence. * * *

Now here repairs are to be done to the exterior of the premises, as to which it is just possible that the lessor might by observation acquire a knowledge of their necessity. But the main timbers of the building, which must be within its carcase, and the roofs are to be kept in repair; and of the repairs required for these he could have no knowledge without notice. He could not enter to see the condition of those parts, even though, independently of his obligation under the covenant, it might be of great consequence to him to be acquainted with it. Here, therefore, by the rule of common sense, which is supported by the case of Vyse v. Wakefield, we ought to import into the covenant the condition that he shall have notice of the want of repair before he can be called on under the covenant to make it good.

BRAMWELL, B. I am also of opinion that the plea is good. To hold it to be so, we must hold the defendant's covenant to be a covenant to repair on notice. I have the strongest objection to interpolate words into a contract, and think we ought never to do so unless there is some cogent and almost irresistible reason for it, arising from the absurdity of the contract if it is read without them. Does such a reason, then, exist, here? I think it does. I think that we are irrisistibly driven to say that the parties cannot have intended so preposterous a covenant as that the defendant should keep in repair that of which he has no means of ascertaining the condition. The lessee is in possession; he can say to the lessor; "You shall not come on the premises without lawful cause;" and to come for the purpose of looking into the state of the premises would not be a lawful cause. If the lessor comes to repair when no re-

[23] Parts of the opinions are omitted.

pair is needed, he will be a trespasser; if he does not come, he will, according to the plaintiff's contention, be liable to an action on the covenant if repair is needed, and will be liable, not only to the cost of repair, but to consequential damage for injury to chattels caused by want of the repairs he had no opportunity of effecting. This is so preposterous that we ought to hold that the parties intended the covenant to be read with the qualification suggested. * * *

If we look to the reason of the rule, it is that when a thing is in the knowledge of the plaintiff, but cannot be in the knowledge of the defendant, but the defendant can only guess or speculate about the matter, then notice is necessary.

To have inserted a provision in the covenant, requiring notice, would certainly have been very reasonable. When it is a question of putting it into the covenant by implication, one must needs, as in all such cases, have great doubt; but upon the whole, * * * I think we are warranted in so reading the covenant.

MARTIN, B. I am of opinion that this plea is bad. I think that when we are construing a contract we ought to adhere to its words, and not insert words not to be found in it; otherwise it is impossible for the parties to know what are the obligations they have bound themselves to, or for counsel to advise with certainty. Now the declaration states a covenant by the defendant to keep in good and substantial repair, and that the defendant did not keep in repair. In answer to this the plea alleges that there was no notice of want of repair. I think this plea bad, and for the simplest reason, that no such stipulation is contained in the covenant, nor any thing from which such a stipulation can be inferred.

I cannot perceive that the covenant as it stands is so unreasonable as alleged. Moreover, there are in leases covenants to repair generally, and covenants to repair on notice; but if this covenant is construed in the way proposed, it is idle to require notice in terms; the one covenant will do as well as the other.

The authorities appear to me directly against the plea. * * * Lastly, Rolfe, B., [in Vyse v. Wakefield, 6 M. & W. 442] says: "I own that when the case was first opened my impression was in favor of the plaintiff; and for this reason, that when a party enters into a contract he is bound to perform it, whether reasonable or not. Where the law casts an obligation upon him, it says that it shall be reasonable; but that is not so when a party contracts to do a particular act, for then it is his own fault for entering into such a contract." I entirely agree with the rule of law so stated, and therefore think we are not at liberty to import any such stipulation into this covenant as the defendant claims. *Judgment for the defendant.*[24]

[24] "The law implies that the parties must have agreed or intended that notice should be given by the party entitled to the benefit of a condition, of every

## HAYDEN *v.* BRADLEY.

(Supreme Judicial Court of Massachusetts, 1856. 6 Gray 425, 66 Am. Dec. 421.)

Action of contract to recover damages for the defendant's failure to keep in repair the buildings included in a lease from the defendant to the plaintiff of a hotel and farm in Southwick, by which the defendant covenanted to "put the buildings and fences on, around, and about the premises in a good condition, and so to maintain them for and during the term of" the lease, and the plaintiff covenanted "that the lessor

fact necessary for the other party to know, to enable him to perform the condition, and of every material circumstance connected with it, which is within his peculiar and personal knowledge, or which depends on his choice, so that the other party has no means, or no reasonable means, to arrive at that knowledge except from the party himself. But where the condition depends on any act of a third person, no notice is implied, and the party who is bound to perform is bound to take notice of such act. In the class of cases where the performance of the condition depends on any thing to be done by the party entitled to the performance, to or with any third persons, who is distinctly named or designated, or by any such third person to or with him, though it is apparent that what is done is more properly and particularly within the knowledge of the plaintiff, yet, because the defendant may obtain knowledge of it otherwise than from him, notice is not required to be given nor averred; for the party who is bound must take notice of it at his peril." Bell, J., in Whitton v. Whitton, 38 N. H. 127, 137-138 (1859). See Lord Abinger, C. B., in Vyse v. Wakefield, 6 M. & W. 442, 453 (1840), quoted in Hayden v. Bradley, *post*.

In Hugall v. McLean, 53 L. T. R. 94 (1885), a receiver as landlord agreed with the tenant of a house that the receiver would execute the repairs to the drains and sewers, "which are to be kept in good tenantable repair and condition by the receiver during the tenancy." On June 18, the drains which, unknown to tenant and to landlord, though the jury found that the receiver "had the means of knowing," were in a defective condition before, ceased to function properly and the basement of the tenant's house was flooded with sewage in consequence of the defective condition of the drains. The tenant thereupon had a sanitary engineer put the drains in proper state of repair and on September 22 sent the landlord his first notice of the happening in the form of a complaint as to the expense to which the tenant had been put and of a question as to whether the bill for repairs should be sent to him. The defendant was given a judgment on the apparent theory that the tenant, who had no knowledge or means of knowledge of the defective state of repair of the drains could not recover against the landlord, who had no knowledge but had means of knowledge, in the absence of a notice of the need of repair. And Brett, M. R., went farther by saying: "I doubt whether, if the landlord had notice *aliunde* he would be liable." Professor Williston has properly referred to the case as one where the rule of Makin v. Watkinson "seems to have been grossly misapplied" (2 Williston on Contracts, § 894); but nevertheless the actual decision perhaps may be supported on the ground that a tenant has no right to make repairs and charge them up to the landlord, in the absence of an emergency which will not permit of the delay, without first notifying the landlord of what has actually happened and giving him a reasonable time to make his own repairs. See 1 Tiffany, Landlord and Tenant, p. 587.

may enter to view and make improvements, and to expel the lessee, if he shall fail to pay the rent, or make or suffer any strip or waste thereof."

At the trial in the Court of Common Pleas, the defendant, who resided in Springfield, contended that he was not liable, under his covenant, for damages arising from want of repair, after the plaintiff had entered into the occupation of the premises under the lease, and before notice to the defendant of such want of repair. But Mellen, C. J., instructed the jury, that "for defects in the buildings, occurring after the commencement of the lease, the plaintiff was entitled to recover damages for such want of repair from the time such defects occurred; it being the duty of the defendant, under this lease, to take notice of such defects or want of repair, and prevent damage to the plaintiff, by repairing the same, without notice from the plaintiff." The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

METCALF, J. The established rule of law, which the court are now to apply, is rightly stated by Lord Abinger in Vyse v. Wakefield, 6 M. & W. 452, 453. It is this: "Where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him." The case at bar comes within the first branch of this rule. The defendant stipulated to maintain the buildings in good condition during the term for which he demised them to the plaintiff, on the happening of a specific event, to wit, that they should not be in good condition, but should need repairs. He might have known, or made himself acquainted with the fact, that they needed repairs. And he did not stipulate for notice. See Smith v. Goffe, 2 Ld. Raym. 1126, and 11 Mod. 48; 1 Saund. Pl. & Ev. (2d ed.) 214; System of Pleading, 126, 127; Laws Pl. in Assump. (Amer. ed.) 176 *et seq.*

But if the defendant's agreement to maintain the buildings in good condition were not, of itself, sufficient to decide the question raised in this case, yet there is another clause in the lease which is decisive, namely, the reservation, by the defendant, of a right of entry upon the premises, "to view and make improvements." He, therefore, having provided for himself the means of ascertaining the contingency upon which he was to make repairs, was not entitled to notice from the plaintiff that the contingency had happened. Keys v. Powell, 2 A. K. Marsh. 254.

*Exceptions overruled.*[25]

[25] In Melles & Co. v. Holme, [1918] 2 K. B. 100, it is held that no express notice from the tenant is required where his lease is of only a part of the premises, where the landlord's covenant is to make outside repairs, and where the part to be repaired remains under his control or in his possession.

## SEMMES *v.* HARTFORD INSURANCE COMPANY.

(Supreme Court of the United States, 1871. 13 Wall. 158, 20 L. Ed. 490.)

Semmes sued the City Fire Insurance Company, of Hartford, in the court below, on the 31st of October, 1866, upon a policy of insurance, for a loss which occurred on the 5th day of January, 1860. The policy as declared on showed as a condition of the contract, that payment of losses should be made in sixty days after the loss should have been ascertained and proved.

The company pleaded that by the policy itself it was expressly provided that no suit for the recovery of any claim upon the same should be sustainable in any court unless such suit should be commenced within the term of twelve months next after any loss or damage should occur; and that in case any such suit should be commenced after the expiration of twelve months next after such loss or damage should have occurred, the lapse of time should be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced. And that the plaintiff did not commence this action against the defendants within the said period of twelve months next after the loss occurred.

To this plea there were replications setting up, among other things, that the late civil war prevented the bringing of the suit within the twelve months provided in the condition, the plaintiff being a resident and citizen of the State of Mississippi and the defendant of Connecticut during all that time.

The plea was held by the court below to present a good bar to the action, notwithstanding the effect of the war on the rights of parties.

That court, in arriving at the conclusion, held, first, that the condition in the contract, limiting the time within which suit could be brought, was like the Statute of Limitation, susceptible of such enlargement, in point of time, as was necessary to accommodate itself to the precise number of days during which the plaintiff was prevented from bringing suit by the existence of the war. And ascertaining this by a reference to certain public acts of the political departments of the government, to which it referred, found that there was, between the time at which it fixed the commencement of the war and the date of the plaintiff's loss, a certain number of days, which, added to the time between the close of the war and the commencement of the action, amounted to more than the twelve months allowed by the condition of the contract.

Judgment being given accordingly in favor of the company the plaintiff brought the case here.

MILLER, J. It is not necessary, in the view which we take of the matter, to inquire whether the Circuit Court was correct in the principle by which it fixed the date, either of the commencement or cessation of

the disability to sue growing out of the events of the war. For we are of opinion that the period of twelve months which the contract allowed the plaintiff for bringing his suit, does not open and expand itself so as to receive within it three or four years of legal disability created by the war, and then close together at each end of that period so as to complete itself, as though the war had never occurred.

It is true that, in regard to the limitation imposed by statute, this court has held that the time may be so computed, but there the law imposes the limitation, and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other. If the law did not, by a necessary implication, take this time out of that prescribed by the statute, one of two things would happen: either the plaintiff would lose his right of suit, by a judicial construction of law which deprived him of the right to sue yet permitted the statute to run until it became a complete bar, or else, holding the statute under the circumstances to be no bar, the defendant would be left, after the war was over, without the protection of any limitation whatever. It was, therefore, necessary to adopt the time provided by the statute as limiting the right to sue, and deduct from that time the period of disability.

Such is not the case as regards this contract. The defendant has made its own special and hard provision on that subject. It is not said, as in a statute, that a plaintiff should have twelve months from the time his cause of action accrued to commence suit, but twelve months from the time of loss; yet by another condition the loss is not payable until sixty days after it shall have been ascertained and proved. The condition is that no suit or action shall be sustainable unless commenced within the time of twelve months next after the loss shall occur, and in case such action shall be commenced after the expiration of twelve months next after such loss, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim.[26] Now, this contract relates to the twelve months next succeeding the occurrence of the loss and the court has no right, as in the case of a statute, to construe

[26] Such a contract provision, fixing a period shorter than that fixed by the legislature for the bringing of an action, will be held invalid, in any event, by some courts if the period fixed is unreasonably short. Dechter v. National Council of Knights & Ladies of Security, 130 Minn. 329 (1915). One fixing a period of six months was held invalid in Miller v. State Ins. Co., 54 Neb. 121 (1898). One fixing a period of a year was held invalid in Union Central Life Ins. Co. v. Spenks, 119 Ky. 261 (1904).

"The statutes of this state provide in what time all actions may be brought, and a contract which provides that no action shall be brought thereon, or for a breach thereof, unless within a time therein specified, which is different from the time which the statute fixes for bringing an action on such contract, or for a breach thereof, is against public policy, and will not be enforced by the courts of this state." Ragan, C., in Miller v. State Ins. Co. of Des Moines, 54 Neb. 121, 122-123 (1898).

it into a number of days equal to twelve months, to be made up of the days in a period of five years in which the plaintiff could lawfully have commenced his suit. So also if the plaintiff shows any reason which in law rebuts the presumption, which, on the failure to sue within twelve months, is, by the contract, made conclusive against the validity of the claim, that presumption is not revived again by the contract. It would seem that when once rebutted fully nothing but a presumption of law or presumption of fact could again revive it. There is nothing in the contract which does it, and we know of no such presumptions of law. Nor does the same evil consequence follow from removing absolutely the bar of the contract that would from removing absolutely the bar of the statute, for when the bar of the contract is removed there still remains the bar of the statute, and though the plaintiff may show by his disability to sue a sufficient answer to the twelve months provided by the contract, he must still bring his suit within the reasonable time fixed by the legislative authority—that is, by the statute of limitations.

We have no doubt that the disability to sue imposed on the plaintiff by the war relieves him from the consequences of failing to bring suit within twelve months after the loss, because it rendered a compliance with that condition impossible, and removes the presumption which that contract says shall be conclusive against the validity of the plaintiff's claim. That part of the contract, therefore, presents no bar to the plaintiff's right to recover.

As the Circuit Court founded its judgment on the proposition that it did, that judgment must be reversed and the case remanded for a new trial.[87]

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## GRAY *v.* GARDNER.

(Supreme Judicial Court of Massachusetts, 1821. 17 Mass. 188.)

Assumpsit on a written promise to pay the plaintiff $5,198.87, with the following condition annexed—viz., "On the condition that if a greater quantity of sperm oil should arrive in whaling vessels at Nantucket and New Bedford, on or between the first day of April and the first day of October of the present year, both inclusive, than arrived at said places, in whaling vessels, on or within the same term of time the last year, then this obligation to be void." Dated April 14th, 1819.

The consideration of the promise was a quantity of oil sold by the plaintiff to the defendants. On the same day another note uncondi-

[87] See Earnshaw v. Sun Mutual Aid Soc., 68 Md. 465 (1888), where an injunction prevented suit being brought within the period fixed by the contract. Compare Elliot Nat. Bk. v. Beal, 141 Mass. 566 (1886).

Such conditions subsequent occur also in indemnity bonds. Heimer v. Title Guaranty Surety Co., 55 Wash. 558 (1909).

tional had been given by the defendants, for the value of the oil estimated at 60 cents per gallon; and the note in suit was given to secure the residue of the price estimated at 85 cents, to depend on the contingency mentioned in the said condition.

At the trial before the chief justice the case depended upon the question whether a certain vessel, called the Lady Adams, with a cargo of oil, arrived at Nantucket on October 1st, 1819, about which fact the evidence was contradictory. The judge ruled that the burden of proving the arrival within the time was on the defendants, and further that, although the vessel might have, within the time, gotten within the space which might be called Nantucket Roads, yet it was necessary that she should have come to anchor, or have been moored, somewhere within that space before the hour of twelve following the first day of October in order to have arrived within the meaning of the contract.

The opinion of the chief justice on both these points was objected to by the defendants, and the questions were saved. If it was wrong on either point, a new trial was to be had, otherwise judgment was to be rendered on the verdict, which was found for the plaintiff.

PARKER, C. J. The very words of the contract show that there was a promise to pay, which was to be defeated by the happening of an event—viz., the arrival of a certain quantity of oil at the specified places in a given time. It is like a bond with a condition; if the obligor would avoid the bond, he must show performance of the condition. The defendants in this case promise to pay a certain sum of money on condition that the promise shall be void on the happening of an event. It is plain that the burden of proof is upon them, and if they fail to show that the event has happened, the promise remains good.

The other point is equally clear for the plaintiff. Oil is to arrive at a given place before 12 o'clock at night. A vessel with oil heaves in sight, but she does not come to anchor before the hour is gone. In no sense can the oil be said to have arrived. The vessel is coming until she drops anchor or is moored. She may sink or take fire, and never arrive, however near she may be to her port. It is so in contracts of insurance, and the same reason applies to a case of this sort. Both parties put themselves upon a nice point in this contract; it was a kind of wager as to the quantity of oil which should arrive at the ports mentioned before a certain period. They must be held strictly to their contract. there being no equity to interfere with the terms of it.

*Judgment on the verdict.*[28]

[28] It is important to distinguish between contracts which contain conditions subsequent in form only, being precedent in fact, and those which contain genuine conditions subsequent. In doing so it is well to consider two assertions in Harriman on Contracts, 2 ed., § 205, namely: (1) "If A covenants to pay B $100 per annum for ten years, provided B does not use tobacco during that time. B's use of tobacco is a condition subsequent entitling A to be discharged from his obligation to pay the annuity;" and (2) "If A sells a cow to

## BEHN *v.* BURNESS.

(Court of Exchequer Chamber, 1863. 3 Best & Smith 751.)

The defendant brought error on the judgment for the plaintiff entered in the Queen's Bench.

WILLIAMS, J.[29] The question in this case is whether the statement in the charter-party, that the ship is "now in the port of Amsterdam," is a "representation" or a "warranty," using the latter word as synonymous with "condition;" in which sense it has been for many years understood with respect to policies of insurance and charter-parties.

It may be expedient to commence the consideration of this question by some examination into the nature of representations. Properly speaking, a representation is a statement, or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract; and, consequently, the contract is not broken though the representation proves to be untrue; nor (with the exception of the case of policies of insurance, at all events marine policies, which stand on a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue. See Elliot v. Von Glehn, 13 Q. B. 632; Wheelton v. Hardisty, 8 E. & B. 232, 285.

If this be so, it is difficult to understand the distinction which is to be found in some of the treatises, and is in some degree perhaps sanctioned by judicial authority (see Barker, appellant, Windle, respondent, 6 E. & B. 675, 680), that a representation, if it differs from the truth to an unreasonable extent, may affect the validity of the contract. Where, indeed, the misrepresentation is so gross as to amount to sufficient evidence of fraud, it is obvious that the contract would on that ground be voidable.

The representations are not usually contained in the written instrument of contract, yet they sometimes are. But it is plain that their insertion therein cannot alter their nature. A question, however, may arise, whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction which the court, and not the jury

B as a Jersey cow for $100 and agrees that B may return the cow if she is not a Jersey, the fact that the cow is not a Jersey is a condition subsequent, entitling B to rescind the contract." See note to Costigan's Performance of Contracts, pp. 14-18.

[29] Parts of the opinion are omitted.

must determine. If the court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract, and not a mere representation, the often-discussed question may, of course, be raised, whether this part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages. In the construction of charter-parties, this question has often been raised, with reference to stipulations that some future thing shall be done or shall happen, and has given rise to many nice distinctions. Thus a statement that a vessel is to sail, or be ready to receive a cargo, on or before a given day, has been held to be a condition (see Glaholm v. Hays, 2 M. & G. 257; Oliver v. Fielden, 4 Exch. 135; Croockewit v. Fletcher, 1 H. & N. 893; Seeger v. Duthie, 8 C. B. N. S. 45), while a stipulation that she shall sail with all convenient speed or within a reasonable time, has been held to be only an agreement. See Tarrabochia v. Hickie, 1 H. & N. 183; Dimech v. Cortlett, 12 Moo. P. C. C. 199; Clipsham v. Vertue, 5 Q. B. 265. But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty—that is to say, a condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract in toto, and so be relieved from performing his part of it, provided it has not been partially executed in his favor. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word—viz., a stipulation by way of agreement, for the breach of which a compensation must be sought in damages. See Ellen v. Topp, 6 Exch. 424-441; Graves v. Legg, 9 Exch. 709-716[80];

[80] In the passage in the text by "warranty in the narrower sense of the word" is meant not a warranty that is a condition but a warranty as the English have it in the law of sales of personal property, namely, "An agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated." Sales of Goods Act, 1893 (56 & 57 Vict.), c. 71, sec. 62. Under the American Uniform Sales Act, and in general in the United States, the right of rescission exists. See 3 Williston on Contracts, § 1462.

In Graves v. Legg, *supra*, the court had to pass on a contract for the sale of wools to arrive by vessels, the names of the vessels to be declared as soon as the wools were shipped. In leading up to the statement that if the condition was originally precedent it remained so for lack of sufficient benefit to the buyer, Parke, B., said, that when it appears that the consideration has been sufficiently executed in part "it is no longer competent for the defendant to insist upon the nonperformance of that which was originally a condition prece-

adopting the observations of Williams on the case of Boone v. Eyre, 1 H. Bl. 273, note *a*, in 1 Saund. 320 d, 6th ed.; Elliott v. Von Glehn, 13 Q. B. 632. * * *

In the present case, as the defendant has not received any benefit or advantage under the contract, but has wholly repudiated it, the question is simply whether, in the true construction of the charter-party, the court ought to infer that the statement as to the ship's being at that date in the port of Amsterdam, was meant to be a substantive part of the contract, or a representation collateral to it. And this question appears to be properly raised by the averment in the plea, that time, and the situation of the vessel, were essential and material parts of the contract. * * *

It is plain that the court must be influenced in the construction, not only by the language of the instrument, but also by the circumstances under which, and the purposes for which, the charter-party was entered into. For instance, if it was made in the time of war, the national character of the vessel is of such importance, that a statement of it in the charter-party might properly be regarded as part of the shipowner's contract, and so amounting to a warranty; whereas, the very same statement in the time of peace, being wholly unimportant, might well be construed to be a mere representation. So if it were shown that the charter-party was made for a purpose such that, unless the vessel began her voyage from the port of loading, with her cargo on board, by a certain time, it was manifest that the object of the charter-party would in all probability be frustrated, the court might properly be led by this circumstance to conclude that a statement as to the locality of the ship, coupled with a stipulation that she should sail with all convenient speed, was a warranty of her then locality. But we feel a difficulty in acceding to the suggestion which appears to have been, to some extent, sanctioned by high authority (see Dimech v. Corlett, 12 Moo. P. C. C. 199), that a statement of this kind in a charter-party, which may be regarded as a mere representation if the object of the charter-party be still practicable, may be construed as a warranty if that object turns out to be frustrated; because the instrument, it should seem, ought to be construed with reference to the intention of the parties at the time it was made, irrespective of the events which may afterward occur. It is true that in some of the cases, where the question has been whether a stipulation in a charter-party amounted to a condition, the court decided that question in the negative, and in so doing took occasion to suggest that neglect or delay on the part of the shipowner to execute his part of the contract, might be a breach of such an essential stipulation on his part as to justify the charterer in treating the contract as brought to an end thereby, and in refusing on that account to perform

dent; and this is more correctly expressed than to say it was not a condition precedent at all."

See Palmer v. Meriden Brittania Co., 188 Ill. 508 (1901).

his part of it, and further suggested that, in deciding whether the breach on the shipowner's part was of such an essential stipulation as that described, the court might advert to the fact whether such breach had frustrated the whole object which the charterer had in view. See Freeman v. Taylor, 8 Bing. 124; Tarrabochia v. Hickie, 1 H. & N. 183; Dimech v. Corlett, 12 Moo. P. C. C. 199, 224, 227. But the court did not, we apprehend, mean to intimate that the frustration of the voyage would convert a stipulation into a condition, if it were not originally intended to be one.

The question on the present charter-party is confined to the statement of a definite fact—the place of the ship at the date of the contract. Now the place of the ship at the date of the contract, where the ship is in foreign parts and is chartered to come to England, may be the only datum on which the charterer can found his calculations of the time of the ship's arriving at the port of loading. A statement is more or less important in proportion as the object of the contract more or less depends upon it. For most charters, considering winds, markets, and dependent contracts, the time of a ship's arrival to load is an essential fact, for the interest of the charterer. In the ordinary course of charters in general it would be so; the evidence for the defendant shows it to be actually so in this case. Then, if the statement of the place of the ship is a substantive part of the contract, it seems to us that we ought to hold it to be a condition upon the principles above explained, unless we can find in the contract itself or the surrounding circumstances reason for thinking that the parties did not so intend. If it was a condition and not performed, it follows that the obligation of the charterer dependent thereon, ceased at his option, and considerations either of the damage to him or of proximity to performance on the part of the shipowner are irrelevant. So was the decision of Glaholm v. Hays, 2 M. & G. 257, where the stipulation in a charter of a ship to load at Trieste was that she should sail from England on or before February 4th, and the non-performance of this condition released the charterer, notwithstanding the reasons alleged in order to justify the non-performance.[31] So in Ollive v. Booker, 1 Exch. 416, the statement in the charter

[31] In Glaholm v. Hays, cited *supra*, Tindal, C. J., said:

"The very words themselves, 'to sail on or before a given day,' do, by common usage, import the same as the words 'conditioned to sail,' or 'warranted to sail on or before such a day;' and, undoubtedly, if in the middle of a common bought and sold note, for a cargo of corn, or any other goods were found the words, 'to be delivered on or before such a day,' they would be held to amount to a condition; and the purchaser would not be bound to accept the cargo, if not ready for delivery by the day appointed.

"And looking at the subject-matter of the contract, without regarding the precise words, we think that construing the words as a condition precedent, will carry into effect the intention of the parties, with more certainty than holding them to be matter of contract only, and merely the ground of an action for damages.

"Both parties were aware that the whole success of a mercantile adventure

of a ship which was to load at Marseilles was that she was "now at sea, having sailed three weeks ago," and it was held to be a condition for the reasons above stated.[32] And we would note that the marginal abstract of this case states the stipulation to have been "having sailed three weeks ago or thereabouts." If the statement had really been so indefinite, it may be that the court would have come to a different conclusion.

We think these cases well decided, and that they govern the present case. We think that the decision of Dimech v. Corlett, 12 Moo. P. C. C. 199, does not conflict with them, because it is immersed in the specific facts there set out, so as to be a precedent only for cases with very analogous specific facts. The statement in that charter, that the ship was "now at anchor in this port" (Malta), did not avail to release the charterer, because the ship was in the port in the dry dock; and although the statement of the fact that she was at anchor in the port was definite, and indicated that she was ready for sea, while in truth she was in a dry dock being built, and was not completed for a month, yet, as the defendant was at Malta, and was presumed to have known the state of the ship, and also to have known of the delay, and did not insist that the charter-party was broken, but allowed the ship to sail from Malta for Alexandria without objection, his defence on this point failed.

The court below in a manner referred the present case to a court of error to say whether the decision should be governed by Ollive v. Booker, 1 Exch. 416, or Dimech v. Corlett. We are of opinion, for the reasons assigned, that the decision of Ollive v. Booker was sound, and that it governs our decision here; and we are further of opinion that, in so holding, we do not at all conflict with the decision in Dimech v. Corlett, as above explained.

On these grounds we think that the judgment of the Queen's Bench should be reversed.

*Judgment reversed.*

does, in ordinary cases, depend upon the commencement of the voyage by a given time. The nature of the commodity to be imported, the state of the foreign and home market at the time the contract of charter-party is made, and the various other calculations which enter into commercial speculations, all combine to show that despatch and certainty are of the very first importance to their success; and certainly nothing will so effectually insure both despatch and certainty as the knowledge that the obligation of the contract itself shall be made to depend upon the actual performance of the stipulation which relates to them."

[32] In Ollive v. Booker, *supra*, Baron Parke said:

"It appears to me that it [the statement in the charter-party] is a warranty, and not a representation that the vessel had sailed three weeks. It is, therefore, a condition precedent. The rule depends upon each particular contract, and here time was of the essence of the contract."

## THE GLOBE MUTUAL LIFE INSURANCE ASSOCIATION OF CHICAGO *v.* DORA WAGNER.

(Supreme Court of Illinois, 1900. 188 Ill. 133, 58 N. E. 970, 52 L. R. A. 649, 80 Am. St. Rep. 169.)

Action by the appellee upon a policy of insurance on the life of her son, Richard Wagner. The plaintiff recovered judgment and the appellant appealed to the Appellate Court, which affirmed the judgment. Defendant then appealed to the Supreme Court.

WILKIN, J. The chief ground urged by appellant for a reversal of the judgment of the Appellate Court is the falsity of the answer to one of the questions appearing in the medical examination of the insured. On the back of the application made by appellee, in what purports to be the medical examination of the insured, this question and answer appear: "Q.—How many brothers dead? Ans.—None." The medical examination is certified to by the medical examiner, as follows:

"I certify that I have, this 7th day of October, 1895, made a personal examination of the above named person, (Richard Wagner,) and that the above answers are in my own handwriting, and that the signature of the applicant or person examined was written in my presence.

"M. J. MCKENNA, M.D."

Preceding the medical examiner's certificate, and immediately at the end of the series of questions and answers referred to in the certificate, of which the quoted question is one, appears the following language, to which is affixed the signature of Richard Wagner, the insured: "I hereby declare and warrant that the answers to the above questions, and the statements made in the applications on the other side hereof, are true, and were written by me or by my proper agent, and that said answers and statements, together with this warranty, shall form the basis of any contract of insurance that may be entered into between me and the Globe Mutual Insurance Association, and that if a contract of insurance is issued it shall not be binding on the company unless, upon its date and delivery, I shall be in sound health." On the front side of the sheet, on the back of which is the medical examination and statement signed, as above, by the insured, is the application by appellee for the policy, and over her signature appears the following: "I hereby make application for the policy described above, and as an inducement to the association to issue a policy, and as a consideration therefor, make the agreement as to agency, and all other agreements, and warranties contained in the medical examination, as fully as if I had signed the same."

It appears from the evidence that a brother of the insured died in London, England, more than four years prior to the date of the application for insurance in this case, but there is no evidence tending to show that the insured ever knew of his brother's death. Appellant as-

serts, however, that, whether he knew of it or not, the statement that none of his brothers were dead is a warranty, and being untrue, avoids the policy. Appellee contends that the statement, though false, is not a warranty, but a mere representation, which, unless material, would not avoid the policy.

In the absence of explicit, unequivocal stipulations requiring such an interpretation, it should not be inferred that the insured or the appellee took a life policy with the distinct understanding that it should be void if any statements made in the medical examination should be false, whether the insured was conscious of the falsity thereof or not. (Moulor v. American Life Ins. Co., 111 U. S. 335.) Whether or not the deceased knew of the death of his brother at the time of the application for insurance was a question for the jury, and no evidence of such knowledge appears in the record. To hold that, as a precedent to any binding contract, he should guarantee absolutely that none of his brothers were dead would be unreasonable, in the absence of a more explicit stipulation than here appears. It not infrequently happens that a man loses trace of all or a part of his relations, and to hold him to absolutely guarantee that they were living, in order that he might obtain insurance, would sometimes be to require an impossibility, and would be almost absurd.

What is said in Moulor v. American Life Ins. Co., *supra,* is peculiarly applicable to the case at bar. In that case the insured made a false statement as to his having had certain diseases, and "warranted that the above are fair and true answers." The court say: "The entire argument in behalf of the company proceeds upon a too literal interpretation of those clauses in the policy and application which declare the contract null and void if the answers of the insured to the questions propounded to him were in any respect untrue. What was meant by 'true' and 'untrue' answers? In one sense, that only is true which is conformable to the actual state of things. In that sense a statement is untrue which does not express things exactly as they are, but in another and broader sense, the word 'true' is often used as a synonym of honest, sincere, not fraudulent. Looking at all the clauses in the application, in connection with the policy, it is reasonably clear—certainly the contrary cannot be confidently asserted —that what the company required of the applicant as a condition precedent to any binding contract was, that he would observe the utmost good faith towards it, and make full, direct and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation or concealment of facts with which the company ought to be made acquainted, and that by so doing, and only by so doing, would he be deemed to have made fair and true answers." In that case the untrue statements were held to be representations, and not warranties, and we think, on the same reasoning, the answer here in question should be so held, and in the absence of

proof by the company of fraud or intentional misstatement on the part of the insured the policy was not rendered invalid merely because the answer proved to be false.

We are satisfied the court below committed no reversible error, and the judgment of that court will be affirmed.

*Judgment affirmed.*[33]

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## FRANKLIN STATE BANK *v.* MARYLAND CASUALTY CO. SAME *v.* UNITED STATES FIDELITY & GUARANTY CO.

**(United States Circuit Court of Appeals, Fifth Circuit, 1919. 256 Fed. 356, 167 C. C. A. 526.)**

GRUBB, J.[34] These cases arise, so far as the alleged loss is concerned, upon identical facts. They differ only as to the terms of the policies, which are the bases of the suits. They are both actions on policies, providing banks with indemnity protection against losses of money or securities, through burglary and robbery. The facts being identical, the cases may be best treated in one opinion. * * *

The plaintiff was a state bank, engaged in business at Winnsboro, La. Evidence was introduced by plaintiff tending to show that on the night of February 12, 1917, about 9 o'clock, while the vice president of the bank, Heatherwick, and a citizen, Judge Holstein, were in the

[33] "Policies are drawn by the legal advisers of the company, who study with care the decisions of the courts, and, with those in mind, attempt to limit as narrowly as possible the scope of the insurance. It is only a fair rule, therefore, which the courts have adopted to resolve any doubt or ambiguity in favor of the insured and against the insurer." Taft, J., in Manufacturers' Accident Indemnity Co. v. Dorgan, 58 Fed. 945, 956 (1893). See also Wright v. Fraternities' Health & Accident Assoc., 107 Me. 418 (1910).

"The practical operation of such literal warranties is so often harsh and unfair that courts require their existence to be evidenced clearly and unequivocally, and are not inclined to allow it to rest upon a mere verbal interpretation, where a reasonable construction of the contract as a whole will authorize a different meaning." Gray, J., in McClain v. Provident, etc., Co., 110 Fed. 80, 84 (1901).

"Furthermore, 'freedom of contract' rarely exists in these cases. Life insurance contracts are contracts of 'adhesion.' The contract is drawn up by the insurer and the insured, who merely 'adheres' to it, has little choice as to its terms." Edwin W. Patterson, The Delivery of a Life Insurance Policy, 33 H. L. R. 198, 222.

By statutes in a number of states no misrepresentation or warranty will defeat recovery on an insurance policy unless the misrepresentation is made with actual intent to deceive or the matter misrepresented is material to the risk. See White v. Provident, etc., Soc., 163 Mass. 108 (1895). Such statutes have been held to be a proper exercise of legislative power. Penn Mut. Life Ins. Co. v. Mechanics', etc., Co., 72 Fed. 413 (1896). But due weight should be given to the opinion of the company as to what is material. See Continental Casualty Co. v. Lindsay, 111 Va. 389 (1910).

[34] Parts of the opinion are omitted.

bank for the purpose, as claimed, of agreeing on and settling the amount of an overdraft in Judge Holstein's account, a man with a flash light in one hand and a pistol in the other appeared and ordered Heatherwick to give him the bank's money, and then forced them both into the bank vault, which had been opened to get the ledger showing Holstein's account with the bank. The man himself, standing outside at the door of the vault, threw Heatherwick a flour sack, and, continuing to point the gun at him, forced him to open the inner safe, which was not locked and which was supposed to contain the money, and to put the money in the sack. Heatherwick testified that he filled the sack with currency and asked the robber if he wanted the silver. The robber shook his head in reply, and Heatherwick then threw the sack to the robber, who grabbed it and quickly slammed the outside door of the vault, and, by turning the combination, locked Heatherwick and Holstein on the inside of the vault, and disappeared with the sack, containing about $44,000 in currency. Heatherwick and Holstein got out of the vault by the use of a screwdriver and iron bar, left in it, as claimed, to meet such an emergency. * * *

The district judge directed a verdict in the case in which the Maryland Casualty Company was defendant, upon the ground that the policy did not cover the loss; the undisputed evidence showing that the money was taken from an open safe. In the case in which the United States Fidelity & Guaranty Company was defendant, the verdict was directed because the policy issued by it was held to include losses from daylight robberies only. If the verdicts were properly directed, for a reason different from that assigned by the district judge, the result would be an affirmance of the judgments entered on them. * * *

Our conclusion is that the policies of the defendant in error, Maryland Casualty Company, properly construed, cover losses from safes only when the safe is closed and locked, and entrance is effected either by "cracking" the safe or by forcibly compelling an officer or office employee to unlock and open it. Access to the safe was not obtained by either method in this case, and the district judge rightly directed a verdict, on this ground, for the defendant the Maryland Casualty Company.

In the case of the United States Fidelity & Guaranty Company, defendant, the district judge directed a verdict for the defendant, holding that its policy covered daylight robberies only; the robbery, in this case, having occurred at night. We find it unnecessary to pass either upon this question, or upon the question of the scope of the policy, as to the inclusion in it of losses from unlocked safes. The language of the policy is different from those of the Maryland Casualty Company in the latter respect. We think the direction of the verdict was proper upon another ground. The policy contained the statement, in its schedule, that the insured's safe contained an outer burglar-proof

door, which was locked by both a combination and time lock. It also contained this promissory warranty:

"All combination and time locks will be continued to be regularly used during the currency of the policy."

It also recited that the consideration for the policy was the premium paid, and—

"the statements in the schedule hereinafter contained, which statements the assured makes on the acceptance of this policy, and warrants to be true."

It also contained a provision that, "in case of error of description of equipment or failure to maintain watchman's service," the policy should not be avoided, but the indemnity, in case of loss, reduced to correspond to what the premium paid would purchase, in view of the increased hazard.

The district judge found that the stipulation with reference to the character of locks was a matter of description of equipment only, and not a warranty, and a breach of it would not totally avoid the policy. The first extract from the policy might bear that interpretation. We do not think the statement that "combination and time locks will be continued to be regularly used during the currency of the policy" admits of being construed as a description of equipment. It was a warranty of an existing fact as to the use when the policy was issued, and promissory as to what was to be done during the currency of the policy. The last renewal before the loss in February, 1917, was on March 25, 1916, and for a year from that date. The evidence, without conflict, shows that the safe from which the money and securities were taken was not locked with either a combination or a time lock at the time of the robbery, and that it had not been so locked at any time during the years 1916 and 1917, and that the combination had passed out of the memory of the officers of the bank. When the policy was last renewed in March, 1916, the implied statement that a combination and time lock was then being used was false, and the statement that it would continue to be used regularly during the currency of the policy was one the bank officers had no intention of keeping, and did not, in fact, keep.

That the warranty was breached, both as a representation of a present existing condition and also as a future promise, is shown without dispute. It also appears that, if the warranty had been observed and the safe locked with either the time or combination lock, or both, access to the safe could not have been had by the method it is testified it was had. If the time lock had been used at the close of business hours, the vice president, Heatherwick, could not have opened the safe, even though he had the combination. If the safe had been locked with the combination lock only, it would have been equally out of the power of Heatherwick to have opened it, if his testimony is to be credited, since it was to the effect that he had forgotten the combina-

tion, and he was the only bank officer present, *ex officio,* at least, when the alleged robbery occurred.

If the agreement to regularly use the combination and time lock was a warranty, then a breach of it would avoid the policy, though it did not contribute to the loss. Royal Exchange Assurance Co. v. Thrower, 246 Fed. 768, 770, 159 C. C. A. 70; Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231. We think the decisions of the federal courts require us to hold that it was a warranty. It was partly promissory and partly an assurance of an existing condition when the policy was last renewed. It was material to the risk insured. Covenants against overinsurance, change of occupancy or title, and for the keeping of proper books of account in an iron safe, in fire insurance policies, have all been recognized as warranties, though pertaining to the future conduct of the insured, the breach of which would work a forfeiture of the policy, as have covenants against deviation in marine insurance, and covenants against the engaging in certain hazardous occupation in life and accident insurance policies. Home Insurance Co. of New York v. Williams, 237 Fed. 171, 150 C. C. A. 317; Royal Exchange Assurance Co. v. Thrower, 246 Fed. 768, 159 C. C. A. 70; Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; Kentucky Vermillion M. & C. Co. v. Norwich U. F. Ins. Soc., 146 Fed. 695, 77 C. C. A. 121; Lumber Underwriters v. Rife, 237 U. S. 605, 35 Sup. Ct. 717, 59 L. Ed. 1140.

The district court did not err in directing verdicts for the defendants in both cases, and the judgment in each case is affirmed, with costs.

*Affirmed.*

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## Section 2. General Principles Applicable to Conditions in Contracts.

### VAN DEMARK *v.* CALIFORNIA HOME EXTENSION ASS'N ET AL.

**(District Court of Appeal, Second District, Division 2, California, 1919. 185 Pac. 866.)**

Action by Harry S. Van Demark against the California Home Extension Association and M. V. Hartranft. Judgment for plaintiff, and defendants appeal. Affirmed.

SLOANE, J.[35] The only questions on this appeal arise on the construction and application of provisions in a contract for the sale of land, whereby it is agreed that in the event of the purchaser becoming dissatisfied with the investment the seller shall buy back the land.

[35] Parts of the opinion are omitted.

The complaint contained two causes of action, based on agreements to repurchase, under separate contracts for the sale of separate tracts, and judgment was against the defendant, appellants here. The repurchase clause in the first contract is as follows:

"Art. 10. If after completion of payments the buyer should be dissatisfied with the investment, the association stands ready at any time between the fifth and sixth year from date of planting to buy back the land by paying the buyer the amount of the purchase price."

The second provides:

"Art. 6. If after completion of purchase the buyer should be dissatisfied with the investment, the association guarantees at any time during the sixth year following date of this contract * * * to buy back the land."

It will only be necessary to incidentally refer to any other subject-matter of these contracts, as no dispute exists on any other of the conditions pleaded.

The complaint also contains an allegation that within the period specified in the contracts plaintiff became dissatisfied with his investments, and so notified the defendant corporation, and demanded that the agreement to repurchase be fulfilled. No facts are stated as to reasons or grounds for dissatisfaction with the investment. Defendants urged on demurrer that without some showing of reasonable grounds for dissatisfaction the complaint does not state a cause of action, and the overruling of this demurrer is one of the alleged errors on appeal. * * *

The distinction is well recognized, though the line cannot always be very clearly drawn, in actions arising on these "dissatisfaction clauses," that where the right involved is one which is submitted to the taste or fancy, feelings, or judgment of the party in whose favor the option is given, it may be exercised without any practical or utilitarian reason; but, when it is apparent that the question of satisfaction relates to the commercial value or quality of the subject-matter of the contract, it must be shown that it is deficient or defective in these respects, and that the dissatisfaction is reasonable and well founded. "But where there is nothing to justify the contrary construction, the general rule is that the party to be satisfied is the judge of his own satisfaction, subject only to the limitation in most jurisdictions that he must act in good faith, and, if he does so act and is really dissatisfied, he may reject the work or the article on the ground that it is not satisfactory to him." Tiffany v. Pacific Sewer Pipe Co., 182 Pac. 428. Such construction of the rule has been applied to contracts for a suit of clothes, a portrait, a musical instrument, a carriage, a steam heater, a literary article for a magazine, horses, employment of a servant, dissatisfaction with a home furnished, and with security for performance of an obligation. 9 Cyc. 618, and citations; Singerly v. Thayer, 108 Pa. 291, 2 Atl. 230, 56 Am. Rep. 207; McCarren v. McNulty, 7 Gray (Mass.) 139; Brown v. Foster, 113 Mass. 136, 18 Am. Rep. 463; Zaliski v. Clark, 44 Conn. 218, 26 Am.

Rep. 446; Moore v. Robinson, 92 Ill. 491. It has been held in California that an agreement to furnish title satisfactory to the purchaser was not met by a merely good and marketable title, if the purchaser himself was not satisfied. Parkside Realty Co. v. MacDonald, 166 Cal. 426, 137 Pac. 21; Allen v. Pockwitz, 103 Cal. 85, 36 Pac. 1039, 42 Am. St. Rep. 99; Church v. Shanklin, 95 Cal. 626, 30 Pac. 789, 17 L. R. A. 207.

The contract considered under the decisions cited by appellant are for the most part clearly distinguishable from the contract under consideration here. They involve the quality or value of things in common use which have a fixed and recognized standard of fitness and worth, and concerning which it is fair and equitable to require a purchaser to be satisfied with the commonly accepted standard of excellence. And sometimes, too, the courts have been controlled in their rulings on this question by the equities involved in cases where the exercise of a captious and unreasonable feeling of dissatisfaction would involve the other party to the contract in serious loss or damage. Hawkins v. Graham, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422. We think it is clear in this case that the purpose of the agreement to repurchase in the event the buyer should become dissatisfied with his investment was to submit the matter to the personal option and judgment of the purchaser. The exercise of this right is not dependent upon a failure in value of the property, or a breach of any conditions of the contract. It was made a question alone of his dissatisfaction with the "investment"— with that particular disposition of his capital which tied it up in this California land—a matter which might develop into a condition of personal dissatisfaction entirely independent of values or quality. The fulfillment of the terms of the agreement, moreover, does not involve the loss of the vendor's property. It amounts only to a rescission. He gets his property back and refunds the purchase money with interest. It was probably incumbent on the plaintiff to show good faith, and that he was really dissatisfied; but an allegation that he did become dissatisfied, which was pleaded and testified to, was sufficient. Incidentally it appears by the plaintiff's evidence not only that he was dissatisfied, but that he had grounds for his dissatisfaction, in that by reason of unseasonable frosts the growing eucalyptus trees on his land had been injured. The defendants pleaded by their answer that the injury to the premises resulting from the freeze was the fault of plaintiff, but the court found against this defense, and there was evidence to the contrary; but in any event the finding is not made an issue on this appeal. * * *

It is apparent that it was the intention of the parties that if, for any reason not growing out of the wrong or fraud of the purchaser, he became dissatisfied with his investment under the first contract, the vendor would repurchase at any time during the sixth year after July 17, 1915, and, if he was dissatisfied after the completion of his purchase under the second contract, that the vendor would repurchase at any time during the sixth year after date of the contract. That he

did become dissatisfied with these contracts and was entitled to exercise the option given him against the defendant corporation is sufficiently pleaded and proved.[36]

The rulings and judgment of the court are supported by the pleadings, evidence, and findings.

*The judgment is affirmed.*[37]

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## INMAN MANUFACTURING CO. *v.* AMERICAN CEREAL CO.

(Supreme Court of Iowa, 1904. 124 Ia. 737, 100 N. W. 860.)

SHERWIN, J.[38] The plaintiff agreed to build certain machines for the use of the defendant in its mill at Cedar Rapids, and to install the same therein. The several machines were to have a specified capacity operated by the number and class of workmen named in the contract. The contract contained the following provision: "The party of the first part further agrees that all of said machines are to be to the full satisfaction of the officers of the second party as to quality of work and life and durability of the machines before payment of the machines will be required." The agreement was made on the 23d day of August, 1899, and the machines were to be in place within six months thereafter. On account of delays, however, some of which were caused by the failure of the machines to do the work agreed upon, this time was extended until the 22d of April, 1901, at which time the defendant in writing rejected the entire outfit. The court gave the following instruction:

"The written contract between the parties, under which the machines claimed for in the first count of the plaintiff's petition were furnished, provides that the same were to be to the full satisfaction of the officers of the defendant as to the quality of work and life and durability of the machines before payment would be required. You are instructed that the above condition of the contract did not give the defendant the right to arbitrarily and capriciously declare that it was dissatisfied with said machines, and thus refuse to accept the same. The law requires the defendant to act reasonably and fairly, and to exercise fair, just, and honest judgment. A dissatisfaction with the machines which would warrant the defendant in rejecting the machines must be founded upon some reasonable objection to the quality of the work, or life and durability of the machines. That which the law shall say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with."

This instruction is wrong in principle and contrary to the decisions

[36] "If the evidence shows a disputed question whether the seller was in fact dissatisfied or not, a jury question is presented; not whether the seller ought to be satisfied, but whether he was dissatisfied, and acted as he did for that reason. Gwynne v. Hitchner & Yerkes, *supra*, [67 N. J. L. 654]." Bergen, J., in Corn Products Refining Co. v. Fasola, (N. J. L.) 109 Atl. 505, 506 (1920).

[37] On contracts to perform to "satisfaction," see 6 A. L. R. 1497, note; Ann. Cas. 1913 D, 629, note. On what constitutes "satisfactory title" as to land, see 18 L. R. A. (N. S.), 741, note.

[38] Part of the opinion is omitted.

of this court. The language of the contract is plain and its meaning certain; the machines were to be to the full satisfaction of the defendant, and nothing less would satisfy the terms of the contract. The plaintiff did not undertake to make and install machines which the defendant ought in reason to be satisfied with, and therefore ought to pay for, but he undertook to furnish machines which the defendant would be satisfied with, and by this contract he is bound, provided only that the defendant acted in good faith, and was honestly dissastified. This much and no more the law requires of the contemplated purchaser, and if his dissatisfaction is in good faith, it matters not whether it be reasonable or unreasonable, for the law will not make contracts for persons *sui juris*. McCormick H. M. Co. v. Okerstrom, 114 Iowa, 260; Haney-Campbell Co. v. Creamery Ass'n, 119 Iowa, 188. And see cases sustaining the rule cited therein. 6 Am. & Eng. Enc. of Law, 464; 9 Cyc. 620. The defendant asked an instruction which embodied the true rule, and it should have been given. * * *

*For the errors pointed out, the judgment is reversed.*[39]

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## SYLVESTER RICHARDSON *v.* J. D. BRECKER.

(Supreme Court of Colorado, 1883. 7 Colo. 58, 1 Pac. 433, 49 Am. Rep. 344.)

HELM, J.[40] * * * Nearly 11 years passed between the maturity of the note and the commencement of suit thereon; plaintiff's action was therefore barred by our statute of limitations, and he could only recover upon proof of a new promise sufficient in law to revive the debt, or give him a new right of action therefor. For this purpose but one witness was sworn. * * * Upon a careful consideration of his entire testimony, we think, if it establishes anything, it is that the new promise was to pay when able, or to pay on the thirtieth of the current month, provided a sale of coal land was effected.

No evidence whatever was offered by plaintiff to show that at the commencement of the action, defendant was able to pay the note, or that he had sold his coal land. The suit is upon the contract created by the new promise, and therefore, if such new promise be conditional, the plaintiff is not entitled to recover except upon the performance or happening of such condition; and the burden of proving the same rests upon him. 2 Greenl. Ev. § 440, and note; Wood, Lim. Act. § 79, and notes. If the new promise in this case was to pay the note

[39] In Taylor v. Brewer, 1 M. & S. 290 (1813), a person who had performed work under the resolution of a committee which provided that his service should be taken into consideration "and such remuneration be made as shall be deemed right" was not allowed to maintain an action.

[40] Parts of the opinion are omitted.

upon the sale of coal lands, it clearly devolved upon plaintiff to prove such sale; so, also, if the new promise was to pay when able, we think it was plaintiff's duty to establish defendant's ability to do so. Upon this question, however, there is some conflict of authority. In Illinois, Connecticut, Vermont, and New Hampshire, it is held that promises to pay "when able," "as soon as possible," "when I can," "as soon as he could," were not conditional. It is said that these phrases, following a promise, are too uncertain to constitute a condition. Horner v. Starkey, 27 Ill. 13; Cummings v. Gassett, 19 Vt. 310; Norton v. Shepard, 48 Conn. 142; First Cong. Soc. v. Miller, 15 N. H. 522. But we think the weight of authority, as well as the better reason, supports the position that the promise to pay "when able" is conditional; of course, the expression must be construed as referring to financial ability.

In this case the statutory bar had attached before the alleged new promises were made. The debtor was under no legal obligation whatever to pay the debt. While the indebtedness itself was not canceled, it could never be collected by judicial proceedings, if he saw fit to invoke the statute. Whatever promise he made was entirely voluntary, and authorities universally recognize his right to impose any condition which he might deem proper. By agreeing to pay when able, he practically declared that he would not bind himself unless he then had, or should thereafter acquire, the means to do so; and it is difficult to understand how it can truthfully or logically be said that his promise was absolute and unconditional; the very language used indicates an intention not to renew the liability, except upon the conditions above mentioned. It may be hard for the creditor to prove the debtor's financial ability, yet it is not more difficult for him to do this than to prove a great many other conditions which might legally be imposed. This is not a matter left to the debtor's discretion and judgment. His ability to pay is a question of fact for the jury, and that body might find that he was able to do so at the very time he made the conditional promise.[41]

[41] Ability to borrow does not show ability to pay. Torrey v. Krauss, 149 Ala. 200 (1907). In that case all the salary the promisor received was needed for his family.

"A promise to pay when able is to be reasonably interpreted. On the one hand it does not imply ability to pay without embarrassment, or even without crippling the debtor's resources or business, while on the other hand ability to pay cannot be fairly implied while the debtor, although he may be in possession of property sufficient to pay the particular debt, is plainly insolvent or when payment, if enforced would strip him of his means of support. * * * It is not contemplated by the parties that the debtor will pay the debt out of earnings necessary for the support of himself or his family, or that he will pay the particular debt to the prejudice of other creditors, whose debts are absolute and unconditional." Andrews, J., in Tebo v. Robinson, 100 N. Y. 29, 30 (1885). Each case must be judged on its own facts. If the promise really is properly construed to be one to pay only when the promisor's

The law regards the creditor as culpable for not enforcing his demand within the statutory period; and the leading authorities are now decidedly against removing the bar of the statute, and relieving him from the result of such negligence, except upon clear proof of a new promise, and the performance or fulfillment of the conditions, if any attached thereto. See, generally upon this subject, 2 Greenl. Ev., *supra;* Wood, Lim. Act. § 78; Mattacks v. Chadwick, 71 Me. 314; Tompkins v. Brown, 1 Denio, 248; Bidwell v. Rogers, 10 Allen, 438; Laforge v. Jayne, 9 Pa. St. 410; Sedgwick v. Gerding, 55 Ga. 264. * * * The court erred in finding upon the evidence adduced that defendant made a new promise to pay the debt in controversy sufficient to avert the statutory bar.

The judgment, resting upon such finding, must be reversed, and the cause remanded.

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## WORSLEY *v.* WOOD ET AL., ASSIGNEES OF LOCKYER AND BREAM, BANKRUPTS; IN ERROR.

(Court of King's Bench, 1796. 6 Term Reports, 710.)

This was an action of covenant brought in the Court of Common Pleas. The declaration stated that by a policy of insurance made before Lockyer and Bream became bankrupts, namely, on the 9th of March, 1792, it was witnessed that Lockyer and Bream had paid 11*l.* 16*s.* to the Phoenix Company, and had agreed to pay to them, at their office, the sum of 11*l.* 16*s.* on the 25th of March, 1793, and the like sum yearly on the said day during the continuance of the policy for insurance from loss or damage by fire, not exceeding the sum of 7,000*l.* That Worsley covenanted with L. and B. that, so long as the assured should pay the above premium, the capital stock and funds of the Phoenix Company should be liable to pay to the assured any loss that the assured should suffer by fire on the property therein mentioned,

circumstances "change for the better," either by an acquisition of fortune or a decrease of obligation, it is an essential part of the plaintiff's case to show such change at a period subsequent to the time when the promise was made. Work v. Beach, 13 N. Y. Supp. 678 (1891). In Work v. Beach a judge who for about three years after he promised to pay about $14,600 "when I shall be able to do so" had received $15,000 a year salary, paid monthly, was given a judgment when sued for the money because he saved nothing out of the salary. Courts differ as to whether one has ability to pay if by acting reasonably he could pay.

If the promisor once becomes able to pay, the condition disappears and his promise becomes absolute, and his subsequent inability will not restore the condition. Denney & Co. v. Wheelwright Co., 60 Miss. 733 (1833). As soon as he has ability to pay the statute of limitations begins to run. Tebo v. Robinson, 100 N. Y. 29 (1885).

On effect of promise to pay as soon as one can, see L. R. A. 1918 A, 902, note.

not exceeding 7,000*l.*, according to the tenor of the printed proposals delivered with the policy. That in the printed proposals referred to by the policy it is declared that the company would not be accountable for any loss by fire caused by foreign invasions, civil commotion, &c.; and also that all persons assured sustaining any loss by fire should forthwith give notice to the company, and as soon as possible after deliver in as particular an account of their loss as the nature of the case would admit, and make proof of the same by their oath and by their book of accounts, or other vouchers as should be reasonably required, and should procure a certificate under the hands of the minister and churchwardens and of some reputable householders of the parish, not concerned in the loss, importing that they were acquainted with the character and circumstances of the person insured, and knew or believed that he by misfortune and without any kind of fraud or evil practice had sustained by such fire the loss and damage therein mentioned; and in case any difference should arise between the assured and the company touching any loss, such difference should be submitted to the judgment of arbitrators indifferently chosen, whose award should be conclusive, &c., and when any loss should have been duly proved, the assured should immediately receive satisfaction to the full amount of the same. The declaration then stated that on the 1st of July, 1792, a loss happened by fire in the house of L. and B., in which all their books of accounts were destroyed, to the amount of 7,000*l.* That L. and B. on the same day gave notice of it to the company, and on the same day delivered to the company as particular an account of their loss as the nature of the case admitted, and were then and there also ready and willing and then and there tendered to make proof of the loss by their oath, and to produce such vouchers as could be reasonably required in that behalf; that on the same day they procured and delivered to the said company a certificate under the hands of four reputable householders of the parish, to the effect required in the printed proposals, and applied to E. Embry, the minister, and H. Hutchins and J. Bellamy, the churchwardens of the parish, to sign such certificate, but that they, without any reasonable or probable cause, wrongfully and unjustly refused and have ever since refused to sign it. The declaration then stated that the funds of the company were sufficient to pay this loss, yet the company have not paid it, either to the bankrupts or to their assignees; nor have the company submitted the said difference to the judgment of such arbitrators, &c.

There was another count, in which it was not averred that the bankrupts either offered to make proof of the loss, or procured a certificate, or applied to the minister, &c., for one; and the breach in this count was, that the company had not submitted the said difference to the judgment of such arbitrators, &c.

The defendant pleaded (to the first count) that the bankrupts were not interested in the house or goods, &c., at the time of the loss. on

which issue was taken in the replication. 2d. That the loss was occasioned by the fraud and evil practice of the bankrupts; on which issue was taken, &c. 3d. That the minister and churchwardens did not refuse wrongfully and injuriously, and without any reasonable or probable cause, to sign the certificate; on which issue was taken. To the second count: 1st. That the bankrupts were not interested, &.; on which issue was taken. 2d. That the loss was occasioned by fraud, &c. (as above); on which issue was taken. 3d. That neither the bankrupts or their assignees procured such certificate under the hands of the minister and churchwardens and respectable inhabitants, &c., as required in the printed proposals.

To the last of these pleas, the plaintiffs replied, that the bankrupts as soon as possible after the loss, namely, on the 1st of July, 1792, procured and delivered to the company such certificate as is required in the printed proposals under the hands of four respectable inhabitants, &c., but that the minister and churchwardens wrongfully refused to sign it without any reasonable or probable cause for so doing.

The rejoinder stated that the minister and churchwardens did not wrongfully refuse, &c., on which issue was taken in the surrejoinder.

The jury found all the issues for the plaintiffs, and gave a verdict for 3,000*l*.

The defendant below removed the record into this court by writ of error, and assigned for error that the declaration, the replication, and the other pleadings of the plaintiffs below, were not sufficient in law to maintain the action.

LORD KENYON, C. J.[42] * * * We are called upon in this action to give effect to a contract made between these parties; and if from the terms of it we discover that they intended, that the procuring of the certificate by the assured should precede their right to recover, and that it has not been procured, we are bound to give judgment in favor of the defendant below. These insurance companies, who enter into very extensive contracts of this kind, are liable (as we but too frequently see in courts of justice) to great frauds and impositions; common prudence, therefore, suggests to them the propriety of taking all possible care to protect them from frauds when they make these contracts. The Phoenix Company have provided, among other things, that the assured should, as soon as possible after the calamity has happened, deliver in an account of their loss, and procure a certificate under the hands of the minister and churchwardens, and of some reputable householders of the parish, importing that they knew the character and circumstances of the assured, and believed that they had sustained the loss without any kind of fraud. That this is a prudent regulation, this very case is sufficient to convince us; for it appears on

[42] The opinions of Ashhurst, Grose and Lawrence, JJ., and a part of the opinion of Lord Kenyon, C. J., are omitted.

the record, that soon after the fire the assured delivered in an account of their loss, which they said amounted to 7,000*l.*, that they obtained a certificate from some of the reputable inhabitants that the loss did amount to that sum, and that the jury after inquiring into all the circumstances were of opinion that the loss did not exceed 3,000*l.*; and yet it is also stated that the minister and churchwardens, who refused to certify that they believed that the loss amounted to 7,000*l.*, wrongfully and without any reasonable or probable cause refused to sign such certificate. The great question here is, whether or not it was the intention of these parties that that certificate should precede payment by the insurance office; now it seems to me from the printed proposals that it was their intention that it should precede payment. What is a condition precedent, or what a condition subsequent, is well expressed by my brother Ashhurst in the case of Hotham v. The East India Company, to which I refer in general. If there be a condition precedent to do an impossible thing, the obligation becomes single; but however improbable the thing may be, it must be complied with, or the right which was to attach on its being performed does not vest. If the condition be, that A shall enfeoff B, and A do all in his power to perform the condition, and B will not receive livery of seisin, yet from the time of Lord Coke to the present moment, it has not been doubted but that the right which was to depend on the performance of that condition did not arise. In the case of Hesketh v. Gray, which has been cited as a determination in this court, there was also an application to the Great Seal, at the time when Lord Chief Justice Willes was the first commissioner, to dispense with the condition, which was, that the Bishop of Chichester should accept the resignation of a living; but it was held that there was no ground for a court of equity to interfere. This court also held, when the case came before them, that it was a condition precedent, and must be performed.

In this case, however, it is said that, though the minister and churchwardens did not certify, some of the inhabitants did certify, and that that was sufficient, it being a performance of the condition *cy pres*. But I confess, I do not see how the terms *cy pres* are applicable to this subject; the argument for the plaintiffs below goes to show that if none of the inhabitants of this parish certified, a certificate by the inhabitants of the next or of any other parish would have answered the purpose. But the assured cannot substitute one thing for another. In the case of Campbell v. French, we explained the grounds of this doctrine, and said that the party who had not complied with the condition could not substitute other terms or conditions in lieu of those which all the parties to the contract had originally made. So here it was competent to the insurance office to make the stipulations stated in their printed proposals; they had a right to say to individuals who were desirous of being insured, "Knowing how liable we are to be imposed upon, we will, among other things, require that the minister, churchwardens, and

some of the reputable inhabitants of your parish shall certify that they believe that the loss happened by misfortune and without fraud, otherwise we will not contract with you at all." If the assured say that the minister and churchwardens may obstinately refuse to certify, the insurers answer, "We will not stipulate with you on any other terms." Such are the terms on which I understand this insurance to have been effected; and, therefore, I am clearly of opinion, that there is no foundation for the action, and that the judgment below must be reversed.

*Judgment reversed.*[48]

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## HEBERT *v.* DEWEY.

## DEWEY *v.* HEBERT.

**(Supreme Judicial Court of Massachusetts, 1906. 191 Mass. 403, 77 N. E. 822.)**

Two actions. The first by Valerie Hebert, administratrix, against P. H. Dewey; the second by Dewey against Hebert. Rulings were adverse to Dewey, and he excepted. In second action, exceptions overruled; in first action, exceptions sustained.

[48] See Audette v. L'Union St. Joseph, 178 Mass. 113 (1901); Lane v. St. Paul Ins. Co., 50 Minn. 227 (1892); Kelly v. Sun Fire Office, 141 Pa. St. 10 (1891). This is seemingly still the majority rule in insurance contracts.

But in Lang v. The Eagle Fire Company, 12 N. Y. App. Div. 39 (1896), Adams, J., said: "The defendant further insists that the plaintiff should fail in his action because of his omission to furnish a certificate of the magistrate or notary public living nearest the place of the fire, stating the amount of the loss sustained. It seems that the policy in suit does, in terms, require such a certificate to be furnished when requested by the insurer, and that the request was made in this case. Thereafter, a certificate was furnished to the defendant, which is apparently satisfactory in all respects save that it was not made out by the magistrate or notary living nearest the place of the fire. It is conceded that there was such an officer living nearer the place of the fire than the one making the certificate, but as he declined to act the plaintiff procured a certificate of the nearest notary who was willing to act. It is to be noticed that the provision which requires this certificate is one which relates merely to the procedure after the loss has occurred, and the courts of this state are inclined to be liberal and reasonable in their construction of the stipulations of a contract of insurance which prescribe the formal acts upon the part of the insured necessary to the recovery of his loss. (McNally v. Phœnix Ins. Co., 137 N. Y. 389-398, and cases there cited.) In this case we think that the plaintiff has done all that could be required of him; he certainly could not compel any magistrate or notary to furnish the certificate called for by the defendant, and if upon his application to the one living nearest the fire he was met with a refusal to comply with his request, there was nothing left for him to do but to apply to the one living next nearest. The defendant's contention in this regard is extremely technical, and, in the absence of any objection to the person making the certificate, or to the certificate itself, is not entitled to serious consideration."

KNOWLTON, C. J.[44] The first of these actions was brought by the plaintiff's intestate to recover upon a contract in writing for building a house for the defendant, and also for extra work done in connection with the contract. The second is a cross-action, brought to recover damages for the nonperformance of the contract, and also for money lent to the defendant, and money had and received by the defendant to the plaintiff's use. * * *

The first important exception relates to the rulings and refusals to rule in regard to certificates given to the plaintiff's intestate by the architect, upon which payments were made by the defendant under the contract. The contract provided for three payments to be made at different stages in the progress of the work, and a fourth after the completion of it. Then followed this proviso: "That in each case of the said payments, a certificate shall be obtained from and signed by said F. S. Newman, architect, to the effect that the work is done in strict accordance with the drawings and specifications, and that he considers the payment properly due; said certificate, however, in no way lessening the total and final responsibility of the contractor; neither shall it exempt the contractor from liability to replace work, if it be afterwards discovered to have been done ill, or not according to the drawings and specifications, either in execution or materials," etc.

The third certificate, in its substantive parts, is as follows: "This is to certify that under the terms of the contract dated," etc., "Mr. Joseph Hebert, contractor for building your house, is entitled to the third payment, amounting to $1,200." The first and second certificates were in the same form; but the architect refused to give the fourth and final certificate, and the plaintiff's intestate never obtained it.

At the trial the evidence was conflicting upon all the questions in issue, and there was much dispute as to whether the plaintiff's intestate had performed the contract, or had done improper work and used improper materials in violation of it. The judge instructed the jury, in substance, that so far as the work and materials which had previously been supplied were known to the architect at the time of giving one of these certificates, the certificate would be conclusive upon the defendant as to the quality and fitness of the work and materials, and it would not afterwards be open to the architect or the owner to question it. He treated each of these certificates as a final determination, in favor of the contractor, that the contract had been properly performed up to that time, in all parts of which the architect had knowledge.

It is well settled that, in the absence of fraud, or such mistake as prevents him from exercising his judgment upon the case, the parties are bound by the certificate of an architect, made under the authority of a building contract like that now before us. His position is like that of an arbitrator, to determine the particular matter submitted to him.

[44] Part of the opinion is omitted.

Palmer v. Clark, 106 Mass. 373, 389; Flint v. Gibson, 106 Mass. 391; Robbins v. Clark, 129 Mass. 145; National Contracting Co. v. Com., 183 Mass. 89, 66 N. E. 639; Norcross v. Wyman, 187 Mass. 25, 27 N. E. 347; White v. Abbott, 188 Mass. 99, 74 N. E. 305. The only question of difficulty in this part of the case arises from the peculiar language of the contract as to the effect of the certificates. They are referred to as "in no way lessening the total and final responsibility of the contractor," etc. This language furnishes ground for an argument that the certificates given prior to the completion of the work were intended to be merely intermediate or progress certificates, for the benefit of the builder, given to enable him to obtain payments on account, during the progress of the work. Such certificates are not conclusive as to the final payment, nor upon a claim for damages, nor on a *quantum meruit*. 1 Hudson, Building Contracts, 288; Tharsis Sulphur & Copper Co. v. McElroy, 3 App. Cas. 1040; Ford v. Railroad Co., 54 Iowa, 723, 7 N. W. 126. While the matter is not free from doubt, we are inclined to hold that these certificates were intended to be something more than progress certificates, and that they are to be held final in their determination of all matters which were then within the knowledge of the architect. In the first place, the contract makes no distinction in this particular between the certificates to be given before the work is completed and the final certificate. Then the special provision as to the effect is that they shall not relieve the contractor from liability for inferior work, "if it be afterwards discovered to have been done ill, * * * either in execution or materials," etc. Inasmuch as the general rule would make such certificates conclusive, we are of opinion that they should be held to leave the claims open only as to deficiencies that are afterwards discovered, and that this exception of the defendant should be overruled.

The defendant contended that the plaintiff could not recover under the contract, because her intestate failed to obtain from the architect a certificate that the final payment was due. The question is whether a sufficient justification was shown for this failure. The instruction to the jury on this point was as follows: "If the defendant's architect capriciously withheld the final certificate, and capriciously allowed the contractor to believe that nothing more remained to be done to entitle him to such certificate, the contractor is thereby relieved from his obligation to secure the certificate." This was in accordance with the plaintiff's request, except that the judge left out the word "fraudulently" which was used in the request with "capriciously." The law bearing upon this part of the case has not been definitely settled in this commonwealth.

There is a class of cases arising under policies of insurance and other similar contracts, in which it is held that the procurement of the certificate, called for by the contract, is a condition precedent to the plaintiff's recovery. Johnson v. Phoenix Ins. Co., 112 Mass. 49, 17 Am. Rep. 65; Audette v. L'Union St. Joseph, 178 Mass. 113, 59 N. E. 668,

and cases there cited. The reason why it is not open to the plaintiff in these cases to show that he could not obtain the certificate, is because the nature of the contract and the purpose of the requirement of a certificate are such as to make the recovery conditional upon the presentation of the paper, for the purpose of affording the insurer an assurance against fraud, and giving him additional evidence that there is a legal liability. Johnson v. Phoenix Ins. Co., *ubi supra*. The promise is to pay only upon the existence of conditions shown by a particular kind of proof, which the parties prescribe as the only evidence that will be deemed sufficient to establish the fact. In such contracts the plaintiff takes upon himself the obligation to furnish the required proof, and assumes the risk of whatever difficulty there may be in procuring it. Whether a contract is of this kind is a question of construction, dependent upon the meaning of the parties, as ascertained from the writing.

A provision for a certificate by an architect, in a building contract, stands differently. The architect is the agent of the owner, to perform an act for the convenience of both parties, in regard to a matter with which he is directly connected as an employee. It is assumed by the contracting parties and implied in the contract that he will do his duty, and will act in good faith in determining whether a certificate should be granted. In cases under provisions like the one before us, it is everywhere held that the contractor may recover without a certificate, if the circumstances relieve him from the obligation to obtain one. What circumstances are sufficient for this purpose is the only question. If the owner wrongfully interferes to prevent the giving of a certificate, it is universally held that this will entitle the contractor to recover without it. Beharrell v. Quimby, 162 Mass. 571, 575, 39 N. E. 407; Whitten v. New England Live Stock Co., 165 Mass. 343, 345, 43 N. E. 121; Battsburg v. Vyse, 2 H. & C. 42; Whelen v. Boyd, 114 Pa. 228, 6 Atl. 384. Many of the authorities are to the effect that any wrongful refusal of the architect to give a certificate will entitle the contractor to proceed without one. In some cases it is said that if the architect unreasonably refuses to give a certificate it is enough. Nolan v. Whitney, 88 N. Y. 648; Flaherty v. Miner, 123 N. Y. 382, 390, 25 N. E. 418; Thomas v. Stewart, 132 N. Y. 580, 30 N. E. 577; Crouch v. Gutman, 134 N. Y. 45, 31 N. E. 271, 30 Am. St. Rep. 608; United States v. Robeson, 9 Pet. 319, 327, 9 L. Ed. 142. In others it appeared that he refused "dishonestly and arbitrarily," or "willfully and fraudulently," or "capriciously." Bentley v. Davidson, 74 Wis. 420, 43 N. W. 139; Chism v. Schipper, 51 N. J. Law, 1, 16 Atl. 316, 2 L. R. A. 544, 14 Am. St. Rep. 668; Bradner v. Roffsell, 57 N. J. Law, 32, 29 Atl. 317; Id., 57 N. J. Law, 412, 31 Atl. 387; Badger v. Kerber, 61 Ill. 328. In Beharrell v. Quimby, 162 Mass. 571, 575, 39 N. E. 407, 409, there is an implication that if the architect "had fraudulently or capriciously

withheld a final certificate," the plaintiff might have recovered without it.

In the present case there was evidence from which the jury might have found that after a complete performance of the contract the plaintiff's intestate applied to the architect for the final certificate, and he willfully and fraudulently refused to give it. It is plain that in making the contract it was understood between the parties that the architect would act in good faith in the performance of this part of his duty. In legal effect, the contract is as if their understanding in this particular had been written into it, as one of its terms. If, under such an agreement, after the full performance of the contract, the architect willfully and fraudulently refuses to act, or dies, or becomes disqualified, and there is no provision for such a case, the question arises whether the contractor is entitled to receive the contract price, the fact of performance being shown in some other way, or whether the entire contract falls to the ground, and the parties are left to enforce their rights under a *quantum meruit*. It is a general rule that if an implied condition that fails is of the essence of the contract, and enters largely into the consideration, in such a way that there can be no substantial performance under the changed conditions, the whole contract will fail, and the parties may have reasonable compensation for what they have done in reliance upon it. Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654. But the provision in this case for the ascertainment of their rights, in reference to the construction of the building called for by the contract is of a different kind. It is a part of the machinery provided for the ascertainment and adjustment of their rights in reference to the matters to which the contract relates. It is provided to be used only upon an implied condition that it will be available for use. If, through the death or incapacity of the architect, or his willful refusal to act, it becomes impossible to adopt this method of determining the rights of the parties, other means may be adopted, on the ground that this no longer remains as an essential term of the agreement. In all substantial particulars the contract is complete without the provision for obtaining a final certificate, and, in the case supposed, it should be treated as if the provision were stricken from the contract.[45] In Whitten v. New England

[45] While this is the customary way of handling the difficulty, where the builder is excused from producing the particular architect's certificate, it does not seem a happy one where the other party to the contract is not to blame for what has happened. In Clarke v. Watson, 18 C. B., N. S. 278 (1865), where a surveyor's certificate, seemingly an architect's, was sought to be dispensed with because the surveyor "had wrongfully and improperly" refused to give one though the work was duly and efficiently performed, Willes, J., said: "Consistently with the allegations in this declaration, the only wrong the surveyor has been guilty of may be an error in judgment, or he may have refused to exercise any judgment; in which case the proper course would have

Live Stock Insurance Co., 165 Mass. 343, 345, 43 N. E. 121, this was held to be the effect of an interposition by a party to prevent that from happening, upon the happening of which he was to make a payment under a contract.

A provision like the one before us in this kind of contract, where the substance of the consideration on one side is valuable property in the form of labor and materials, is materially different from the provision in the policies of insurance to which we have referred. In these contracts for insurance a small sum is paid on one side to obtain indemnity from the possible consequences of a risk which is very likely to cause damage. The compensation is to be paid only for genuine losses, resulting from the risk insured against. Satisfactory proof of their character, as coming within the policy, is of the very essence of the contract. On that depends the obligation of the insurer to pay a very large sum for which only a small consideration is given. In view of the ease with which frauds may be practiced the parties sometimes prescribe a method of establishing the validity of the claim, which they make essential to its recognition. They say, in effect, that the policy shall apply only to claims established in this way, and they thereby make the production of the prescribed certificate of the very essence of the contract. It is only to contracts which are construed as showing such a strict agreement that this rule is applied. Whether any of these insurance contracts should be held to require the production of a certificate as a condition precedent to recovery, if the person who is to give it is incapacitated from acting, or fraudulently refuses to act, is a question which we need not consider in this case. In regard to such questions the rights of the parties depend upon what is their meaning and intention as shown by their contracts as applied to the subject with which they are dealing. We do not intend to extend the doctrine of the insurance cases beyond the statements in our decisions.

In all the cases that we have cited under building contracts, it is held that there may be a recovery upon the contract, where the contractor's failure to obtain the architect's certificate showing perform-

been to call upon the defendants to appoint some other surveyor who will do his duty."

Considering the importance to the owner of having competent supervision and certification before making payments, it would seem as if far less remaking of the contract would take place if the owner were simply required to make a reasonable choice of a new architect and merely deprived of the benefits of a certificate as to matters with which the new architect could not fairly acquaint himself. Where the owner has the right to name any architect, one not being named in the contract, that should be the rule applied as a matter of construction. Where, however, the satisfaction of a named architect is called for and the owner discharges him and employs another architect without any agreement for his substitution, it is fair to regard the condition as to architects as eliminated. Thomas Haverty Co. v. Jones, (Cal.) 197 Pac. 105 (1921).

ance of it is caused by the fraud or intentional misconduct of the architect. In United States v. Robeson, 9 Pet. 319, 327, 9 L. Ed. 142, a case where the contract entitled the plaintiff to payment on the certificate of a colonel, commanding a party, Mr. Justice McLean said in the opinion: "Had the defendant proved that application has been made to the commanding officer for the proper certificates, and that he refused to give them, it would have been proper to receive other evidence to establish the claim." In Whelen v. Boyd, 114 Pa. 228, 232, 6 Atl. 384, 386, the court said of the defendant, in reference to the refusal of a certificate: "The law is settled that he cannot take advantage of his own or his agent's wrong." In Baltimore & Ohio R. R. v. Polly, Woods & Co., 14 Grat. (Va.) 447, 464, this language is used, in reference to the same subject: "The principal cannot take advantage of the fraud of his agent, even though he did not actually participate in the perpetration of the fraud." Other cases, indicating that, where the plaintiff is excused from obtaining such a certificate, the recovery may be on the contract itself, are Herrick and Belknap's Estate v. the Vermont Central R. R., 27 Vt. 673, 681, and Batchelor v. Kirkbride (C. C.) 26 Fed. 899. We have found no case of this kind in which it is held, on a failure to obtain an architect's certificate after performance of a contract, that the contract lost its force, and that the parties were left to their rights upon a *quantum meruit.*

In a case like the present, we are of opinion that if an architect after the completion of a contract willfully, and without excuse, refuses to act at all, or if he acts dishonestly and in bad faith, and the contractor is thereby prevented from obtaining a certificate, the contractor may proceed with his suit without it. Such action or refusal to act would leave the provision for obtaining an architect's certificate of no effect upon the rights of either party. The judge followed the instruction quoted with other instructions which went too far in relieving the plaintiff from obligation to obtain the certificate. He said: "If the fact was that after Mr. Hebert had finished the contract so far as he thought it required him to do work and furnish material, and when he called upon Mr. McCauley or Mr. Newman to come there and see whether the thing was right, and if it was, to give him a certificate, and if not, tell him what work was to be done, and he would do it, Mr. McCauley went there and pointed out where things were necessary to be done, and then the certificate could be given, and Guinan or Mr. Hebert caused those things to be done, and the doing of those things was said to be all that was required, and they were done, and then Mr. Newman [the architect] refused to give the certificate, or to come to the premises to look them over and see whether in these respects the added matters were sufficiently done, and they were sufficiently done, then the architect's certificate would drop out of sight and not be required." The facts here stated would be evidence from which the jury might find that the plaintiff's intestate was excused from obtaining the certifi-

cate; but it cannot be said as matter of law that they would excuse him. The architect, in the meantime, might have discovered other things which justified him in refusing the certificate.

After telling the jury that certain conduct of Dewey would not be fraudulent in reference to the certificate, he added: "It would still have to be shown by the plaintiff that the certificate ought to have been given, and if it was shown that the work was done and the contract substantially performed, then the fact that the certificate was not given was not of any account." This last proposition was not correct in law. If the architect, acting in good faith, thought that the work was not properly done and the contract was not substantially performed, and refused the certificate for that reason, the mere fact that the certificate ought to have been given, and that the work was done, and the contract was performed, would not entitle the plaintiff to recover without the certificate. The parties were bound by the decision of the architect made in good faith. The judge also gave the following instruction: "Under the law as I have instructed you I do not know as it would make any difference what was the conduct of Mr. Dewey, whether he tried improperly to get the architect to withhold the certificate, because if the work was properly done, then the certificate ought to have been given. If the work was not properly done, and was so far improperly done as to render it no performance of the contract by Hebert, then the certificate would not avail. Perhaps it is only in the event that although the contract was not performed, still there were particulars in which it could be compensated for, and certain things could be done by Mr. Dewey to remedy it, in that event, but even in that event I don't see that the certificate would make any difference."

Because these instructions give too little effect to the requirement that the contractor shall procure a certificate from the architect before he is entitled to payment, there must be a new trial.[46] We deem it un-

[46] In Bush v. Jones, 144 Fed. 942, 944, 947-948 (1906), Archbald, J., said:

"The law upon the subject of architects' certificates is well settled. It is perfectly legitimate to provide in a building or working contract that payment of the several installments of the contract price shall only be made upon certificates or estimates by the architect or engineer in charge as to the extent and value of the work done or materials furnished, and that final payment shall not be demandable without a certificate of completion. These are familiar provisions, universally recognized, and will be enforced. 30 Am. & Eng. Encycl. Law (2d Ed.) 1237. Equally well recognized, however, is it that the production of such a certificate as a condition precedent to a recovery is not necessary where it is capriciously or arbitrarily withheld. But where this is alleged it is incumbent on the contractor, in order to bring himself within the exception, if he does not produce a certificate, to show why he cannot, and until he successfully does so he has not made out a case. * * *

"Completion to the satisfaction and according to the trained professional judgment of the architect, who drew the plans and specifications, and is able to speak from a direct supervision over and inspection of the work as it progresses, and completion according to the opinion of the jury, under the

necessary to discuss other questions raised by the bill of exceptions.

In the second action the exceptions are overruled. In the first action the entry will be

*Exceptions sustained.*[47]

imperfect conditions of a trial and the inability to produce things as they actually are, are two different and distinct propositions; and the owner, who has stipulated for the one, is not to be put off with the other, where everything is honestly and fairly done. Whether this is true, or whether the architect in withholding his approval acts capriciously or fraudulently, where there is evidence to sustain this charge, has necessarily to be submitted to the jury, and proof of a substantial compliance with the contract enters into this as an essential step. But to hold that, upon such proof, without more, the necessity for the production of a certificate is dispensed with, or is to be regarded as unreasonably withheld, and that, not as a fact, with others, for the consideration of the jury, but as a matter of law for the court, not only loses sight of the distinction which we have referred to, but makes the provision with regard to the architect's certificate useless and meaningless, for it puts a contract where it appears on a level with one where it does not; the contractor in the former being permitted to recover upon showing that he has substantially complied with it, and in the latter being required to prove no less. The jury in the present instance should therefore have been instructed that the production of a certificate was essential to a recovery, and that the want of it could not be dispensed with, unless it was established to their satisfaction that it had been unreasonably withheld. Bearing upon this, as already stated, was the evidence of a substantial completion of the work; but it should not have stopped there. Compliance with the contract was seriously questioned, and the material reduction made by the jury from the amount of the plaintiff's claim shows that at least some things were lacking. Admittedly, there was a leaky and imperfectly waterproofed cellar, and whatever may be said of the guaranty that it should be water-tight, there was in this an apparent defect, sufficient to justify the architect in refusing to approve until it had been remedied. Had the jury, therefore, been instructed as to the necessity for his approval, and what was requisite to overcome the want of it, they might well have hesitated, under the circumstances, to hold as they were required, in order to find for the plaintiffs, that his refusal was arbitrary. In any view, the question was for them, and, not having been submitted to them nor passed upon by them, the verdict is without a proper finding to support it, and cannot be sustained."

On architects' certificates and engineers' estimates as conditions, see 56 Am. St. Rep. 312, note; 10 Ann. Cas. 575, note. On necessity of pleading excuse for nonproduction of certificate, see 5 Ann. Cas. 721, note; 19 Ann. Cas. 905, note.

[47] The English rule has been stated as follows:

"Reading the two clauses [of the building contract] together I am of opinion that their true meaning is that the [architect's] certificate must be obtained before the plaintiff can sue for payment. * * * The plaintiff must fail in the action unless he can show that there was some wrong act done by the defendant entitling him, the plaintiff, to proceed notwithstanding that he has not obtained the architect's certificate. Such a wrong would be fraud or collusion between the defendant and the architect, or some moral turpitude amounting to improper conduct which would lead the court to interfere. There must be something in the nature of improper conduct by the defendant before the court can ignore the contract and say that the plaintiff may proceed not

## MICHAEL NOLAN ET AL., RESPONDENTS *v.* CORDELIA C. WHITNEY, APPELLANT.

(Court of Appeals of New York, 1882. 88 N. Y. 648.)

In July, 1877, Michael Nolan, the plaintiffs' testator, entered into an agreement with the defendant to do the mason work in the erection of two buildings in the City of Brooklyn for the sum of $11,700, to be paid to him by her in instalments as the work progressed. The last instalment of $2,700 was to be paid thirty days after completion and acceptance of the work. The work was to be performed to the satisfaction and under the direction of M. J. Morrill, architect, to be testified by his certificate, and that was to be obtained before any payment could be required to be made. As the work progressed, all the instalments were paid except the last, and Nolan, claiming that he had fully performed his agreement, commenced this action to recover that instalment. The defendant defended the action upon the ground that Nolan had not fully performed his agreement according to its terms and requirements, and also upon the ground that he had not obtained the architect's certificate, as required by the agreement.

Upon the trial the defendant gave evidence tending to show that much of the work was imperfectly done, and that the agreement had not been fully kept and performed on the part of Nolan; the latter gave evidence tending to show that the work was properly done, that he had fairly and substantially performed his agreement, and that the architect had refused to give him the certificate which, by the terms of his agreement, would entitle him to the final payment. The referee

withstanding the absence of the certificate. Clarke v. Watson, 18 C. B. (N. S.) 278, shows this quite clearly. The mere fact that the architect may have been guilty of an error of judgment by not applying his mind sufficiently to the question raised, or that he gave a wrong judgment are immaterial matters for this purpose. The court cannot consider them unless the plaintiff has shown a ground for attacking the defendant with regard to the architect's certificate and that is where the plaintiff fails. In Hickman & Co. v. Roberts, [1913] A. C. 229, it was said that where improper conduct was shown, for example, if the architect was acting in the interests of one party by his direction, that would render his acts invalid. If in this case it had been shown that the defendant had given instructions to the architect as to the amount for which he should certify, or as to the decision at which he ought to arrive upon any particular matter, there would be sufficient to override the necessity for obtaining the certificate and the plaintiff would be entitled to proceed without it. But that is what is absent in this case. There is no allegation that the defendant did anything wrong. * * *· All the allegations are against the architect. Neither fraud nor collusion nor improper conduct on the part of the defendant is alleged; all that is said is that the architect has done things which he ought not and has omitted to do things which he ought to have done. That being so, sufficient has not been shown to entitle the plaintiff to proceed with the action in view of the conditions of the contract." Earl of Reading, C. J., in Eaglesham v. McMaster, [1920] 2 K. B. 169, 175, 177-178.

found that Nolan completed the mason work required by the agreement according to its terms; that he in good faith intended to comply with, and did substantially comply with, and perform the requirements of his agreement; but that there were trivial defects in the plastering for which a deduction of $200 should be made from the last instalment, and he ordered judgment in favor of Nolan for the last instalment, less $200.

The court say: "It is a general rule of law that a party must perform his contract before he can claim the consideration due him upon performance; but the performance need not in all cases be literal and exact. It is sufficient if the party bound to perform, acting in good faith, and intending and attempting to perform his contract, does so substantially, and then he may recover for his work, notwithstanding slight or trivial defects in performance, for which compensation may be made by an allowance to the other party. Whether a contract has been substantially performed is a question of fact depending upon all the circumstances of the case to be determined by the trial court. Smith v. Brady, 17 N. Y. 189; Thomas v. Fleury, 26 id. 26; Glacius v. Black, 50 id. 145; Johnson v. DePeyster, 50 id. 666; Phillip v. Gallant, 62 id. 256; Bowery Nat. Bank v. The Mayor, 63 id. 336. According to the authorities cited under an allegation of substantial performance upon the facts found by the referee, Nolan was entitled to recover unless he is barred because he failed to get the architect's certificate, which the referee found was unreasonably and improperly refused. But when he had substantially performed his contract, the architect was bound to give him the certificate, and his refusal to give it was unreasonable; and it is held that an unreasonable refusal on the part of an architect in such a case to give the certificate dispenses with its necessity."

EARL, J., reads for affirmance.
All concur. *Judgment affirmed.*[48]

[48] This New York case seems to have been one of refusing to give effect to the clearly expressed intention that the honest dissatisfaction of the architect should be final so far as recovery on the contract was concerned. In Crouch v. Gutmann, 134 N. Y. 45 (1892), where the contract was for the building of a brick block for $16,500 payable in instalments, and the architect's certificate was an express condition precedent to the right to any payments upon the work, the architect refused to give the last certificate because there were defects in the work to the amount of $216.71. The court held that the refusal to give a certificate after deducting that amount was unreasonable and dispensed with the necessity of production of the certificate, since the builder had substantially performed. Bradley, J., for the court, said: "The rule of substantial performance should not be extended beyond the purpose in view when the relaxation of the strict performance was adopted, which was founded upon equitable considerations in furtherance of justice, and made applicable to cases of honest intention of contractors to fairly perform their contracts, and who shall in the main have done so, with only slight defects or omissions inadvertently and unintentionally caused and appearing in the work" (p. 55). In

## JACOB & YOUNGS, Inc., *v.* KENT.

(Court of Appeals of New York, 1921. 230 N. Y. 239, 129 N. E. 889.)

Action by Jacob & Youngs, Incorporated, against George E. Kent. From an order of the Appellate Division (187 App. Div. 100, 175 N. Y. Supp. 281), reversing judgment for defendant entered on verdict directed by the court and granting new trial, defendant appeals. Order affirmed and judgment absolute directed in favor of plaintiff.

CARDOZO, J. The plaintiff built a country residence for the defendant at a cost of upwards of $77,000, and now sues to recover a balance of $3,483.46, remaining unpaid. The work of construction ceased in June, 1914, and the defendant then began to occupy the dwelling. There was no complaint of defective performance until March, 1915. One of the specifications for the plumbing work provides that—

"All wrought-iron pipe must be well galvanized, lap welded pipe of the grade known as 'standard pipe' of Reading manufacture."

The defendant learned in March, 1915, that some of the pipe, instead of being made in Reading, was the product of other factories. The plaintiff was accordingly directed by the architect to do the work anew. The plumbing was then encased within the walls except in a few places where it had to be exposed. Obedience to the order meant more than the substitution of other pipe. It meant the demolition at great expense of substantial parts of the completed structure. The plaintiff left the work untouched, and asked for a certificate that the final payment was due. Refusal of the certificate was followed by this suit.

The evidence sustains a finding that the omission of the prescribed brand of pipe was neither fraudulent nor willful. It was the result of the oversight and inattention of the plaintiff's subcontractor. Read-

dissenting Follett, C. J., said: "The tendency, called equitable, of courts to relieve persons from the performance of engagements deliberately entered into, and in legal effect to make for litigants new contracts which they never entered into, and which it cannot be supposed they ever would have entered into, has been and is being carried to a length which cannot be justified in reason" (p. 58). In connection with this dissenting opinion, see Fuchs v. Saladino, 133 N. Y. App. Div. 710 (1909), where it was held that there was no substantial performance of a building contract, and that the architect's certificate was not unreasonably withheld, since fifteen per cent in value of the work was unperformed. There Laughlin, J., for the court said (pp. 715-716): "Neither a complete nor a substantial performance can be predicated upon facts showing omissions, deviations and defects of this magnitude, regardless of whether or not they constituted structural defects. * * * Contractors should understand that the obligation to perform a building contract is the same as the law imposes with respect to other contracts, and that there can be no recovery where there have been deviations or omissions of a material nature, unless a sufficient excuse or waiver be pleaded and proved, and that the rule with respect to allowing a deduction on account of small or immaterial items, and a recovery as for a substantial performance, will not be extended."

ing pipe is distinguished from Cohoes pipe and other brands only by the name of the manufacturer stamped upon it at intervals of between six and seven feet. Even the defendant's architect, though he inspected the pipe upon arrival, failed to notice the discrepancy. The plaintiff tried to show that the brands installed, though made by other manufacturers, were the same in quality, in appearance, in market value, and in cost as the brand stated in the contract—that they were, indeed, the same thing, though manufactured in another place. The evidence was excluded, and a verdict directed for the defendant. The Appellate Division reversed, and granted a new trial.

We think the evidence, if admitted, would have supplied some basis for the inference that the defect was insignificant in its relation to the project. The courts never say that one who makes a contract fills the measure of his duty by less than full performance. They do say, however, that an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach of condition to be followed by a forfeiture. Spence v. Ham, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238; Woodward v. Fuller, 80 N. Y. 312; Glacius v. Blanck, 67 N. Y. 563, 566; Bowen v. Kimbell, 203 Mass. 364, 370, 89 N. E. 542, 133 Am. St. Rep. 302. The distinction is akin to that between dependent and independent promises, or between promises and conditions. Anson on Contracts (Corbin's Ed.) §367; 2 Williston on Contracts, § 842. Some promises are so plainly independent that they can never by fair construction be conditions of one another. Rosenthal Paper Co. v. Nat. Folding Box & Paper Co., 226 N. Y. 313, 123 N. E. 766; Bogardus v. N. Y. Life Ins. Co., 101 N. Y. 328, 4 N. E. 522. Others are so plainly dependent that they must always be conditions. Others, though dependent and thus conditions when there is departure in point of substance, will be viewed as independent and collateral when the departure is insignificant. 2 Williston on Contracts, §§841, 842; Eastern Forge Co. v. Corbin, 182 Mass. 590, 592, 66 N. E. 419; Robinson v. Mollett, L. R., 7 Eng. & Ir. App. 802, 814; Miller v. Benjamin, 142 N. Y. 613, 37 N. E. 631. Considerations partly of justice and partly of presumable intention are to tell us whether this or that promise shall be placed in one class or in another. The simple and the uniform will call for different remedies from the multifarious and the intricate. The margin of departure within the range of normal expectation upon a sale of common chattels will vary from the margin to be expected upon a contract for the construction of a mansion or a "skyscraper." There will be harshness sometimes and oppression in the implication of a condition when the thing upon which labor has been expended is incapable of surrender because united to the land, and equity and reason in the implication of a like condition when the subject-matter, if defective, is in shape to be returned. From the conclusion that promises may not be treated as dependent to the extent of their uttermost *minutiæ* without a sacrifice of justice, the

progress is a short one to the conclusion that they may not be so treated without a perversion of intention. Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If something else is in view, it must not be left to implication. There will be no assumption of a purpose to visit venial faults with oppressive retribution.

Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and found the latter to be the weightier. The decisions in this state commit us to the liberal view, which is making its way, nowadays, in jurisdictions slow to welcome it. Dakin & Co. v. Lee [1916], 1 K. B. 566. 579. Where the line is to be drawn between the important and the trivial cannot be settled by a formula. "In the nature of the case precise boundaries are impossible." 2 Williston on Contracts, § 841. The same omission may take on one aspect or another according to its setting. Substitution of equivalents may not have the same significance in fields of art on the one side and in those of mere utility on the other. Nowhere will change be tolerated, however, if it is so dominant or pervasive as in any real or substantial measure to frustrate the purpose of the contract. Crouch v. Gutmann, 134 N. Y. 45, 51 31 N. E. 271, 30 Am. St. Rep. 608. There is no general license to install whatever, in the builder's judgment, may be regarded as "just as good." Easthampton L. & C. Co., Ltd., v. Worthington, 186 N. Y. 407, 412, 79 N. E. 323. The question is one of degree, to be answered, if there is doubt, by the triers of the facts (Crouch v. Gutmann; Woodward v. Fuller, *supra*), and, if the inferences are certain, by the judges of the law (Easthampton L. & C. Co., Ltd., v. Worthington, *supra*). We must weigh the purpose to be served, the desire to be gratified, the excuse for deviation from the letter, the cruelty of enforced adherence. Then only can we tell whether literal fulfillment is to be implied by law as a condition. This is not to say that the parties are not free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery. That question is not here. This is merely to say that the law will be slow to impute the purpose, in the silence of the parties, where the significance of the default is grievously out of proportion to the oppression of the forfeiture. The willful transgressor must accept the penalty of his transgression. Schultze v. Goodstein, 180 N. Y. 248, 251, 73 N. E. 21; Desmond-Dunne Co. v. Friedman-Doscher Co., 162 N. Y. 486, 490, 56 N. E. 995. For him there is no occasion to mitigate the rigor of implied conditions. The transgressor whose default is unintentional and trivial

may hope for mercy if he will offer atonement for his wrong. Spence v. Ham, *supra*.

In the circumstances of this case, we think the measure of allowance is not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing. Some of the exposed sections might perhaps have been replaced at moderate expense. The defendant did not limit his demand to them, but treated the plumbing as a unit to be corrected from cellar to roof. In point of fact, the plaintiff never reached the stage at which evidence of the extent of the allowance became necessary. The trial court had excluded evidence that the defect was unsubstantial, and in view of that ruling there was no occasion for the plaintiff to go farther with an offer of proof. We think, however, that the offer, if it had been made, would not of necessity have been defective because directed to difference in value. It is true that in most cases the cost of replacement is the measure. Spence v. Ham, *supra*. The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value. Specifications call, let us say, for a foundation built of granite quarried in Vermont. On the completion of the building, the owner learns that through the blunder of a subcontractor part of the foundation has been built of granite of the same quality quarried in New Hampshire. The measure of allowance is not the cost of reconstruction. "There may be omissions of that which could not afterwards be supplied exactly as called for by the contract without taking down the building to its foundations, and at the same time the omission may not affect the value of the building for use or otherwise, except so slightly as to be hardly appreciable." Handy v. Bliss, 204 Mass. 513, 519, 90 N. E. 864, 134 Am. St. Rep. 673. Cf. Foeller v. Heintz, 137 Wis. 169, 178, 118 N. W. 543, 24 L. R. A. (N. S.) 321; Oberlies v. Bullinger, 132 N. Y. 598, 601, 30 N. E. 999; 2 Williston on Contracts, § 805, p. 1541. The rule that gives a remedy in cases of substantial performance with compensation for defects of trivial or inappreciable importance has been developed by the courts as an instrument of justice. The measure of the allowance must be shaped to the same end.

The order should be affirmed, and judgment absolute directed in favor of the plaintiff upon stipulation, with costs in all courts.[49]

MCLAUGHLIN, J.* I dissent. The plaintiff did not perform its contract. Its failure to do so was either intentional or due to gross neglect which, under the uncontradicted facts, amounted to the same thing, nor did it make any proof of the cost of compliance, where compliance was possible. * * *

[49] On substantial performance, see *post*, p. 783, note 68; p. 802, note 79; p. 913, note 123. See also Henry W. Ballantine, Forfeiture for Breach of Contract, 5 Minn. L. Rev. 329.

* Parts of the dissenting opinion are omitted.

The question of substantial performance of a contract of the character of the one under consideration depends in no small degree upon the good faith of the contractor. If the plaintiff had intended to, and had, complied with the terms of the contract except as to minor omissions, due to inadvertence, then he might be allowed to recover the contract price, less the amount necessary to fully compensate the defendant for damages caused by such omissions. Woodward v. Fuller, 80 N. Y. 312; Nolan v. Whitney, 88 N. Y. 648. But that is not this case. It installed between 2,000 and 2,500 feet of pipe, of which only 1,000 feet at most complied with the contract. No explanation was given why pipe called for by the contract was not used, nor that any effort made to show what it would cost to remove the pipe of other manufacturers and install that of the Reading Manufacturing Company. The defendant had a right to contract for what he wanted. He had a right before making payment to get what the contract called for. It is no answer to this suggestion to say that the pipe put in was just as good as that made by the Reading Manufacturing Company, or that the difference in value between such pipe and the pipe made by the Reading Manufacturing Company would be either "nominal or nothing." Defendant contracted for pipe made by the Reading Manufacturing Company. What his reason was for requiring this kind of pipe is of no importance. He wanted that and was entitled to it. It may have been a mere whim on his part, but even so, he had a right to this kind of pipe, regardless of whether some other kind, according to the opinion of the contractor or experts, would have been "just as good, better, or done just as well." He agreed to pay only upon condition that the pipe installed were made by that company and he ought not to be compelled to pay unless the condition be performed. Schultze v. Goldstein, 180 N. Y. 248, 73 N. E. 21; Spence v. Ham, *supra;* Steel S. & E. C. Co. v. Stock, 225 N. Y. 173, 121 N. E. 786; Van Clief v. Van Vechten, 130 N. Y. 571, 29 N. E. 1017; Glacius v. Black, 50 N. Y. 145, 10 Am. Rep. 449; Smith v. Brady, 17 N. Y. 173, and authorities cited on page 185, 72 Am. Dec. 442. The rule, therefore, of substantial performance, with damages for unsubstantial omissions, has no application. Crouch v. Gutman, 134 N. Y. 45, 31 N. E. 271, 30 Am. St. Rep. 608; Spence v. Ham, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238. * * *

I am of the opinion the trial court did not err in ruling on the admission of evidence or in directing a verdict for the defendant.

For the foregoing reasons I think the judgment of the Appellate Division should be reversed and the judgment of the Trial Term affirmed.

HISCOCK, C. J., and HOGAN and CRANE, JJ., concur with CARDOZO, J.

POUND and ANDREWS, JJ., concur with MCLAUGHLIN, J.

*Order affirmed, etc.*

## THURNELL *v.* BALBIRNIE.

**(Court of Exchequer, 1837. 2 Meeson & Welsby, 786.)**

The first count of the declaration stated, that before and at the time of making the agreement and the promise and undertaking of the defendant thereinafter mentioned, the defendant held, occupied, and enjoyed, at his request, certain rooms, apartments, and premises of the plaintiff, as tenant thereof to the plaintiff, the same then being part and parcel of a dwelling-house of the plaintiff, and in which there were certain goods and fixtures and chattels, to wit, etc., of the plaintiff, of great value, to wit, of, etc.; and thereupon heretofore, to wit, on December 26th, 1836, it was agreed by and between the plaintiff and the defendant in manner following; that is to say, the plaintiff then agreed to sell and deliver to the defendant, who then agreed to purchase and take of the plaintiff, the said goods, fixtures, and chattels, at a valuation to be made by certain persons, to wit, Mr. Newton and Mr. Matthews, or their umpire: and the plaintiff said, that the said Mr. Newton was appointed by and on behalf of the plaintiff, and the said Mr. Matthews by and on behalf of the defendant, to value as aforesaid. The declaration then averred mutual promises, and alleged that Newton, on behalf of the plaintiff, was ready and willing to value the said goods, etc., and at the request and by the authority of the plaintiff requested Matthews to value the same, whereof the defendant and Matthews had notice; but that the defendant and Matthews then and thence continually neglected and refused so to do: and the plaintiff further said, that he, the plaintiff, afterward, to wit, on February 2d, 1837, gave notice to the defendant that the plaintiff's said appraiser and valuer, the said Newton, was ready to meet the defendant's appraiser and valuer, the said Matthews, or any other person he might think proper to nominate for the purpose on the defendant's behalf, at any time within ten days from the said February 2d, which the defendant might fix, to value the said goods, etc., of which the defendant then had notice, but then and thence hitherto wholly neglected and refused to appoint any day for his appraiser, the said Matthews, to value, and wholly neglected and refused to nominate any other appraiser, and during all that time, has wholly refused and neglected to take any steps to value as aforesaid, or to cause or procure the same to be valued according to his said agreement and promise, and has during all the time aforesaid wholly refused to value the said goods, etc., or to let the same be valued, according to his said agreement and promise: And thereupon the said Mr. Newton, afterward, and after the lapse of a reasonable period of time, to wit, one month from the day and year last aforesaid, proceeded to value and did then value the said goods, etc., and the price thereof, upon such valuation, reasonably amounted to the sum of £500, whereof the defendant had notice, and was requested to pay the same to the plaintiff: and the

plaintiff further says, that he had always from the time of making such valuation as aforesaid been ready and willing to sell and deliver to the defendant the said goods, etc., and to receive payment by him of the value thereof, whereof the defendant had always had notice; yet the defendant, not regarding, etc., did not nor would, although often requested, take the said goods, etc., so agreed by him to be taken as aforesaid, and pay the plaintiff the value thereof, but had hitherto wholly neglected and refused so to do, whereby, etc.

There were also counts for goods and fixtures bargained and sold, and on an account stated.

Special demurrer to the first count, assigning, among other causes, the following: that the count does not sufficiently allege a breach of the defendant's promise therein mentioned, for that it does not allege that the defendant hindered or prevented the said persons appointed and agreed on to make the said valuation, or either of them, from making such valuation. And also that it is alleged by way of breach that the defendant refused to take the goods, etc., agreed by him to be taken, and that he also refused to pay the plaintiff the value of the said goods, etc., and no agreement or promise is stated in the said count, to take the said goods, etc., at their value generally, or at the valuation made by the said Mr. Newton, but at the valuation only of the said Newton and Matthews, or their umpire. Joinder in demurrer.

LORD ABINGER, C. B. I am of opinion that this count is bad. The agreement stated is an agreement to purchase the goods on the valuation of Newton and Matthews. There is no distinct allegation that the defendant refused to permit Matthews to value on his part; but only an obscure statement that he refused to appoint any day for his valuing, or to take any steps to value or to cause and procure the goods to be valued according to his agreement, and that he has refused to value the goods, or to let them be valued, according to his agreement: all which comes after the allegation that Matthews had refused to value, there being no statement that he had changed his mind, and was ready and willing to do so, but that the defendant would not permit him. I am of opinion, therefore, that enough is not stated to render the defendant liable for the price of the goods.

ALDERSON, B. I should refer the words "or to let the same be valued," etc., to the defendant's letting the goods be valued by another appraiser instead of Matthews, according to the notice which the plaintiff says he gave him.[50]

Leave to amend on payment of costs; otherwise judgment for the defendant.

[50] The case of a valuer, mutually selected, differs from the case of an architect selected by the owner for his protection against the builder sufficiently for it to be fair not to require the appointment of a new valuer unless, as suggested by Alderson, B., the construction of the contract calls for that. Accordingly the parties need not go ahead under the contract where the valuer dies,

## LAMB *v.* LATHROP ET AL.

(Supreme Court of New York, 1834. 13 Wend. 95.)

Demurrer. The plaintiff declared on a note made by the defendants, bearing date 8th March, 1831, whereby the defendants promised, one year after date, to pay to the plaintiff $50 in a horse, neat stock, or first rate pine lumber, to be delivered in Cortland village, at the market price, at the appraisal of two persons of the names of Bartlett and Rowley, with use; and alleged non-performance. The defendants pleaded, that when the note became due, to wit, on the 8th March, 1832, they tendered to the plaintiff the said sum of $50 and the interest thereof for one year, in a horse, appraised by Bartlett at $70, averring that Rowley was not on that day in the state, but was in the state of Pennsylvania, wholly beyond the reach, power and control of the defendants, so that they could not procure his attendance to unite with Bartlett in the appraisal of the horse, and concluding by alleging that the plaintiff refused to receive the horse so tendered by them; wherefore they prayed judgment, &c. This plea did not contain the averment of *tout temps prist*. The plaintiff replied, that after the tender of the horse, to wit, on the 10th day of March, &c., at, &c. he demanded the same horse of the defendants, which horse then was in their possession, and that the defendants refused to deliver the horse to him, unless he would pay to them $16.50, the difference between the appraised value of the horse and the sum of $50, with the interest thereof for one year; concluding with a verification and prayer of the judgment. To which replication the defendants demurred.

SAVAGE, C. J. The principal question arises upon the plea of the defendants, the validity of which is denied by the plaintiff, and the first ground urged on his part is, that it is not averred that the defendant is still ready to deliver the horse. It is contended, on the authority of Chipman's Essay on Contracts, p. 96, that such an averment is necessary; and that, in a case like this, the replication of a subsequent demand and refusal authorizes a recovery upon the original cause of action. The learned author of this essay argues that as there is at this day no case where property is lost to the creditor by a tender and refusal, it follows that every plea of tender must contain an averment that the property is still ready. It is true that property tendered is not lost to the creditor by his neglect or refusal to receive it; but it is also true that, in the case of a tender of specific articles, the courts in this

or without the fault of either party refuses to act, and in so far as they have gone ahead, rescission and, where proper, quasi contract recovery may be allowed. See 2 Williston on Contracts § 801. For a case of hardship redressable today if a fair method of ascertaining the value of the property was contracted for, i. e., if there was no disguised wager, and if a quasi contract recovery could not be had, see Brogden v. Marriott, 2 Bing. N. C. 473 (1836). Compare Deyo v. Hammond, 102 Mich. 122 (1894), *semble contra* to Brogden v. Marriott.

state consider the contract to deliver or pay such articles discharged. The tender, properly made, is a satisfaction of the demand; the debt is paid, and the articles tendered become the property of the creditor, and afterwards are kept at his risk and expense. In the case of Slingerland v. Morse, 8 Johns. 478, the court say, "We consider it a complete bar to the suit upon the contract." In Shelden v. Skinner, 4 Wend. 528, 529, this subject was again considered by this court, and such a tender held analogous, as it was in the last case cited, to the French consignation, whereby the debtor is discharged. The creditor must resort to the specific articles, and to the person who tendered them as the bailee thereof. The relation of debtor and creditor no longer subsists between these parties, but that of trustee and *cestui que trust*, or bailor and bailee. See 2 Kent, Comm. 508, 509. If such be the law, the defendant in this case was not bound to aver that the horse was still ready; and the plea is not faulty for want of such averment.

The remaining objections to this plea are, that it is not averred that the appraisal was by the persons agreed upon, nor at the market price, nor that the tender was made in satisfaction of the debt. No authority is cited to show that it should be averred that the offer was made in satisfaction of the debt; the precedents are not so, nor do I see any necessity for such an averment. The plaintiff complains that the defendant did not pay him $50 and interest in a horse, according to his contract. The defendant says, that on the day, and at the place appointed, he tendered to him the said sum in a horse, according to his contract; that is enough. Nor can it be necessary, in such case, to aver that the appraisement was at the market price. The market price is the price of every article, unless some other is mentioned. The market price, I apprehend, was inserted as directory to the appraisers and the averment that the horse was appraised by the appraisers is sufficiently minute and certain; to appraise at any other price would be a violation of duty, even if the words market price were omitted. The presumption, in such cases is, that the persons designated have done their duty; not that they have violated it.

But the objection that there is no averment that the property in question was appraised by the persons agreed upon is not so easily obviated. The defendants, by their contract, agreed to pay $50 and interest for one year, in a horse, at the appraisal of Bartlett and Rowley. They aver that they tendered the horse at the appraisal of Bartlett; that is not a compliance with the contract; the appraisement by two persons is a condition precedent to the tender; the plaintiff has not agreed to accept a horse at the appraisement of Bartlett alone, nor of Bartlett and any other except Rowley. It is not sufficient that the act done may be equivalent. The plaintiff relied upon the judgment of those particular persons; the defendants undertook to procure it: if they failed, they must pay the money. There is a debt due the plaintiff; he agrees to receive a horse, provided it is appraised by Bartlett and

Rowley. The defendants agree to pay the money, if they do not deliver a horse at the appraisal of Bartlett and Rowley. This is the legal effect of the contract. It is manifest that the defendants have not procured the appraisal of the two persons named; and as they have not performed the condition upon which they were to be excused from the payment of the money, it follows that the money must be paid. It is not for the defendants to say that they can make a new agreement for the plaintiff; nor can the court do it. The plaintiff has substantially said, I will not agree to take a horse at all, unless at the appraisal of these two men. I will not take the appraisal of one of them, but of both. The defendants entered voluntarily into the agreement, and they must perform it. This case appears to me to be analogous to the cases upon fire policies, where, if the certificate of certain persons is required, no other can be substituted. 6 Term. R. 719; 1 H. Bl. 254; 2 H. Bl. 574. This view of the subject is sufficient to authorize a judgment in favor of the plaintiff.

It is not improper to remark, that the plea is defective in another particular, though the point is made here as an objection to the replication. The horse, it seems, was appraised at $70, and the defendant claims the payment of the difference in money, before he is liable to deliver the horse. Under what agreement of the plaintiff do the defendants set up this claim? The plaintiff hath said that he will receive a horse worth $53, on certain conditions; but it does not follow that he is to receive a horse of a greater value, and pay the difference. He has entered into no such agreement. The defendants must tender the horse according to agreement; if he is of greater value, they must either tender him at the amount to be paid, or keep him, and pay the money.

The plea is bad, and the plaintiff is entitled to judgment, with leave to defendants to amend, on payment of costs.

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## CHISM *v.* SCHIPPER.

(Supreme Court of New Jersey, 1888. 51 N. J. Law, 1, 16 Atl. 316, 2 L. R. A. 544, 14 Am. St. Rep. 668.)

On demurrer to declaration. The declaration was founded on a building contract, under seal, whereby it was alleged the plaintiff agreed to "erect and finish" a certain dwelling-house "agreeably to the drawings and specifications by Oscar S. T., architect, within the time aforesaid, in a good, workmanlike, and substantial manner, to the satisfaction and under the direction of said architect, to be testified by a writing or certificate, under the hand of said architect;" that the plaintiff was to furnish all materials, &c., and that for his work and materials he was to be paid the sum of $6,050; that if the defendant requested alterations, additions, or omissions, which, at a reasonable valuation, were to be deducted from or added to the contract price; that the defendant did request

certain alterations (which were specified), which were made, to the value of $600; that it was further provided that in case of a dispute arising as to the true construction or meaning of the drawings or specifications, the said architect was "to decide the same, and whose decision should be final and conclusive." Full performance on the part of the plaintiff is alleged.

The breach is that the said architect "wilfully and fraudulently decides that the aforesaid alterations, deviations, and additions are within the true construction of said drawings and specifications referred to in the said contract, and that the plaintiff is not entitled to be paid the fair and reasonable value thereof, and willfully and fraudulently withholds from the plaintiff, and refuses to sign the certificate, required by said contract, for the fifth and last payment called for thereby; which fraudulent and wilful decision of the architect, and fraudulent and wilful withholding of the said certificate have been brought to the knowledge of the said defendant by the said plaintiff; but the said defendant, though often," etc., "hath not paid the said sum of $600," &c.

This count was demurred to, and the issue thus raised was certified for the opinion of the Supreme Court.

BEASLEY, C. J.† A comprehension of the facts stated in the summary of the declaration prefixed to this opinion will make it manifest that the question to be decided is, Can the defendant cheat the plaintiff by due course of law?

The case, in brief, is this: The plaintiff has done work for the defendant to the value of $600, which work was additional to that specified in the written contract; the money was payable on the certificate of the architect, whose decision was to be final; such architect fraudulently decided that the work in question was not additional, but was embraced in the contract, and the defendant, being notified of the facts, refused to pay the demand. As the demurrer confesses the truth of this statement, it will be observed that the defendant stands now before the court saying: I admit that this money is due for additional work; I admit that the architect fraudulently certifies to the contrary; and I claim that, by a correct application of legal principles, I have the right to take advantage of this fraud, and to appropriate to myself the moneys that are its fruits. The inquiry is, Does the law, in reality, justify this immoral attitude?

It should be premised to the inquiry, that if this action will not lie, neither will any action against the defendant, founded on the facts stated, either at law or in equity. As such a result would be one much to be deprecated, and would stand as a blot on the jurisprudence of the state, it would seem that the most cogent reasons should be forthcoming

† Parts of the opinion and the dissenting opinion of Magie, J., are omitted.

to afford a satisfactory answer to the interrogatory: Why should a man be permitted to take advantage of the fraud of another? The only known reply is, that the plaintiff has covenanted to that effect; that he has agreed that the action of the architect, whether honest or dishonest, shall be conclusive.

It is proper to say, *in limine*, that it is not by any means deemed certain that this contract, if to be read in the sense just specified, is sustainable in law. It is assumed that a man cannot contract that he himself may commit a fraud; for example: this defendant could not have agreed that this money should not be payable except on his own written certificate, and that he might fraudulently withhold such certificate. If such a stipulation would, as it is thought, be expurged from the instrument on grounds of public policy, how can the party legally stipulate that another may commit this same crime for him? The capacity of parties to a contract to provide that one or the other, as the case turns out, may be cheated, does not appear to be a faculty requisite in the transaction of any legitimate business; while, at the same time, its existence is palpably offensive to good morals, and, consequently, may well be said to be adverse to the public welfare. The consequence is that it is, in my opinion, doubtful whether such an agreement can be legally made; but it is not deemed necessary to pursue the inquiry, inasmuch as, by proper rules of construction, applied to the facts set forth in this record, the proper conclusion is, that the contract existing between these parties does not contain this stipulation, so highly questionable.

The inquiry is: What did these parties mean? Did they intend, or by reason of the language employed must it be concluded *de jure*, that they intended, to be bound by the award of the architect, even though such award was the creature of fraud?

The clause thus referred to is in the common form, that has long been in frequent use; and yet, it may be safely said, that it is most improbable that it would have been adopted in a single instance if it had expressed in plain terms the meaning that it is now contended lies latent in its expressions. It is hard to believe that any self-respecting man would put his name to an agreement that a third party might do in his favor. a fraudulent act. Nor does it seem probable that to the ordinary mind any suggestion of so extraordinary a purpose would be made by the generality of the expressions of this clause of the contract under criticism. And this last is an important consideration, for it is truly remarked by Gibson, C. J., in Schuylkill Nav. Co. v. Moore, 2 Whart. 477, 491, that in the interpretation of contracts "the best construction is that which is made by viewing the subject of the contract, as the mass of mankind would view it, for it may be safely assumed that such was the aspect in which the parties themselves viewed it." Tested by this standard, it would seem to be certain that the con-

struction of this term of the contract insisted on by the defence in this case cannot prevail.

But the adverse argument is, that the agreement of the parties is to be ascertained from the plain language used by them, and such agreement is to be enforced, no matter what the intention may have been.

This is the general rule, beyond a doubt, but such required literalism is not to be pushed to the preposterous length of requiring, that by its operation the general intention of the parties, as evidenced by their contract itself, shall be frustrated or perverted, either in whole or in part. The terms employed are servants and not masters of a perspicuous intent; they are to be interpreted so as to subserve and not to subvert such intent. As an illustration: it plainly appears on the face of this instrument that it was the evident and sole purpose of the provision in question to provide for the fair and definite decision of certain matters; and it is now said that by force of the terms used, the decider is empowered to cheat either party at will; and yet it is obvious that the existence of such a power in the agent has no tendency to effectuate the object in view, but so far as it can operate, it is destructive of it. The stipulation giving the quality of finality to the action of their agent, is part of a contrivance of these parties to enforce fair dealing between them in certain particulars; there seems to be no reason why they should impart to such a contrivance a fraudulent potency. It was quite reasonable for these parties to say to their agent, decide honestly between us, and your decision shall be final; but it was utterly unreasonable for them to agree to abide by such award if it were fraudulent. For my own part, I do not believe that in the history of the human race, the transaction has occurred in which a man has consciously agreed that another should be clothed with the power to cheat him, and that the decision of the fraudoer should be conclusive on the subject.[51] And in the present instance such a stipulation can be con-

[51] Yet in Tullis v. Jacson, [1892] 3 Chancery, 441, that was what occurred. And Chitty, J., said of the clause so agreeing as to the fraud of the architect: "It is said that the clause is void as being against public policy, because in substance it is an agreement on the part of the plaintiffs and defendants through the committee not to set up fraud, and the argument proceeds in this way. 'The court will not listen to any such stipulation to be found in any contract however solemn.' To some portion of this argument I accede. If a contract was obtained by fraud, and in the contract itself there was the term inserted that neither party should impeach the contract on the ground of fraud, it may well be that such a term would not stand, and the reason is obvious, that the court would set aside that contract, because it was obtained by fraud, and setting aside the contract, it would set aside the stipulation. That is a case I put by way of illustration, of fraud between the parties to the contract in its inception. It may well be also, that if there was some stipulation where some subsequent things had to be done which went to fraud on the part of either of the contracting parties, such a clause as that would not hold. But the case I have to deal with appears to me to be an entirely different one. Those who frame clauses in building contracts, which some years ago were stringent,

structed only by an abstract interpretation of the conventional terms; for, if such language be construed as a part of an integer, and in the view of purpose in hand, it can be made to produce no such result. There is no more important rule of construction than that which requires that words shall be interpreted in the reflected light of the context in which they are found. And applying this rule to the case in hand it is not perceived how it can be reasonably said that these parties have

have by degrees kept on making them more and more stringent by reason of the consequences that follow from opening a certificate, and the enormous cost and litigation that arises where the work is a large work like a railway or a large public building from any court of justice endeavoring to take the account, an account of thousands and thousands of items on every one of which skilful advisers may raise some issue, whether the amount should stand for the sum charged, or for some less sum, or for some greater sum. A litigation of that kind it is almost impossible to bring to a conclusion in a court of justice where the parties are entitled to be heard, and to insist on every possible objection. It does appear to me that those who deal in matters of this kind are wise in making the clauses more and more stringent. It is of course for the contractor when he enters into a contract of this kind to consider whether he will accept it or not. I have no doubt contractors do accept clauses which to the lawyer look terrific; but they do it as business men, they do it for better or worse, and they think on the whole it is very unlikely that any architect selected would act unjustly towards them, and they are content to take him as the person whose award is to be final on the subject. Then it appears to me that the policy of the law does not require that I should hold, in the case I am now dealing with, a clause like the present to be void. To put an illustration, suppose a gentleman who is going to have a house built for him enters into a complex agreement with the contractor, in the performance of which innumerable questions may arise, says, 'Will you agree with me (for if you will, I will agree with you) that nothing on earth shall upset the certificate that is given?' Why is that unfair or against public policy? The late Master of the Rolls (Sir G. Jessel), in the case of the Printing and Numerical Registering Co. v. Sampson, Law Rep. 19 Eq. 462, 465, says this: 'If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.' Entirely agreeing as I do with these remarks, I myself can see no reason why grown-up men should not be allowed to contract in these terms. 'Neither of us,' each says to the other, and each agrees with the other, 'will ever raise the charge of fraud.' Persons will shrink very often from charges of this kind, and those who are persistent, will, by making charges, induce persons to come to terms of compromise. It seems to me that this clause is addressed to get out of what the parties may consider evils, and which I have endeavored to describe. The clause therefore stands thus: 'both of us agree,' to our advantage or disadvantage as it may turn out, 'that every certificate given by the gentleman named shall stand firm and good and shall not be questioned even for fraud.' That that is the meaning of the clause I have no doubt. * * * I need hardly say that if the case had been that the trustees themselves [the defendants] had been party in any way to the fraud it would have been very different."

given to the provision in question that noxious efficacy that is sought to be imparted to it.

That the clause under discussion cannot be, out and out, construed literally, appears to be undeniable. This and similar engagements are never so read. Undoubtedly, if we construe these terms with entire literalness, the builder is required to produce, before he can claim the money due him, the certificate of the architect. There are no exceptions provided for nor indicated, if the language is thus alone regarded. But suppose the money be earned, and the architect die before the signing of the certificate, is the claim lost or forfeited? Such a result, it is presumed, would not be claimed; and yet it is avoidable only in one way, and that is, to construe the terms of the contract reasonably as applied to their subject, and not literally. The exception can stand on no other ground than this, for the maxim, "*actus dei nemini facit injuriam,*" is never applied in violation of a contract. Looking to the letter alone, these parties have said that under all possible circumstances the certificate shall be a condition precedent to the right to payment. Admitting this as the true construction, the impossibility of the performance of such condition would not avoid it; and that such an effect has never been judicially given to such provisions, shows conclusively that they have been interpreted according to their spirit and not in subservience to their very letter.

And, indeed, in my view, the entire legal course that has been pursued in the construction of submissions to arbitration, in the common-law form, can be explained only on the ground that they have been construed liberally and not with literal narrowness. In all these submissions the stipulation is in the most unqualified form, that the award shall be final and conclusive; but if such award be tainted with fraud, it is set aside on the application of the party. And yet, it is plain that such party could not be permitted to make such application if his submission is to be read by its letter, and thus made to mean an engagement on his part to abide by the award, whether honest or dishonest. In such cases it has never been pretended that the parties by the terms of their submission, reasonably understood, meant anything of the kind. The grounds of decision in that entire class of cases would seem to be precisely applicable to the present case.

As another illustration of the principle that a literal interpretation is out of place when its adoption will run counter to the expressed general object of the contract, reference may be made to the familiar case of clauses so frequent in leases, that if the rent is in arrear for a certain time the instrument shall become void. In all these instances the courts have declared, notwithstanding the literal meaning of the terms, that the lease, on the happening of the event, is not absolutely vacated, but only becomes voidable at the option of the lessor. * * *

In Batchelor v. Kirkbride, 27 Fed. Rep. 899, the question present in this case was put directly in question, and was pointedly decided; for

the inquiry was whether the plaintiff was dispensed from producing a certificate if it had been refused by the fraud of the arbiter without collusion with the defendant. The jury was instructed at the trial, by Mr. Justice Bradley, that if such fraud was shown, the plaintiff was entitled to recover; and that ruling was upon recommendation declared to be right both by the distinguished judge before whom the case had been tried and by his associate, Mr. Judge Nixon. The case in itself is of great weight and appears to be supported by the general current of American authority. * * *

I think on this issue the plaintiff should have judgment.[52]

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## HAMILTON *v.* LIVERPOOL & LONDON & GLOBE INS. CO.

**(Supreme Court of the United States, 1890. 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419.)**

This was an action upon a policy of insurance numbered 2,907,224, against fire, for a year from September 5, 1885, upon a stock of tobacco in the plaintiff's warehouse at 413 and 415 Madison street, in Covington, in the state of Kentucky. Among the printed "conditions relating to the methods of adjustment of loss, and the payment thereof," was one as to arbitration. The defendant requested plaintiff to arbitrate and he refused. Verdict and judgment for the defendant, and plaintiff sued out this writ of error.

GRAY, J.[53] The conditions of the policy in suit clearly and unequivocally manifest the intention and agreement of the parties to the contract of insurance that any difference arising between them as to the amount of loss or damage of the property insured shall be submitted, at the request in writing of either party, to the appraisal of competent and impartial persons, to be chosen as therein provided, whose award shall be conclusive as to the amount of such loss or damage only, and shall not determine the question of the liability of the company; that the company shall have the right to take the whole or any part of the property at its appraised value so ascertained; and that until such an appraisal shall have been permitted, and such an award obtained, the loss shall not be payable, and no action shall lie against the company. The appraisal, when requested in writing by either party,

[52] So, too, "An owner is not bound as against his contractor by the acts of a supervising engineer or inspector in approving work done by the contractor where such approval is the result of either bad faith, collusion, or gross negligence. Reid v. Alaska Packing Co., 47 Or. 215, 221, 83 Pac. 139; 2 C. J. p. 834; Chandler v. Wheeler (Tenn. Ch. App.) 49 S. W. 278; Rogue River Ass'n v. Gillen-Chambers Co., 85 Ore. 113." Bean, J., in City of Seaside v. Randles, 92 Ore. 650, 671-672 (1919).

[53] The statement of facts and a part of the opinion are omitted.

is distinctly made a condition precedent to the payment of any loss, and to the maintenance of any action. Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country. Scott v. Avery, 5 H. L. Cas. 811; Viney v. Bignold, 20 Q. B. Div. 172;[54] Delaware & Hudson Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 250; Reed v. Insurance Co., 138 Mass. 572, 576; Wolff v. Insurance Co., 50 N. J. Law, 453, 14 Atl. Rep. 561; Hall v. Insurance Co., 57 Conn. 105, 114, 17 Atl. Rep. 356. The case comes within the general rule long ago laid down by this court: "Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so." U. S. v. Robeson, 9 Pet. 319, 327. See, also, Railroad Co. v. March, 114 U. S. 549, 5 Sup. Ct. Rep. 1035. * * * The court therefore rightly instructed the jury that the defendant had requested in writing, and the plaintiff had declined, the appraisal provided for in the policy, and that the plaintiff, therefore, could not maintain this action. If the plaintiff had joined in the appointment of appraisers, and they had acted unlawfully, or had not acted at all, a different question would have been presented.

*Judgment Affirmed.*[55]

[54] In Viney v. Bignold, Wills, J., said: "The principle on which cases such as the present ought to be decided is very clear, and it is this. The court must look and see what the covenant is. If there is a covenant to pay the amount of the loss, accompanied by a collateral provision that the amount shall be ascertained by arbitration, such arbitration is not a condition precedent to the maintenance of an action on the covenant; but if the parties have covenanted that the liability is only to arise after the amount has been adjusted by arbitration, then such adjustment is a condition precedent to the right to recover."

See 8 Ann. Cas. 171, note; Ann. Cas. 1915 D, 327, note.

[55] For a case where merely a reference to arbitration, and not an award, was the condition precedent, see Second Society of Universalists v. Royal Ins. Co., Ltd., 221 Mass. 518 (1915).

"It is familiar law that, where a building contract makes the architect an arbitrator between the parties, to decide practical questions of performance that may arise during the progress of building, his decision, within the limits of the matters committed to him, is binding, so long as he does not act unreasonably, capriciously, arbitrarily, willfully or fraudulently. Norcross v. Wyman, 187 Mass. 25, 72 N. E. 347; Hebert v. Dewey, 191 Mass. 403, 77 N. E. 822; Handy v. Bliss, 204 Mass. 513, 90 N. E. 864, 134 Am. St. Rep. 673; Evans

## STEWART *v.* NEWBURY.

(Court of Appeals of New York, 1917. 220 N. Y. 379, 115 N. E. 984, 2 A. L. R. 519.)

Action on a contract for plaintiff to do the concrete work on the defendant's foundry building. Plaintiff without completing the work sued for work done to date of discontinuing work. A verdict for the plaintiff resulted and the judgment in his favor thereon was affirmed by the Appellate Division. Defendant appealed.

CRANE, J.[56] * * * The appeal to us is upon exceptions to the judge's charge. The court charged the jury as follows:

"Plaintiff says that he was excused from completely performing the contract by the defendants' unreasonable failure to pay him for the work he had done during the months of August and September. * * * Was it understood that the payments were to be made monthly? If it was not so understood, the defendants' only obligation was to make payments at reasonable periods, in view of the character of the work, the amount of work being done, and the value of it. In other words, if there was no agreement between the parties respecting the payments, the defendants' obligation was to make payments at reasonable times. * * * But whether there was such an agreement or not, you may consider whether it was reasonable or unreasonable for him to exact a payment at that time and in that amount."

The court further said, in reply to a request to charge:

"I will say in that connection, if there was no agreement respecting the time of payment, and if there was no custom that was understood by both parties, and with respect to which they made the contract, then the plaintiff was entitled to payments at reasonable times."

The defendants' counsel thereupon made the following request, which was refused:

"I ask your honor to instruct the jury that, if the circumstances existed as your honor stated in your last instruction, then the plaintiff was not entitled to any payment until the contract was completed."

The jury was plainly told that if there were no agreement as to payments, yet the plaintiff would be entitled to part payment at reasonable times as the work progressed, and if such payments were refused he could abandon the work and recover the amount due for the work performed.

This is not the law. Counsel for the plaintiff omits to call our atten-

v. Middlesex Co., 209 Mass. 474, 95 N. E. 897." Cornish, C. J., in Jacques v. Otto Nelson Co. (Me.), 111 Atl. 515, 516 (1920).

For conditions precedent as to arbitration and award deemed invalid because ousting the court of jurisdiction, see United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., reported, *post*, p. 1166.

[56] The statement of facts is abbreviated from the opinion and parts of the opinion are omitted.

tion to any authority sustaining such a proposition and our search reveals none. In fact, the law is very well settled to the contrary. This was an entire contract. Ming v. Corbin, 142 N. Y. 334, 340, 341, 37 N. E. 105. Where a contract is made to perform work and no agreement is made as to payment, the work must be substantially performed before payment can be demanded. Gurski v. Doscher, 112 App. Div. 345, 98 N. Y. Supp. 588; affirmed 190 N. Y. 536, 83 N. E. 1125; Cunningham v. Jones, 20 N. Y. 486; People ex rel Cossey v. Grout, 179 N. Y. 417, 426, 72 N. E. 464, 1 Ann. Cas. 39; Delehanty v. Dunn, 151 App. Div. 695, 136 N. Y. Supp. 193; Smith v. Brady, 17 N. Y. 173, 187, 188, 72 Am. Dec. 442; Catlin v. Tovias, 26 N. Y. 217, 84 Am. Dec. 183; Cronin v. Tebo, 71 Hun, 59, 61, 24 N. Y. Supp. 644, affirmed 144 N. Y. 660, 39 N. E. 344; Coburn v. Hartford, 38 Conn. 290; Poland v. Thomaston Co., 100 Me. 133, 60 Atl. 795; Thompson v. Phelan, 22 N. H. 339; Friedman v. Schleuter, 105 Ark. 580, 151 S. W. 696. * * *

The judgment should be reversed, and a new trial ordered; costs to abide the event.[57]

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## PIKE *v.* THOMAS.

(Court of Appeals of Kentucky, 1817. 4 Bibb 486, 7 Am. Dec. 741.)

COYLE, C. J.[58] This was an action of covenant upon articles of agreement between the plaintiff and defendant, the object of which was to erect and carry on a wool-carding machine in partnership. Various mutual covenants are made by the parties. Among those on the part of the defendant, is a covenant not to erect or have any hand in erecting a wool-carding machine within twenty miles of the plaintiff's machines then in operation, without paying to the plaintiff $200 a year during the operation of such machine.

The action was brought for a breach of this covenant only. The defendant pleaded:

[57] "The defendant agrees to work two years from the date of the agreement for the plaintiffs, and they agree to pay him $100. When was the agreement to be performed? The defendant was to occupy two years in performing his part of the agreement; of course he could not perform within one year. When were the plaintiffs to pay the $100? On this point the contract is silent in terms, but as the payment is to be made in consideration of the services, those services are a condition precedent to the payment, and must be performed in full, before payment can be enforced. The money then was to be paid at the end of two years, and of course not within one year. The contract then, by its terms, was not to be performed within one year." Savage, C. J., in Drummond v. Burrell, 13 Wend. (N. Y.) 307, 308-309 (1835).

On contracts to render service silent as to time of payment, see 2 A. L. R. 522, note.

[58] Parts of the opinion are omitted.

1st. That the plaintiff had not kept and performed the covenants on his part. * * *

3d. That the erection of the wool-carding machine, and the covenants on the part of the plaintiff in relation thereto, were the only consideration of the covenant on the part of the defendant, for the breach of which the action is brought, and that the said machine was never erected, nor did the plaintiff perform the covenants to be performed on his part in relation thereto; and so the consideration of said covenant has failed and the covenant [is] against law and void.

4th. The fourth plea is in substance the same as the third. * * *

The court below gave judgment for the defendant and the plaintiff has appealed to this court.

We have not thought it necessary to recite the substance of the replications, because we are not of opinion that either of the pleas is sufficient to preclude the plaintiff from a recovery; and as the demurrers to the replications brought the whole pleadings before the court, the judgment should have been given for the plaintiff, on the ground of the insufficiency of the pleas, without regard to the matter of the replications.

As to the first plea, it is sufficient to remark, that it could only have been sustained on the ground that the covenants on the part of the plaintiff were precedent to those on the part of the defendant, and the performance of the latter made to depend upon the performance of the former. But this is plainly not the case; for according to the terms of the covenant they are clearly independent, for a breach of which on either side, the other party may have his action; but a failure of performance on the one side is no bar to an action for a non-performance on the other. * * *

The third and fourth pleas turn essentially upon the same principles as the first, plainly presupposing that the performance of the covenants on the part of the plaintiff was the consideration of the covenants on the part of the defendant; whereas it is the covenants themselves, and not their performance, which is on each side the consideration of those on the other; and consequently there can be no failure of consideration unless there was a failure or destruction of the covenants themselves. * * *

The judgment must therefore be reversed, and the cause remanded for new proceedings to be had not inconsistent with the foregoing opinion.

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## FRANCIS JONES *v.* LATHROP MARSH.

**(Supreme Court of Vermont, 1850. 22 Vt. 144.)**

Assumpsit on a written contract in these words: "Received, Franklin, September 31st, 1847, of Francis Jones, fifty dollars, in part pay

for my dairy of cheese. I am to deliver all the new milk cheese I have now on hand, and all I make up to the first of October next, well boxed, on the wharf at St. Albans, by the fifteenth of October next, for which I am to have seven cents per pound on delivery. (Signed) Lathrop Marsh." Plea, the general issue, with notice, that the defendant would prove, that he had ready for delivery at the place agreed upon, on the fifteenth day of October, 1847, and for several days thereafter, all the cheese which he contracted to deliver, but that the plaintiff neglected to appear to receive the cheese, or to pay for the same, and that thereupon the defendant sold the cheese at a price less than seven cents per pound, and thereby incurred a loss of a large sum, to wit, seventy dollars. And it was conceded by the plaintiff, that the facts stated in the defendant's notice under the general issue were to be considered by the court as true. The court rendered judgment for the defendant. Exceptions by plaintiff.

KELLOGG, J.[59] * * * The question presented for consideration is, are the facts reported sufficient to sustain the judgment of the court below?

The contract, upon which the plaintiff seeks to recover, is entire and indivisible, and the delivery of the cheese by the defendant and the payment of the purchase money by the plaintiff are concurrent acts, to be performed at the same time. The contract remains unrescinded and upon such a contract it is well settled by the authorities, that neither party can maintain an action, without averring performance, or an offer to perform, his own part of the contract.

That the promises and undertakings of the parties are dependent would seem, by the language of the contract, to be placed beyond all doubt. But even if it were doubtful, whether the promises are dependent, or independent, it is said, that courts have uniformly favored the former construction,—that of dependent promises,—as being obviously the most just. The vendor ought not to be compelled to part with his property, without receiving the consideration; nor the vendee to part with his money, without receiving an equivalent return. But it is said, that although the promises of the parties are mutual and dependent, yet, inasmuch as part of the consideration has been accepted and enjoyed by the defendant, and the plaintiff has no other remedy than upon the agreement, and inasmuch as the plaintiff's failure to perform his part of the contract can be compensated in damages, the plaintiff should be allowed to recover, without alleging performance of the remainder. And some few authorities are cited by the plaintiff as sustaining this doctrine. These cases, however, proceed upon the ground, that the principal part of the consideration has been received and enjoyed. For it is admitted, that where there has not been such acceptance of part,

[59] The statement of facts is rearranged and abbreviated and parts of the opinion are omitted.

as makes it fraudulent to set up this defense, the action will not be sustained, though the plaintiff's undertaking be divisible. And in this case it can hardly be said to be fraudulent in the defendant to set up this defence, inasmuch as the amount advanced by the plaintiff upon the making of the contract is less than the loss sustained by the defendant upon a re-sale of the property. * * *

Upon the facts found in this case we are unable to discover any ground, upon which the plaintiff is entitled to recover. The judgment of the county court is therefore affirmed.

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## DUNHAM & DIMON v. PETTEE & MANN.

(Court of Appeals of New York, 1853. 8 N. Y. 508.)

Action brought upon a contract made between the plaintiffs and the defendants in the following form:

"Sold to Messrs. Pettee & Mann, for account of Messrs. Dunham & Dimon, 155 tons (or thereabouts) of English bar iron, as per specification of the same, now in public store in this city, at $50 per ton, as per custom-house weigher's return, equal to six months' credit; but payment for said iron is to be made as follows, to wit: $750 to be paid now, and the balance is to be paid within sixty days from this date, and discount is to be made on the bill at the rate of seven per cent. per annum, reckoning the time from the date of the average payment of the bill until the end of the six months above named. The sellers are to hold a policy of insurance on the iron until the whole amount is paid; and the buyers are to pay the insurance and all storage expenses from and after this date. It is understood that the iron is to be paid for on delivery (within the sixty days aforesaid), and should the full amount not be paid within the sixty days aforesaid, Messrs. Dunham & Dimon will be at liberty to sell the iron to other parties, for account of Messrs. Pettee & Mann.

"New York, March 12th, 1849.

"NATHAN CASWELL, Broker."

Verdict and judgment for the plaintiffs. Defendants appealed.

RUGGLES, C. J.[60] Under the contract of sale, the delivery of the iron and the payment of the money were things to be done at one and the same time. The plaintiffs were not bound to deliver the iron unless the defendants at the same time paid the money; and the defendants were not bound to pay the price unless the plaintiffs at the same time delivered the thing sold, or was ready to deliver it. The obligations to deliver on the one part and to pay on the other, were mutual and dependent. If the buyer in a case of this sort fails to pay or offer to pay within the

[60] The statement of facts is abbreviated.

time specified for mutual performance, the seller is discharged from liability to answer in damages for not delivering the thing sold. But it does not follow that the seller, in such case, is entitled from the mere default of the buyer to recover the purchase-money. To entitle the seller to recover the price, he must show not only that the purchaser failed to pay, but that he himself was ready and offered to deliver the goods. (12 Johns. 209, Porter v. Rose, 20 id. 130.)

The issue between the parties was framed upon a correct view of the legal question between them. The plaintiffs averred that they were ready and willing, and offered to deliver the iron within the time specified in the contract, and this averment was denied by the defendants in their answer; and this was the question which ought to have been put to the jury. Instead of that the judge charged the jury that the principal question for them to decide was, "Have the defendants on their part during the sixty days demanded the iron, and in readiness to pay on their part offered to pay the money on delivery?" If this had been an action by the purchaser against the seller, for the non-delivery of the goods, the charge would have been right, because the purchaser is bound, on a contract of this kind, to show a readiness and an offer to perform before he can require the seller to deliver. Whichever party seeks to enforce the contract against the other must show performance or tender of performance. Until that be shown he is himself in default. The plaintiffs in this case are seeking to enforce the contract, and the judge should have told the jury that to entitle them to recover they were bound to show an offer of performance, whether the defendants were ready or not. But the case was put to the jury on the question whether the defendants had offered to pay; and if they had not, the jury were instructed in effect to find for the plaintiff, whether he had offered to deliver or not, thus making the payment by the defendant a duty precedent to the delivery when in truth it was concurrent merely; and allowing the plaintiff to recover in a case in which neither party had shown a readiness and offer of performance. In this the judge charged erroneously, and on this ground the judgment below must be reversed and a new trial ordered.

*Judgment reversed and a new trial ordered.*[61]

[61] "This being a contract in which no time for delivery was fixed by the terms of the instrument itself, it is conceded by the briefs of both the appellant and the respondent that there could be no default which either the buyer or the seller could take advantage of until one party or the other had made a demand for delivery or acceptance. And this is unquestionably the law. * * *

"And we think it equally clear that, if either party lets a reasonable time expire, without a demand, then the contract lapses, and neither party can enforce a performance. Hume v. Mullins (Ky.) 35 S. W. 551." Bennett, J., in Hurst v. Hill, 96 Ore. 311, 321 (1920).

"If the defendant promised to marry the plaintiff on a certain date, and defendant did not marry her on that date, she being ready and willing to marry him on said date, the action could be maintained even although plaintiff did

## MORTON *v.* LAMB.

(Court of King's Bench, 1797. 7 Term Reports, 125.)

In an action on the case the plaintiff declared against the defendant for that whereas on the 10th Feb. 1796, at Manchester in the county of Lancaster, in consideration that the plaintiff, at the special instance and request of the defendant had then and there bought of the defendant 200 quarters of wheat at £5 0s. 6d. per quarter, such price to be therefor paid by the plaintiff to the defendant, he the defendant undertook and then and there promised the plaintiff to deliver the said corn to him (the plaintiff) at Shardlow in the county of Derby in one month from that time, viz. of the sale; and then he alleged that although he (the plaintiff) always from the time of making such sale for the space of one month then next following and afterwards was ready and willing to receive the said corn at Shardlow, yet the defendant not regarding his said promise &c. did not in one month from the time of the making of such sale as aforesaid or at any other time deliver the said corn to the plaintiff at Shardlow or elsewhere, although he (the defendant) was often requested so to do, &c. The defendant pleaded the general issue; and at the trial the plaintiff recovered a verdict. Rule calling on the plaintiff to shew cause why the judgment should not be arrested, because it was not averred that the plaintiff had tendered to the defendant the price of the corn, or was ready to have paid for it on delivery.

LORD KENYON, C. J.[62] If this question depended on the technical niceties of pleading, I should not feel so much confidence as I do: but it depends altogether on the true construction of this agreement. The defendant agreed with the plaintiff for a certain quantity of corn, to be delivered at Shardlow within a certain time; and there can be no doubt but that the parties intended that the payment should be made at the time of the delivery. It is not imputed to the defendant that he did not carry the corn to Shardlow, but that he did not deliver it to the plaintiff: to this declaration the defendant objects, and says "I did not deliver the corn to you (the plaintiff), because you do not say that you were ready to pay for it; and if you were not ready, I am not bound to deliver the corn;" and the question is whether that should or should not have been alleged. The case [of Callonel v. Briggs] decided by Lord Holt, in Salk. 112, if indeed so plain a case wanted that authority to support it, shows that where two concurrent acts are to be done, the

not request defendant to marry her. Clark v. Corey, 24 R. I. 137, 52 Atl. 811, and cases cited.

"Did the defendant tell the plaintiff that he did not intend to marry her? If he did not intend to marry her and he brought this fact to her knowledge no demand was necessary. Kelley v. Brennan, 18 R. I. 41, 25 Atl. 346." Per Curiam in Parkinson v. Murphy (R. I.) 107 Atl. 235, 237 (1919).

62 The opinion of Grose, J., and parts of the opinions of Lord Kenyon, C. J., and Lawrence, J., are omitted.

party who sues the other for non-performance must aver that he had performed or was ready to perform, his part of the contract. Then the plaintiff in this case cannot impute to the defendant the nondelivery of the corn, without alleging that he was ready to pay the price of it. A plaintiff, who comes into a court of justice, must show that he is in a condition to maintain his action. But it has been argued that the delivery of the corn was a condition precedent, and some cases have been cited to prove it: but they do not appear to me to be applicable. * * * In the case of Campbell v. Jones, [6 T. R. 570] I thought, and still continue of that opinion, that whether covenants be or be not independent of each other must depend on the good sense of the case, and on the order in which the several things are to be done: but here both things, the delivery of the corn by one, and the payment by the other, were to be done at the same time; and as the plaintiff has not averred that he was ready to pay for the corn, he cannot maintain this action against the defendant for not delivering it.[63]

LAWRENCE, J. It has been argued, on behalf of the plaintiff, that this must be considered as a declaration on mutual promises, and that as this is a demand on the defendant on the ground of some mutual promise made by him, and which was the consideration of the plaintiff's promise, it was not necessary to aver performance on his part: but if so, the declaration is not adapted to the truth of the case, in not stating that the defendant's promise was in consideration of the plaintiff's. But on this declaration I can only consider it as an agreement by the defendant to deliver the corn at Shardlow on being paid for it. The payment of the money was to be an act concurrent with the delivery; and then the case is like that of Callonel v. Briggs, which was on an agreement to pay so much money six months after the bargain, the plaintiff transferring stock; and there Lord Holt said, "If either party would sue upon this agreement, the plaintiff for not paying, or the defendant for not transferring, the one must aver and prove a transfer or a tender," he did not say, that the not doing it should come from the defendant by way of excuse, but that the doing it must be alleged in the declaration; and that affords an answer to great part of the argument urged on behalf of the defendant in this case. The tendering of the money by the plaintiff makes part of the plaintiff's title to recover, and he must set out the whole of his title. * * * I am of opinion that the declaration cannot be supported and that the judgment must be arrested.

*Rule absolute.*

63 "It is reported in the case of Morton v. Lamb, that I said that the plaintiff should have averred a performance or a readiness to perform his part of the contract; I do not doubt that I said so, and I still think it was rightly said." Lord Kenyon, C. J., in Rawson v. Johnson, 1 East 203, 208-209 (1801).

## JACOB JOHNSON *v.* ABRAHAM REED AND ANOTHER.

(Supreme Judicial Court of Massachusetts, 1812. 9 Mass. 78, 6 Am. Dec. 36.)

This was an action on the case, in which the plaintiff declared upon the following memorandum of an agreement between the parties, viz:

"Memorandum of an agreement made between Jacob Johnson on the one part, Abraham Reed and Daniel Cummings on the other, witnesseth that the said Reed and Cummings do engage to pay the said Johnson, on or before the first day of September next, all and full sums he, the said Johnson, shall recover of Thomas Millet; and the interest is to begin at this date. And the said Johnson engages to let them have all the advantage of the demands he is entitled to. September 13, 1808. Jacob Johnson, Abraham Reed, Daniel Cummings."

The action was tried upon the issue of non-assumpsit, before Thatcher, J., October term, 1810, and a verdict found for the defendants.

At the trial the plaintiff, to support the issue on his part, produced the memorandum declared on, and also the copy of a judgment recovered by him against Thomas Millet, at the Common Pleas for this county, held in November, 1808, for 45 dollars, 71 cents.

The defendants, to maintain the issue on their parts, proved that sufficient property of Millet was attached on the original writ in the suit, in which said judgment was rendered; that Johnson sued out execution thereon on the 5th of December, 1808., within thirty days from the rendition thereof, and kept the same in his hands, and endeavored to offset it against an execution which Millet held against him, until after the attachment was lost; and that, in January following, he offered the execution to the defendant Cummings, provided the defendants would give him a promisory note for the amount of the judgment and not otherwise; which the defendants refused to do.

The plaintiff then proved that, in the month of March ensuing, he tendered the execution to the defendants, without requiring a note as before; but they refused to accept it, as the attachment on the original writ was lost.

Verdict was found for defendants. Plaintiff excepted.

PARKER, J. Whether the verdict in this case is right, depends upon the construction of the writing upon which the action is brought; which, by the plaintiff, is considered to be evidence of mutual and independent promises, and, by the defendants, to contain evidence of a promise on their part, dependent only upon a due performance of the promise of the plaintiff to them.

The facts in evidence so clearly show a want of justice in the plaintiff's demand, that his counsel has been necessarily driven to some technical rules for the support of his action. Johnson refused to let the defendants have what they had promised to pay him for, and yet insists upon the price.

But it is contended,—and it is expected to support the action upon this ground,—that where there are two promises, one appearing to be in consideration of the other, each party may enforce his promise against the other, whether his own promise has been performed or not; and authorities have been cited in support of this position, which go far to maintain it. The position, as laid down in the authorities, occurs principally on questions relating to covenants; but doubtless the same principles will apply to the construction of promises. It is, that in covenants which are independent, either party may enforce his remedy for a breach, whether his own covenant is performed or not; but that, in covenants which are dependent an averment of performance on the part of the plaintiff is necessary in a declaration for a breach by his covenantor.

This principle is disputed nowhere; but, in the construction of covenants, there has been considerable difficulty, heretofore, in ascertaining whether they were dependent or independent.

In the case of Thorpe v. Thorpe, cited at the bar from Salkeld, it is declared by Lord Holt, that "where a certain day of payment is appointed, and is to happen subsequent to the performance of the thing to be done by the contract, performance is a condition precedent, and must be averred in an action for the money." This doctrine is reasonable; for it seems to be unjust that a man, who has bargained for a thing, shall be obliged to pay for it, when he may never get the thing which he pays for. "Every man's bargain," says Lord Holt, "ought to be performed as he intended it. When he relies upon his remedy, it is but just he should be left to it according to his agreement; but, on the contrary, there is no reason a man should be forced to trust, where he never meant it; and therefore, if two men should agree, one that the other should have his horse, the other that he will pay ten pounds for him, no action lies for the money till the horse is delivered."

Upon the principles of this case, there is no difficulty in deciding the nature of the promises now in question. The money stipulated by the defendants was to be paid on a day certain, and the thing to be done by the plaintiff was intended to have been done before that day arrived.

The substance and effect of the plaintiff's engagement is, that he will assign over his demand, whether existing in action, judgment, or execution to the defendants. The action was pending at the time of the promise, and the judgment and execution were obtained several months before the day of payment stipulated by the defendants. Now, it could surely never have been contemplated by the parties to this contract, that, if it was in the power of the plaintiff to perform his promise before the day arrived for the payment of the sum, for which the promise was the consideration, he might neglect to do what he had engaged, and yet exact a performance of the other party; and this after a refusal of

performance on his part, and after he had, by his own negligence, rendered himself unable, at any future time, to perform his promise.

There have been, however, many cases decided which establish very strict principles in the construction of covenants, and, perhaps, may be considered as applying to promises.

In one case, of modern date, it was decided that, if a man covenants to work upon a house, and the owner covenants to pay him by instalments, and that the last instalment shall be paid when the house is finished, the workman may recover the last instalment, whether the house shall be finished or not. Terry et al. v. Duntze, 2 H. Bl. 389. This seems to be turning a man's contract into something totally different from his words and intentions in the contract; and yet, in the same book, it is said that the intent of the parties is to govern in the construction of the covenants. The principal reason given for this decision is, that some of the instalments were to be paid before the house was finished. But, because a man had engaged to pay one certain sum of money before his house was finished, therefore he should be held to pay another sum, which he had not engaged to pay until his house should be finished, seems to be very questionable as a logical, whatever it may be as a legal conclusion.

The cases of Goodisson v. Nunn, 4 D. & E. 761, Campbell v. Jones, cited in the argument, Glazebrook v. Woodrow, 8 D. & E. 366, and Heard v. Wadham, 1 East Rep. 619, all show a disposition, on the part of the judges, to break through the bonds which some old cases had imposed upon them, and to adopt what Lord Kenyon, in one of the cases, calls the common sense doctrine,—that the true intent of the parties, as apparent in the instrument, should determine whether the covenants or promises are independent or conditional, instead of any technical rules, of which the parties were totally ignorant, and the application of which would, in most cases, utterly defeat their intention.

Now, in the case at bar, the defendants promise the plaintiff that they will pay the amount, which he shall recover of Millet, by a certain day, putting the day off so far as to leave no doubt that judgment would be previously recovered; and, in the same instrument, the plaintiff promises the defendants to let them have all the advantage of the demands that he is by law entitled to. What is meant by this, but that the defendants are to have an assignment of the judgment and execution, if necessary, as soon as obtained? Suppose the question had been put, at the time, by the defendants to the plaintiff: What if you, when you obtain your judgment, refuse to let us have the execution, until the benefit of the attachment shall be lost? Would not the plaintiff's answer have been: Why, then, you will not be obliged to pay the consideration? This contract, then, if it is construed according to the true intent and meaning of it, as entertained by the parties, must be considered as containing promises by both parties, dependent upon each other; and it would be idle to permit the plaintiff to recover in this action, when,

at the time of the commencement of his suit, he had not only refused to perform his part of the engagement, but had disabled himself from performing it, by holding his execution against Millet until the attachment was lost, and so the judgment had probably become of no value.

This decision is not opposed to the most approved of the old cases, and is conformable to the more liberal doctrine, maintained of late, relative to the construction of contracts.

In the case of Thorpe v. Thorpe, 1 Salk. 171, it is stated that, "in executory contract, if the agreement be that one shall do an act, and for the doing thereof, the other shall pay, the doing of the act is a condition precedent to payment, and the party who is to pay shall not be compelled to part with his money until the thing be performed for which he is to pay."

It is true that, in the promise declared on in this case under consideration, a certain day is appointed for the payment; and that the thing to be done by the plaintiff might, by possibility, not have been in his power to perform before the day of payment; it might have happened that the plaintiff's judgment would not have been recovered until after the day of payment had arrived. But it did, in fact, take place before, and it was contemplated by the parties that it would, and that seemed the basis of the defendant's promise; and the plaintiff might, and ought to, have delivered the execution or tendered it without conditions, to entitle himself to this action.

There is a further ground, upon which we are clear that the plaintiff ought not to have a verdict, in the present action. All executory contracts may be rescinded by the parties to them, they continuing interested until the agreement to rescind be made. Now, this case shows acts and declarations by both parties, from which it was competent for the jury to decide that there was a mutual agreement to put an end to the contract; and those facts were submitted to the jury upon this very point.

The plaintiff, having obtained an execution against Millet, instead of passing it over to the defendants, in accordance with his agreement, kept it in his own hands, endeavoring to use it for his own purposes, by offsetting it against an execution which Millet had against him. In so doing, he had voluntarily broken his contract; and this being assented to by the defendants, in resisting the payment of the money, when it became due according to the terms of the contract, and on the very ground that the consideration had failed, it would be idle to suffer the plaintiff now to recover when the very recovery would give the defendants a right of action against the plaintiff for the same sum which should be recovered against them. In every view, therefore, we think the verdict right, and that a new trial ought not to be granted.

*Judgment according to the verdict.*[64]

[64] "As has been stated, the verdict establishes the fact that at the time the defendant attempted to terminate the contract, and when it declared that it

## DEY *v.* DOX & MERCER.

(Supreme Court of New York, 1832. 9 Wend. 129, 24 Am. Dec. 137.)

Assumpsit. The plaintiff proved a contract signed by the defendants in these words: "We have this day bought of David Dey 1280 bushels of first quality merchantable wheat, to be delivered on board of boats, at or near the store house of David Brooks, at any time we may require the delivery of the same after the first day of April next, and are to pay seventy-five cents per bushel, payable the first of September next, and have paid him one dollar on account of the same; Geneva, 26th March, 1828;" and claimed to recover the price stipulated in the contract. The defendants insisted that the plaintiff was not entitled to recover, unless he proved a delivery of the wheat, or an offer or readiness to do so. The judge ruled that the promises of the parties were independent, and refused to nonsuit the plaintiff. The defendants then proved a tender of the price and a demand of the wheat, made about the middle of September, 1828, and the refusal of the plaintiff to accept the money and to deliver the wheat—this evidence was objected to by the plaintiff. The plaintiff then introduced the record of the judgment in favor of the defendants against the plaintiff, docketed the 15th January, 1830, as of January term, 1830, by which it appeared that the defendants had sued the plaintiff for the non-delivery of the wheat, and obtained a verdict against him for $1,670.92, being the full value of the wheat on the day it was demanded. In the record, however, there was a remittitur of $1,005.25, stated to be the value of the wheat at 65-100 per bushel, with the interest thereof, and judgment was taken for only $771.61, the balance of the verdict and the costs of increase. The plaintiff also proved the issuing of an execution on such judgment, which was delivered to the sheriff on the 16th January, 1830, directing the levy of $771.61, and that the same was returned satisfied; all of which evidence in relation to the judgment and execution was objected to by the defendants. The suit in this case was commenced on the 11th Janu-

would proceed no further thereunder, it was itself in default of performance of an essential covenant of the contract, because it had failed to deliver the agreed amount of coal the plaintiff was to receive in August, September, and October. The right to repudiate a contract for the default of the other party thereto cannot be exercised by a party who is himself in unexcused default of performance of an essential covenant thereof. Chitty on Contracts (15th Ed.) 722; Walds Pollock on Contracts (3d Ed.) 345; Norwood Paper Co. v. Columbia Paper Bag Co., 185 Fed. 454, 107 C. C. A. 524; Fairchild-Gilmore-Wilton Co. v. Southern Refining Co., 158 Cal. 264, 110 Pac. 951; Mason v. Edward Thompson Co., 94 Minn. 472, 103 N. W. 507; Central Lumber Co. v. Arkansas Valley Lumber Co., 86 Kan. 131, 119 Pac. 322; Griffin v. Griffin, 163 Ill. 216, 45 N. E. 241; Reddish v. Smith, 10 Wash. 178, 38 Pac. 1003, 45 Am. St. Rep. 781; John A. Gauger Co. v. Sawyer & Austin Lumber Co., 88 Ark. 422, 115 S. W. 157; Norris v. Letchworth, 167 Mo. App. 553, 152 S. W. 421; 2 Black on Rescission, § 553; 13 Corpus Juris, 614." Munger, J., in White Oak Fuel Co. v. Carter, 257 Fed. 54, 56 (1919).

ary, 1830, previous to which time the plaintiff demanded of the defendants the price of the wheat, as stipulated in the contract; the defendants told him they would remit such price from their verdict, which the plaintiff said he would not accept, and that if they entered such remittitur, they would do so against his wishes and consent. The contract price of the wheat, with the interest thereof, was shown to be $992.16, for which sum the jury found a verdict, notwithstanding the presiding judge in his charge to the jury expressed his opinion, that the plaintiff was not entitled to recover. The defendants now moved to set aside the verdict.

NELSON, J. The plaintiff must fail upon principles too well settled to require examination, and the omission to avail himself of those principles, when prosecuted by the present defendants on the contract relative to this same subject matter, has no doubt given rise to the present suit; for, had they been applied, he would have had no cause of complaint. If a greater amount in damages for a breach of his agreement has been recovered against him than the well settled principles of law would warrant, it is his own fault, and cannot be heard or admitted as a sufficient reason to indulge him in a cross suit to right himself. But before inquiring to see if, upon principles of law and justice, the whole subject of litigation arising upon this agreement could not have been properly adjusted in the former suit, I will examine this case for the present as if the former suit was out of the question, and which is perhaps placing it upon the ground upon which it ought to have been litigated. It would then stand thus: the plaintiff, after being called upon to carry into execution the agreement on his part, peremptorily refused; and while persisting in such refusal, instituted a suit for damages, for the non-fulfilment of the agreement on the part of the defendants. There is certainly no principle upon which such an action can be sustained, nor have we been referred to any authority in support of it. It cannot be that the plaintiff seeks to recover damages in the strictest sense of that term for the breach of the contract on the part of the defendants, for his own conduct is conclusive to shew that he considers the fulfilment of it an injury to him, and has therefore preferred the hazard of responding in damages himself, rather than carry it into execution. Can he recover the whole consideration for the wheat? This would be unjust, for he has positively refused to deliver the wheat when demanded, unless, indeed, under the idea that they are independent agreements, the court is bound to afford to each party a specific performance, or its equivalent in damages. Suppose the court should do so, how would the case then stand? The plaintiff would recover the consideration to be paid for the wheat, and the defendants the same sum for the non-delivery of it, besides such damages as a jury would allow for the default in not delivering it. It is obvious from this view, that confining the remedy for a violation of this contract to a suit for damages

against the party violating it, the result is exactly the same to both parties as that to which we arrive after the above circuity of action, and I apprehend that such is the well settled law of the case. It is true, where the covenants or agreements are mutual and independent, that is, mutual and distinct, one party may maintain an action against the other without averring or shewing performance on his part, and the defendant in such case cannot plead the non-performance by the plaintiff in bar of the action. Wheat. Selw. 383; 1 Saund. 320, note. When this principle is rightly understood and applied, there can be no objection to it; and the sound reason given for it is, that the damages in each covenant or agreement may be very different, as where they are in the same instrument and the one not the consideration of the other, or where the covenants or agreements go only to part of the consideration on both sides, part having been executed, and the like cases; in all such the damages might be different, and a remedy must be sought in a suit by each party for a breach. So the terms of the instrument may be such that the covenants or agreements must necessarily be independent, without the existence of the reason above assigned; in such case, the court will carry into effect the agreement, according to the intent of the parties; but whether the covenants or promises are independent or not, where the agreement is wholly executory, and the one covenant or promise or performance is the consideration for the covenant or promise or performance of the other, it may be stated with confidence that there is no principle or authority which will maintain a suit at law by a party who has positively refused to fulfil his part of the agreement against the other to recover damages for a breach of it. Though the consideration of the defendants' covenant or promise cannot be said technically to have failed, the principle and reason of that rule have a strong application, but perhaps the best reason is, that this circuity of action, as I trust has already been shewn, is wholly unnecessary, and therefore should not be sanctioned by the court. The case of Van Benthuysen v. Crapser, 8 Johns. 257, I consider as containing the principle I am here applying to this case. See, also, 13 Johns. 365. Mr. Justice Marcy, in delivering the opinion of the court, when this agreement was before under consideration (3 Wend. 356), referred to Van Benthuysen v. Crapser, and distinguished it from that case; but the distinction taken confirms its application here.

It seems to be considered by the counsel for the plaintiff that if one of the promises in the agreement is independent, the other must be so also, and as it has been decided by this court (3 Wend. 356) that the plaintiff's promise to deliver the wheat was independent, therefore the defendants' promise to pay the money must be also independent. This is an entire mistake. In all cases (except concurrent promises, where the performance of both takes place at the same time) where the performance of one promise is a condition precedent, and must be performed or excused before the right of action exists for the breach of the

other promise, the one is independent and the other dependent. The definition of a dependent covenant or promise shews this; If A covenants to do or to abstain from doing a certain act, in consideration of the prior performance of some covenant on the part of B, A's covenant is termed a dependent covenant, because B's right of suing A for a breach of this covenant depends upon the prior performance, or what is equivalent, of the covenant to be performed by B, which, from its nature, is termed a condition precedent. Now it is obvious that the covenant of B is independent, because it must be performed without reference to the covenant of A, and for a breach of it, A may recover damages without shewing a performance himself. Where the promises are concurrent, there, either party seeking to enforce the agreement against the other must aver and prove performance on his part, or what is in law equivalent, before his right of action commences. There can be no doubt that the promise of the plaintiff in this suit was independent, upon the reasons and authorities given by the court (3 Wend. 356); but is not that of the defendant dependent? One of the rules of construction applicable to questions of this kind from the same high authority there referred to is, that "when a day is appointed for the payment of money, &c., and the day is to happen after the thing, which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., before performance. 1 Saund. 320b. In the case under consideration, by the terms of the agreement, the delivery of the wheat became due, and demandable on the first day of April, and the consideration money therefor was not to be paid until the first of September thereafter. Applying the above rule, the delivery of the wheat is a condition precedent, which must be performed, or that must be done which is equivalent in law, before this suit can be sustained for a breach of the agreement by the defendants. It may be remarked that this rule, and the one upon which the case in 3 Wend. was decided, so far as the dependency or independency of the promises was concerned, are conclusive to shew that one of the covenants or promises in an agreement may be dependent and the other independent. If the money is to be paid on a day fixed before the act is to be done for which it is the consideration, the payment of the money does not depend upon the performance of the act—the promise is independent; but the performance of the act may depend upon the payment of the money—that promise may be dependent. If the money is made payable after the act is to be performed, the performance of the act does not depend upon payment of the money, but according to the rule I have above referred to, the payment of the money depends upon the performance of the act; that is, this case. The payment of the money was fixed at a day after the plaintiff was bound to deliver the wheat; by the terms of it, therefore, the defendants were not to trust to the credit or personal responsibility of the plaintiff, but had a right to have possession of the wheat before they parted with their money. This may be no great matter here, where all parties are respons-

ible, but the rule is no less valuable, and must be universal in its application.

The rule to which I have before referred, and which ought to have been applied to the defense on the former suit by the then defendant, and would have adjusted all the rights of the parties without further litigation upon principles of law and justice, and which has been very fully considered by this court, will be found in the case of Clark v. Pinney, 7 Cow. 681. The principle of that case is, that where the vendor is in default for not delivering goods or chattels in pursuance of the contract of sale, and no money has been advanced by the vendee, the true measure of damages is the difference between the contract price and the value at the time the article should have been delivered; and the reason of the rule is conclusive, to wit, that such damages, added to the contract price which the vendee has not parted with, will enable him to buy the article in the market. It is obvious, if this rule had been applied, the plaintiff here would have had no cause of complaint, and his omission to apply it cannot be remedied in this suit. This principle itself is sufficient to defeat this action without the interposition of any other, and settles, with the utmost exactness, all rights and remedies upon the agreement, with the least possible litigation.

The view I have thus taken of the case, renders it unnecessary to examine many of the questions raised; those which have been examined were raised upon the trial.

*New trial granted, costs to abide the event.*

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## ELLEN *v.* TOPP.

**(Court of Exchequer; 1851. 6 Exch. 424.)**

Covenant on an indenture of apprenticeship of the 21st of July, 1846, by the master against the father of the apprentice, the father being a party to the indenture.

By the indenture the infant with the consent of the father put himself apprentice to the plaintiff, "auctioneeer, appraiser, and corn-factor to learn his art," for a five-year period, promising faithful service, and the plaintiff, in consideration of 70*l.* paid him by the father, covenanted with the father and the infant to teach and instruct the latter, or cause him to be taught and instructed in the art of an auctioneer, appraiser, and corn-factor. After serving three years the apprentice absented himself, and continued absent without consent. The plea set up that before the apprentice left the service "the plaintiff voluntarily and of his own free will gave up, relinquished, abandoned and ceased to exercise and carry on, and hath not, at any time since, exercised and carried on the art and business of a corn-factor as aforesaid." There was a replication, to which a demurrer was filed, but the replication being insuffi-

cient, as the law then stood, the question arose on the sufficiency of the plea.

POLLOCK, C. B.[65] * * * The case therefore resolves itself into the only question really argued before us, which was whether the plea was good. * * * The other objection taken by Mr. Taprell [counsel for plaintiff] was, that the carrying on all the three trades was not a condition precedent to the plaintiff's right to recover, but that his omission or refusal to carry on any one must be the subject of a cross-action.

This objection is founded on one of the rules for determining when covenants are dependent on each other; which is laid down in Boone v. Eyre, and followed in Campbell v. Jones and other cases collected in the note to 1 Wms. Saund. 320 c. That rule is, that when a covenant goes to part of the consideration on both sides; that is, forms a part of the consideration on the plaintiff's side for the defendant's covenant on the other, and a breach of such covenant may be paid for in damages, and the whole of the remaining consideration has been had by the defendant, the covenant is independent, and the performance of it is not a condition precedent.

"The reason of the decision in these cases is," as is observed by the learned editor, "that where a person has received a part of the consideration for which he entered into the agreement, it would be unjust that, because he had not had the whole, he should, therefore, be permitted to enjoy that part without either paying or doing any thing for it. Therefore the law obliges him to perform the agreement on his part; and leaves him to his remedy to recover any damages he may have sustained in not having received the whole consideration."

It is remarkable that, according to this rule, the construction of the instrument may be varied by matter *ex post facto;* and that which is a condition precedent when the deed is executed may cease to be so by the subsequent conduct of the covenantee in accepting less: as in the cases referred to, the defendant, in the first, might have objected to the transfer, if the plaintiff had no good title to the negroes, and refused to pay; in the second, he might have objected to the payment if the plaintiff had refused to transfer the patent, though he had been willing to teach the art of bleaching. But this is no objection to the soundness of the rule, which has been much acted upon. But there is often a difficulty in its application to particular cases, and it cannot be intended to apply to every case in which a covenant by the plaintiff forms only a part of the consideration, and the residue of the consideration has been had by the defendant. That residue must be the substantial part of the contract; and if, in the case of Boone v. Eyre, two or three negroes had been accepted, and the equity of redemption not conveyed, we do not apprehend that the plaintiff could have recovered the whole stipu-

[65] The statement of facts is abbreviated and parts of the opinion are omitted.

lated price, and left the defendant to recover damages for the non-conveyance of it.

Whether the rule can be applied to the present case has been a matter of great doubt in the minds of some of us; but, after much consideration, we agree that it is not applicable. If this had been an action on a covenant to pay an apprentice fee at the end of the term, and the apprentice had served the whole period, and had had the benefit of instruction as such in two of the trades, it would, we are disposed to think, have been no answer to the action that the plaintiff had discontinued one. But this is an action for not continuing to serve as an apprentice; and although the later services of an apprentice are much more valuable than the early, and are in part a compensation to the master for his instruction in the commencement of the apprenticeship, and so are analogous in some degree to an apprentice fee payable *in futuro,* yet the immediate cause of action is the breach of the contract to serve, and the obligation to serve depends upon the corresponding obligation to teach as an apprentice; and, if the master is not ready to teach in the very trade which he has stipulated to teach, the apprentice is not bound to serve. To this particular covenant to serve, the relative duty to teach seems to us to be directly a condition precedent; and we are not able to distinguish between the three trades of auctioneer, appraiser, and corn-factor, so as to say that one is more the substantial part of the contract than another.

As the plaintiff by his own fault has disabled himself from acting as a master in all the three trades, he has no right to complain of the defendant's son refusing to continue to serve in any.

Our judgment will, therefore, be for the defendant.

*Judgment for the defendant.*[66]

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## CHRISTIE *v.* BORELLY.

(Court of Common Pleas, 1860. 29 L. J., C. P. (N. S.) 153.)

The first count of the declaration stated that, in consideration that the plaintiff guaranteed to the defendant that two bills of exchange, of £100 and £62, both drawn by Messrs. C. W. Olivier & Co. upon Messrs. Owen & Co., 75 Lower Thames Street, and both due on January 23d, 1859, would be paid and retired by the said Messrs. Owen & Co. when due, the defendant, in return, engaged and guaranteed

[66] In the case of partly unilateral and partly bilateral contracts, where the part which is actually performed is comparatively immaterial, and the part promised and yet to be performed is the essential and material part of the consideration, conditions are implied just as in wholly bilateral contracts, since for all practical purposes such partly bilateral contracts are the same as wholly bilateral contracts partly performed.

to the plaintiff the repayment of the sum of £300 toward the payment of Scotch whiskies, as follows: Six puncheons, 5 hhds., 4 qr. casks, Auchtertool, 2 puncheons, 5 hhds., 8 qr. casks, Anderton, which Mr. B. Fisse, of Norris Street, had ordered, and was about to receive from the plaintiff. Averment, by the plaintiff, that he had performed all things on his part to be done and performed, in pursuance of the said agreement, to entitle him to the due performance by the defendant of his, the defendant's, part of the said agreement; and that the said two bills of exchange of £100 and £62 were duly paid and retired by the said Messrs. Owen & Co. when the same became and were due and payable; and that he, the plaintiff, delivered to the said Mr. B. Fisse, the said Scotch whisky, in the said agreement hereinbefore mentioned, and that the said Mr. B. Fisse, although requested to pay the said amount of £300 toward the payment of the said Scotch whiskies, had not paid for the said Scotch whiskies, nor the said sum of £300 or any part thereof, and the same still remained wholly due and unpaid; yet that the defendant had disregarded and broken his said promise in this, that he had not paid, or caused to be paid, to the plaintiff the said sum of £300, or any part thereof, but, on the contrary thereof, wholly neglected and refused so to do.

The defendant pleaded (*inter alia*), secondly, to the said first count, that, although the said debt and sum of £300, in the said first count mentioned, repayment whereof the defendant engaged and guaranteed to the plaintiff, was not payable, and, by the terms of the said order of the said Mr. B. Fisse, was not payable until after the said two bills drawn by Messrs. C. W. Olivier upon Messrs. Owen & Co., and guaranteed by the plaintiff, became due and payable, as the plaintiff and the defendant, at the time of the making of the said mutual agreement and guarantees, well knew; yet the said two bills of exchange of £100 and £62, in the said first count mentioned, were not duly or at any time paid or retired by the said Messrs. Owen, of which the plaintiff had due notice, but never at any time paid or retired the said bills. Issue thereon.

The defendant having, at the trial, obtained a verdict in his favor on the issue taken on the second plea, the court granted a rule *nisi* to enter judgment for the plaintiff on such issue *non obstante veredicto,* on the ground that the said second plea was no answer to the action.

ERLE, C. J. I am of opinion that this rule should be made absolute, and that the plaintiff is entitled to have judgment entered for him *non obstante veredicto.* The real question is, whether the promises are independent promises, or whether they are mutual promises, their performance being mutually the consideration for each other. It appears to me that they are independent promises. The defendant guarantees the repayment of £300 toward the payment of certain whisky being paid for when due; and the plaintiff guarantees that two

bills of exchange of £100 and £62 shall be paid when due. It, therefore, appears that the damages in respect of the breach on one side must be very different from the damages arising from the breach on the other side; on the one side they would be £300, and on the other only £162; it is consequently apparent, on the face of the contract itself, that it was not intended by the parties that performance of the one stipulation should be a condition precedent to performance of the other. The question is, to my mind, one entirely of fact—namely, what was the intention of the parties to this contract? The rules of law are agreed on by both sides, and it is only a question of construction. On the construction of this contract, I am of opinion that the performance of the plaintiff's promise was not a condition precedent, and, therefore, that the second plea is no answer, and consequently that the rule ought to be made absolute.

WILLIAMS, J. The rules of law are now well established, and the object is to discover in each case what is the intention of the parties. If it had appeared from the contract in the present case, that the undertaking of the plaintiff had been to pay absolutely when the bills became due, the case would have been a very different one from what it is. What, however, the plaintiff undertakes is, only to pay if Messrs. Owen do not retire the bills; therefore, the compensation to be paid by the plaintiff, in consequence of such third party not doing their duty, is a matter which must have to be afterward ascertained; and is it likely that it was the intention of the parties to this contract that the defendant's performance was not to take place until after such amount of compensation had been ascertained? It is, I think, obvious that such could not have been the intention of the parties; for Messrs. Owen might have retired the bills when due, and so there would have been nothing at all payable by the plaintiff.

WILLES, J. I am of the same opinion. It appears to me that the promise only on the one side is the consideration for the promise on the other side; and that the plea is, therefore, a bad plea.

*Rule absolute.*

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## BETTINI *v.* GYE.

(High Court of Justice, Queen's Bench Division, 1876. 1 Q. B. D., 183.)

Third count, that the defendant was and is the director of the Royal Italian Opera in London, and the plaintiff was and is a dramatic artist and professional singer, and thereupon it was agreed by and between the plaintiff and the defendant, in parts beyond the seas, to wit, at Milan, in Italy, by an agreement in writing in the French language, of which the translation is as follows:

"Royal Italian Opera,
"Covent Garden, London.

"Year 1875.

"The undersigned, Mr. Frederick Gye, gentleman, and director of the Royal Italian Opera in London, of the one part, and Mr. Bettini, dramatic artist, on the other part, have agreed as follows:

"1. Mr. Bettini undertakes to fill the part of primo tenor assoluto in the theatres, halls, and drawing-rooms, both public and private, in Great Britain and in Ireland during the period of his engagement with Mr. Gye.

"2. This engagement shall begin on the 30th of March, 1875, and shall terminate on the 13th of July, 1875.

"3. The salary of Mr. Bettini shall be £150 per month, to be paid monthly.

"4. Mr. Bettini shall sing in concerts as well as in operas, but he shall not sing anywhere out of the theatre in the United Kingdom of Great Britain and Ireland from the 1st of January to the 31st of December, 1875, without the written permission of Mr. Gye, except at a distance of more than fifty miles from London, and out of the season of the theatre.

"5. Mr. Gye shall furnish the costumes to Mr. Bettini for his characters according to the ordinary usage of theatres.

"6. Mr. Bettini will conform to the ordinary rules of the theatre in case of sickness, fire, rehearsals, etc.

"7. Mr. Bettini agrees to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals.

"8. In case Mr. Gye shall require the services of Mr. Bettini at a distance of more than ten miles from London, he shall pay his travelling expenses.

"9. Mr. Bettini shall not be obliged to sing more than four times a week in opera. Mr. Bettini, in order to assist the direction of Mr. Gye, will sing, upon the request of Mr. Gye, in the same characters in which he has already sung, and in other characters of equal position. In case of the sickness of other artists, Mr. Bettini agrees to replace them in their characters of first tenor assoluto.

"10. Mr. Gye shall have the right to prolong the period limited above upon the same conditions, provided that the period does not go beyond the end of the month of August.

"F. Gye,

"Milan, 14 Dec., 1874."

That the plaintiff did not sing anywhere out of the said theatre in the United Kingdom of Great Britain and Ireland from January 1st, 1875, to the date of the commencement of this action, without the written permission of the defendant, except at a distance of more than fifty miles from London, and out of the season of the said theatre. That the plaintiff was prevented by temporary illness from being in London before March 28th, 1875, but he did arrive in London on that day; and, save as aforesaid, the plaintiff has always performed his said agreement, and was and is ready and willing to perform his part of the said agreement, of all which the defendant had notice, and all things were done and happened, and all conditions were fulfilled and all times elapsed necessary to entitle the plaintiff to a performance by the defendant of the said agreement and to maintain this action. Yet the defendant did not nor would receive the plaintiff into his said service, but wholly refused so to do, and wrongfully exonerated and discharged the plaintiff from his said

agreement, and from the performance of the said agreement on the plaintiff's part, and wrongfully put an end to and determined the said agreement, whereby the plaintiff was damnified.

The defendant pleaded, ninthly, to the third count, that the plaintiff was not in London six days before the commencement of the said engagement for the purpose of rehearsals, nor had the defendant notice before the six days of the plaintiff's inability to be in London, or that he would not be in London six days before the commencement of his said engagement for the purpose of rehearsals, nor was the plaintiff ready and willing to attend such rehearsals, although it was necessary for him to do so, wherefore the defendant did not nor would receive the plaintiff into his service in the capacity and on the terms aforesaid, which is the breach complained of.

Demurrer to the ninth plea, and joinder.

BLACKBURN, J. In this case the parties have entered into an agreement in writing, which is set out on the record.

The court must ascertain the intention of the parties, as is said by Parke, B., in delivering the judgment of the court in Graves v. Legg, 9 Ex. at p. 716, "to be collected from the instrument and the circumstances legally admissible in evidence with reference to which it is to be construed." He adds: "One particular rule well acknowledged is, that where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract." There was no averment of any special circumstances existing in this case, with reference to which the agreement was made, but the court must look at the general nature of such an engagement. By the seventh paragraph of the agreement, "Mr. Bettini agrees to be in London without fail at least six days before the commencement of his engagement for the purpose of rehearsals." The engagement was to begin on March 30th, 1875. It is admitted on the record that the plaintiff did not arrive in London till March 28th, which is less than six days before the 30th, and therefore it is clear that he has not fulfilled this part of the contract.

The question raised by the demurrer is, not whether the plaintiff has any excuse for failing to fulfil this part of his contract, which may prevent his being liable in damages for not doing so, but whether his failure to do so justified the defendant in refusing to proceed with the engagement, and fulfil his, the defendant's, part. And the answer to that question depends on whether this part of the contract is a condition precedent to the defendant's liability, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages.

This is a question which has very often been raised, and the numerous cases on the subject are collected in the first volume of Sir

E. V. Williams' Notes to Saunders, p. 554, in the notes to Pordage v. Cole, and in the second volume, p. 742, notes to Peeters v. Opie.

We think the answer to this question depends on the true construction of the contract taken as a whole.

Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one[67]; or they may think that the performance of some matter, apparently of essential importance and *prima facie* a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent.

In this case, if to the seventh paragraph of the agreement there had been added words to this effect, "And if Mr. Bettini is not there at the stipulated time Mr. Gye may refuse to proceed further with the agreement;" or if, on the other hand, it had been said, "And if not there, Mr. Gye may postpone the commencement of Mr. Bettini's engagement for as many days as Mr. Bettini makes default, and he shall forfeit twice his salary for that time," there could have been no question raised in the case. But there is no such declaration of the intention of the parties either way. And in the absence of such an express declaration, we think that we are to look to the whole contract, and applying the rule stated by Parke, B., to be acknowledged, see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages. Accordingly, as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent.[68]

If the plaintiff's engagement had been only to sing in operas at the theatre, it might very well be that previous attendance at rehearsals

[67] By statute in some states that is not true as to insurance policies.

[68] "Substantial performance, as that phrase is correctly used, means not doing the exact thing promised, but doing something else that is just as good, or good enough for both obligor and obligee; and courts and juries say what is good enough or just as good. The object (or one important purpose) of warranties and precedent conditions is to prevent (e. g.) our doing any such thing in this case." Hough, J., in Dorrance v. Barber & Co., 262 Fed. 489, 492 (1919).

"It is a clearly recognized principle that if there is only a partial failure of performance by one party to a contract for which there may be a compensation in damages, the contract is not put an end to." Littledale, J., in Franklin v. Miller, 4 A. & E. 599, 605 (1836).

"Substantial performance of a contract means performance in all the essential elements necessary to the accomplishment of the purpose of the contract. Manning v. School District, 124 Wis. 84." Carter, J., in People v. Omen, 290 Ill. 59, 65 (1919).

On right of a building contractor to recover for a substantial performance of his contract, see 134 Am. St. Rep. 678, note.

with the actors in company with whom he was to perform was essential. And if the engagement had been only for a few performances, or for a short time, it would afford a strong argument that attendance for the purpose of rehearsals during the six days immediately before the commencement of the engagement was a vital part of the agreement. But we find, on looking to the agreement, that the plaintiff was to sing in theatres, halls, and drawing-rooms, both public and private, from March 30th to July 13th, 1875, and that he was to sing in concerts as well as in operas, and was not to sing anywhere out of the theatre in Great Britain or Ireland from January 1st to December 31st, 1875, without the written permission of the defendant, except at a distance of more than fifty miles from London.

The plaintiff, therefore, has, in consequence of this agreement, been deprived of the power of earning anything in London from January 1st to March 30th; and though the defendant has, perhaps, not received any benefit from this, so as to preclude him from any longer treating as a condition precedent what had originally been one, we think this at least affords a strong argument for saying that subsequent stipulations are not intended to be conditions precedent, unless the nature of the thing strongly shows they must be so.

And as far as we can see, the failure to attend at rehearsals during the six days immediately before March 30th could only affect the theatrical performances and, perhaps, the singing in duets or concerted pieces during the first week or fortnight of this engagement, which is to sing in theatres, halls, and drawing-rooms, and concerts for fifteen weeks.

We think, therefore, that it does not go to the root of the matter so as to require us to consider it a condition precedent.

The defendant must, therefore, we think, seek redress by a cross-claim for damages.

*Judgment for the plaintiff.*

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## POUSSARD *v.* SPIERS & POND.

**(High Court of Justice, Queen's Bench Division, 1876. 1 Q. B. D., 410.)**

Declaration on an agreement by the defendants to employ the plaintiff's wife to sing and play in an opera at the defendants' theatre. Breach, that the defendants refused to allow the plaintiff's wife to perform according to the agreement.

Pleas: 1. That defendants did not agree as alleged. 2. That plaintiff's wife was not ready and willing to perform. 3. That plaintiff rescinded the contract before breach. Issue joined.

At the trial before Field, J., at the Middlesex Michaelmas sittings, 1875, judgment was entered for the defendants, with leave to move to enter judgment for the plaintiff for £83.

A notice of motion was given accordingly, and a cross order was obtained by the defendants for a new trial, on the ground that the verdict was against the weight of evidence, and that the damages were excessive.

The facts proved and the course of the trial are fully given in the judgment of the court.

BLACKBURN, J. This was an action for the dismissal of the plaintiff's wife from a theatrical engagement. On the trial before my Brother Field it appeared that the defendants, Messrs. Spiers & Pond, had taken the Criterion Theatre, and were about to bring out a French opera, which was to be produced simultaneously in London and Paris. Their manager, Mr. Hingston, by their authority, made a contract with the plaintiff's wife, which was reduced to writing in the following letter:

"Criterion Theatre, October 16, 1874.

"To Madame Poussard:

"On behalf of Messrs. Spiers & Pond I engage you to sing and play at the Criterion Theatre on the following terms:

"You to play the part of *Friquette* in Lecocq's opera of *'Les Pres Saint Gervais,'* commencing on or about the fourteenth of November next, at a weekly salary of eleven pounds (£11), and to continue on at that sum for a period of three months, providing the opera shall run for that period. Then, at the expiration of the said three months, I shall be at liberty to re-engage you at my option, on terms then to be arranged, and not to exceed fourteen pounds per week for another period of three months. Dresses and tights requisite for the part to be provided by the management, and the engagement to be subject to the ordinary rules and regulations of the theatre.

"E. P. HINGSTON, Manager.

"Ratified:

"Spiers & Pond.

"Madame Poussard, 46 Gunter Grove, Chelsea."

The first performance of the piece was announced for Saturday, November 28th. No objection was raised on either side as to this delay, and Madame Poussard attended rehearsals, and such attendance, though not expressed in the written engagement, was an implied part of it. Owing to delays on the part of the composer, the music of the latter part of the piece was not in the hands of the defendants till a few days before that announced for the production of the piece, and the latter and final rehearsals did not take place till the week on the Saturday of which the performance was announced. Madame Poussard was unfortunately taken ill, and though she struggled to attend the rehearsals, she was obliged on Monday, November 23d, to leave the rehearsal, go home and go to bed, and call in medical attendance. In the course of the next day or two an interview took

place between the plaintiff and Mr. Leonard (Madame Poussard's medical attendant) and Mrs. Liston, who was the defendants' stage manager, in reference to Madame Poussard's ability to attend and undertake her part, and there was a conflict of testimony as to what took place. According to the defendants' version, Mrs. Liston requested to know as soon as possible what was the prospect of Madame Poussard's recovery, as it would be very difficult on such short notice to obtain a substitute; and that in the result the plaintiff wrote stating that his wife's health was such that she could not play on the Saturday night, and that Mrs. Liston had better, therefore, engage a young lady to play the part; and this, if believed to be accurate, amounted to a rescission of the contract. According to the evidence of the plaintiff and the doctor, Mrs. Liston told them that Madame Poussard was to take care of herself and not come out till quite well, as she, Mrs. Liston, had procured, or would procure, a temporary substitute; and Madame Poussard could resume her place as soon as she was well. This, it was contended by the plaintiff, amounted to a waiver by the defendants of a breach of the condition precedent if there was one.

The jury found that the plaintiff did not rescind the contract, and that Mrs. Liston, if she did waive the condition precedent (as to which they were not agreed), had no authority from the defendants so to do.

These findings, if they stand, dispose of those two questions. There was no substantial conflict as to what was in fact done by Mrs. Liston. Upon learning, on the Wednesday (November 25th), the possibility that Madame Poussard might be prevented by illness from fulfilling her engagement, she sent to a theatrical agent to inquire what artistes of position were disengaged, and learning that Miss Lewis had no engagement till December 25th, she made a provisional arrangement with her, by which Miss Lewis undertook to study the part and be ready on Saturday to take the part, in case Madame Poussard was not then recovered so far as to be ready to perform. If it should turn out that this labor was thrown away, Miss Lewis was to have a *douceur* for her trouble. If Miss Lewis was called on to perform, she was to be engaged at £15 a week up to December 25th, if the piece ran so long. Madame Poussard continued in bed and ill, and unable to attend either the subsequent rehearsals or the first night of the performance on the Saturday, and Miss Lewis's engagement became absolute, and she performed the part on Saturday, Monday, Tuesday, Wednesday, and up to the close of her engagement, December 25th. The piece proved a success, and in fact ran for more than three months.

On Thursday, December 4th, Madame Poussard, having recovered, offered to take her place, but was refused, and for this refusal the action was brought.

On January 2d Madame Poussard left England.

My Brother Field, at the trial, expressed his opinion that the failure of Madame Poussard to be ready to perform, under the circumstances,

went so much to the root of the consideration as to discharge the defendants, and that he should therefore enter judgment for the defendants; but he asked the jury five questions.

The first three related to the supposed rescission and waiver. The other questions were in writing and were: 4. Whether the non-attendance on the night of the opening was of such material consequence to the defendants as to entitle them to rescind the contract? To which the jury said, "No." And 5, was it of such consequence as to render it reasonable for the defendants to employ another artiste, and whether the engagement of Miss Lewis, as made, was reasonable; to which the jury said, "Yes." Lastly, he left the question of damages, which the jury assessed at £83.

On these answers he reserved leave to the plaintiff to move to enter judgment for £83.

A cross rule was obtained on the ground that the verdict was against evidence and that the damages were excessive.

We think that, from the nature of the engagement to take a leading, and, indeed, the principal female part (for the prima donna sang her part in male costume as the Prince de Conti) in a new opera which (as appears from the terms of the engagement) it was known might run for a longer or shorter time, and so be a profitable or losing concern to the defendants, we can, without the aid of the jury, see that it must have been of great importance to the defendants that the piece should start well, and consequently that the failure of the plaintiff's wife to be able to perform on the opening and early performances was a very serious detriment to them.

This inability having been occasioned by sickness was not any breach of contract by the plaintiff, and no action can lie against him for the failure thus occasioned. But the damage to the defendants and the consequent failure of consideration is just as great as if it had been occasioned by the plaintiff's fault, instead of by his wife's misfortune. The analogy is complete between this case and that of a charter-party in the ordinary terms, where the ship is to proceed in ballast (the act of God, etc., excepted) to a port and there load a cargo. If the delay is occasioned by excepted perils, the shipowner is excused. But if it is so great as to go to the root of the matter, it frees the charterer from his obligation to furnish a cargo. See per Bramwell, B., delivering the judgment of the majority of the Court of Exchequer Chamber in Jackson v. Union Marine Insurance Co., L. R. 10 C. P. at p. 141.

And we think that the question, whether the failure of a skilled and capable artiste to perform in a new piece through serious illness is so important as to go to the root of the consideration, must to some extent depend on the evidence; and is a mixed question of law and fact. Theoretically, the facts should be left to and found separately by the jury, it being for the judge or the court to say whether they, being so found, show a breach of a condition precedent or not. But this course

is often (if not generally) impracticable; and if we can see that the proper facts have been found, we should act on these without regard to the form of the questions.

Now, in the present case, we must consider what were the courses open to the defendants under the circumstances. They might, it was said on the argument before us (though not on the trial), have postponed the bringing out of the piece till the recovery of Madame Poussard, and if her illness had been a temporary hoarseness incapacitating her from singing on the Saturday, but sure to be removed by the Monday, that might have been a proper course to pursue. But the illness here was a serious one, of uncertain duration, and if the plaintiff had at the trial suggested that this was the proper course, it would, no doubt, have been shown that it would have been a ruinous course; and that it it would have been much better to have abandoned the piece altogether than to have postponed it from day to day for an uncertain time, during which the theatre would have been a heavy loss.

The remaining alternatives were to employ a temporary substitute until such time as the plaintiff's wife should recover; and if a temporary substitute capable of performing the part adequately could have been obtained upon such a precarious engagement on any reasonable terms, that would have been a right course to pursue; but if no substitute capable of performing the part adequately could be obtained, except on the terms that she should be permanently engaged at higher pay than the plaintiff's wife, in our opinion it follows, as a matter of law, that the failure on the plaintiff's part went to the root of the matter and discharged the defendants.

We think, therefore, that the fifth question put to the jury, and answered by them in favor of the defendants, does find all the facts necessary to enable us to decide as a matter of law that the defendants are discharged.

The fourth question is, no doubt, found by the jury for the plaintiff; but we think in finding it they must have made a mistake in law as to what was a sufficient failure of consideration to set the defendants at liberty, which was not a question for them.

This view taken by us renders it unnecessary to decide anything on the cross rule for a new trial.

The motion must be refused with costs.

*Motion refused with costs.*[69]

[69] The temporary illness of an employee which does not go to the root of the contract will not prevent him from enforcing the contract, with a deduction from wages or salary for time lost. Spindel v. Cooper, 92 N. Y. Supp. 822 (1905); Gaynor v. Jonas, 104 App. Div. (N. Y.) 35, 93 N. Y. Supp. 287 (1905). In cases where a contract recovery cannot be had, a quasi contract recovery may be allowed.

On right of servant to compensation in case of incomplete performance of his contract caused by physical disability, see 28 L. R. A. (N. S.) 315, note.

For a harsh decision denying a recovery to an executor for a teacher's salary

## LEOPOLD ET AL. *v.* SALKEY.

(Supreme Court of Illinois, 1878. 89 Ill. 412, 31 Am. Rep. 93.)

SCHOLFIELD, J.[70] This was an action by appellee against appellants, upon a written contract, under seal, whereby the former agreed to render personal services for the latter, during a stipulated term, for a price agreed to be paid by the latter. By the terms of the contract, appellee agreed to enter the employ of appellants as a superintendent and manager of the manufacturing department of appellants (they being engaged in the manufacturing and selling of boys', youths' and children's clothing), in connection with, and under the direction of Asher F. Leopold, and whenever required by appellants' firm or either member thereof, to assist in the purchase and sale of materials and goods manufactured by the firm, in such manner and at such times as the firm should direct. Appellee also agreed that he would continue in the employ of the firm for a period of three years from the 1st day of December, 1874, at which time his services were to commence; that during said time, he would devote himself entirely to the business of the firm, in the manner as agreed upon, giving his whole time, attention and skill thereto, and at all times work for the best interest of appellants. Appellants, as a compensation therefor, agreed to pay appellee the sum of $3,000 per annum, in sums of $250 per month, at the expiration of each month.

Appellee commenced work, under the contract, on the 1st of December, 1874, and continued to render services thereunder until the 12th of January, 1875, when he was arrested by a United States marshal, under an order of the district court of the United States for the northern district of this state, and put in jail. He remained in jail until the 25th of the same month, when he was released on bail. Upon being released, he returned to appellants' establishment to resume work under the contract, but they, having obtained another foreman in his place whilst he was in jail, refused to receive him again into their employ.

Appellee has been paid for all the services he actually rendered, and the present suit is only to recover damages for appellants' alleged breach of contract in not continuing him in their employ. The judgment below was in favor of appellee for $500.

The covenants of appellee clearly constitute but one single and entire undertaking—each goes to the whole consideration. The covenant of appellants to pay $3,000 per annum, although to be paid in monthly payments, was not for a part, but for the whole of the term. The covenant by appellee that he would devote himself entirely to the business of the firm, giving his whole time, attention and skill thereto, goes to

where the teacher died during the summer vacation leaving one vacation month of the school year unpaid for, see Donlan v. City of Boston, 223 Mass. 285 (1916), criticised adversely in 2 Williston on Contracts, p. 1601, note 13.

[70] Parts of the opinion are omitted.

the root of the whole matter, and when the situation of the parties, as disclosed by the evidence, is taken into consideration, it is manifest that the failure by appellee to perform his contract from the 12th to the 25th of January, inclusive, would render the performance of the rest of the contract by appellee a thing different, in substance, from that which appellants stipulated for. Appellants were engaged in an extensive business in the manufacturing and selling of boys', youths' and children's clothing. The month of January was their busiest season of the year. In that month they manufactured their goods for the spring trade, and in the latter part of it they sent out their traveling men with samples. When appellee was arrested there were in appellants' employ fourteen cutters and three trimmers. It was his duty as superintendent and manager to superintend these, lay out their work, direct its performance, etc., and also to inspect and receive work from the tailors, besides discharging various other duties incident to the position he assumed. It required peculiar skill, knowledge and great promptness and fidelity. To delay the manufacturing in that month would, obviously, work immediate pecuniary loss, to some extent, and must, necessarily, materially endanger the future prosperity of the business. Rival manufacturers would be enabled to forestall appellants in the trade of that year, and being once forestalled, they might not, during the term, recover their former trade; besides, the character and quality of work have much to do in building up and establishing a prosperous permanent trade in manufactured articles, and great risk, in that respect, would be incurred by the mere change of superintendents and managers; nor is it to be assumed that a person of competent experience, skill, energy and fidelity could be got, without a moment's warning, to fill such a position, and induced to stay, from day to day, during such a season in the business, for a compensation approaching in any reasonable degree a pro rata part of that which he would be willing to accept for his services for a term of three years.

In our opinion, therefore, the failure of appellee to perform the services he had covenanted to perform, from the 12th to the 25th of January, 1875, was a substantial breach of his covenant.

Appellee has averred in his declaration, ability, readiness, and offer to perform, and his undertaking being an entire one, it was incumbent on him to make the averment and support it by proof. Badgley v. Heald, 4 Gilm. 64; Swanzey v. Moore, 22 Ill. 63. * * *

It may be conceded that appellee was put in jail without his fault, yet, this would not relieve him of his covenant to give his whole time, attention and skill to appellants' business. It is not claimed to have been through appellants' fault that he was put in jail, and there is no reason, therefore, why appellants' business should suffer in consequence of it. He might have guarded against this by an exception in his covenant, but he did not do so.

The rule is, it is a good defense to an action on a covenant or

contract, that the obligation to perform the act required was dependent upon some other thing which the other party was to do and has failed to do. And the defense is good, although the omission of the other party to do the thing required of him, was produced by causes which he could neither foresee nor control. 2 Parsons on Conts. (6th ed.) 674; Chitty on Conts. (11 Am. ed.) 1086.

There is a class of cases, where a party contracting to render personal services, after part performance, becomes disabled by inevitable casualty and is thereby prevented from fully completing his contract, has been held entitled to recover for the services actually rendered, upon a *quantum meruit*. Fenton v. Clark, 11 Vt. 557; Hubbard v Belden, 27 id. 645; Dickey v. Linscott, 20 Me. 453; Wolf v. Hewes, 20 N. Y. (6 Smith) 197. But these furnish no warrant for the position that the laborer can, in such case, recover upon the contract for a failure to pay for future services which he has been prevented from performing. On the contrary, they proceed upon the theory that the contract is discharged by the inevitable casualty, and therefore allow the party to recover simply what he has earned. * * *

The general remark [in Selby v. Hutchinson, admr. 4 Gilm. 333], made by the court which counsel quote in discussing the evidence, that "in order to justify an abandonment of the contract, and the proper remedy growing out of it, the failure of the opposite party must be a total one; the object of the contract must have been defeated or rendered unattainable by his misconduct or default," is not understood as laying down the rule that to justify an abandonment of a contract the opposite party must have failed to discharge every obligation imposed on him,—but simply that matters which do not go to the substance of the contract, and the failure to perform which would not render the performance of the rest a thing different in substance from what was contracted for, do not authorize an abandonment of the contract; for, when the failure to perform the contract is in respect to matters which would render the performance of the rest a thing different in substance from what was contracted for, so far as we are advised, the authorities all agree the party not in default may abandon the contract.

It is said in Wood's Law of Master and Servant, p. 233, § 120: "Sickness for a lengthened period—in one case two weeks—releases both parties from the contract. The master is not bound to wait, unreasonably, for the restoration of his servant's health, and his necessities may well be regarded as the measure of what is reasonable." See, also, Hubbard v. Belden, *supra*.

In Poussard v. Spiers and Pond, Law Reports (Q. B. Div.), Vol. 1, p. 410, this rule is, in substance, recognized and applied by the court.

Where neither party is at fault, the absence of the servant from the master's employ, without his consent (by whatever cause occasioned), for an unreasonable length of time, we are of opinion authorizes the master to treat the contract as abandoned; and what, in such case, is an

unreasonable length of time, depends upon the nature and necessities of the business in which the servant is employed. Under the facts here proved, a much shorter time than that during which appellee was confined in jail, might, in our opinion, be regarded as unreasonable. Under different circumstances, absence for a much greater length of time might furnish no cause for abandonment—the question always being, does the delay so affect the interests of the master that the performance of the residue of the contract by the servant would be a thing different in substance from what the master contracted for. * * *

There was evidence that after appellee was in jail, and whilst he was there, appellants agreed that if he got out and returned to his duties within a certain time, they would receive him into their employ. * * * This promise did not amount to a contract. There was no mutuality in it, and no consideration to support it. It was a mere offer which might be withdrawn at any time before it was acted upon. It did not amount to an estoppel because appellee did no act placing himself in a worse condition than he would otherwise have been in, on the faith of the promise. Had appellee been received again into appellants' employ, the promise, and the act of receiving him, would have been sufficient evidence of a waiver of a right to declare a forfeiture for the previous default. * * *

When appellants refused to receive appellee into their employ, upon his return to their place of business, he was fully and sufficiently notified of their election to treat the contract as abandoned, and he needed no other or different notice. * * *

*Judgment reversed.*[71]

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## GENERAL BILLPOSTING COMPANY, LTD. *v.* ATKINSON.

(House of Lords. [1909] A. C. 118, 1 B. R. C. 497.)

The respondent was manager to a Newcastle billposting company for some years upon the terms stated in the head-note, [namely, "that he

[71] As to leases, see Jinnings v. Amend, 101 Kans. 130 (1917). On imprisonment of one of the parties to a contract as affecting rights and obligations thereunder, see L. R. A. 1917 F 628, note.

Where after an engagement to marry the woman became ill, was operated on and continued in ill health for three years, it was held that the man was justified in breaking the engagement and marrying another. Travis v. Schnebly, 68 Wash. 1 (1912). Crow, J., said for the court: "Ill health of one party, contracted without his or her fault, after the original promise to marry is a defense available to the other party in action for breach of promise. A man who has only agreed to marry a healthy woman should not be compelled to accept her as his wife should she become an invalid before marriage." The opinion had previously stated that the defendant was under "the duty to wait a reasonable time for her recovery," though that was stated because of agreements for the postponement from time to time of the marriage.

should hold office subject to termination at twelve months' notice by either party, and with a restriction on his right to trade after its termination"]. The restriction on trade was that he should not whilst in the engagement or within two years after its termination carry on a similar business within a certain radius without the company's permission. In 1906 the company dismissed him without notice. In an action against the company for wrongful dismissal he recovered damages, and afterwards began to trade as a billposter on his own account within the radius. The appellants as assignees of the Newcastle Company brought an action against the respondent for an injunction and for damages for breach of contract. Neville, J., held that the appellants were entitled to sue the respondent for damages notwithstanding the wrongful dismissal. This decision was reversed by the Court of Appeal (Cozens-Hardy, M. R. Fletcher Moulton and Buckley, L. JJ.). Hence this appeal.

LORD ROBERTSON.[72] My lords, if this case be considered for a moment on its own merits and substance (apart in the meantime from authority) it is extremely difficult to be reconciled to the appellant's contention. The respondent's position in entering the contract is a very intelligible one. He says, "I am a billposter, and I desire occupation either on my own account or in the service of others. If I enter the employment of others, I am willing to give up the right to trade on my own account to the extent specified in this agreement. I do not desire to have it both ways." The claim of the appellants, on the other hand, as now put forward, is that, taking him at his word, as expressed in the contract, and getting his services, they are to be entitled both to deprive him (against the contract) of the right to serve them and also of the right to serve himself.

It seems to me that the covenant not to set up business is not only germane to but ancillary to the contract of service, and that once the contract of service is rescinded the other falls with it.

I have only to add that the suggestion that the respondent has already received his *quid pro quo* in that he has had the appellants' wages for a considerable time ignores the equally important fact that they have had his services for the same period.

*Order of the Court of Appeal affirmed and appeal dismissed with costs.*[73]

[72] The opinions of the Earl of Halsbury and Lord Collins are omitted.

[73] See 1 B. R. C. 502, note.

In Jureidini v. National British, etc. Ins. Co., [1915] A. C. 499, a repudiation of a claim under a fire insurance policy made by the company on the ground of fraud and arson was held to go to the root of the contract and preclude the company from relying upon an arbitration clause making an arbitration and an award as to the amount of loss a condition precedent to a right of action on the policy.

## CLARKE CONTRACTING CO. *v.* CITY OF NEW YORK.

(Court of Appeals of New York, 1920. 229 N. Y. 413, 128 N. E. 241.)

Action by the Clarke Contracting Company against the City of New York. From a judgment of the First Appellate Division (182 App. Div. 835, 170 N. Y. Supp. 136), unanimously modifying and affirming a judgment of the Trial Term for defendant entered upon the verdict of a jury, the plaintiff by permission appeals. Judgment reversed, and new trial granted.

HISCOCK, C. J.[74] The plaintiff is the assignee of a contract made with the city of New York. The purpose of this contract as stated therein was "to provide for the loading and trimming of the deck scows, dumpers and other vessels at the water front dumps of the department of street cleaning in the borough of Manhattan, of the ashes, rubbish and street sweepings delivered at said [14 specified] dumps" for the term of three years, commencing January 2, 1914, with the right of renewal. In addition to furnishing the labor necessary for loading and trimming the various vessels by which this material was to be taken to sea or to the appointed dumping ground, the contractor was to pay the sum of $600.51 a week for the privilege. The consideration and benefit secured from the city in return for the performance of this labor and the payment of this sum was the privilege to pick over the ashes, rubbish, etc., and reclaim therefrom certain articles. * * *

As a matter of fact the city under its contract did not furnish for use by the contractor in picking and loading and trimming, and make deliveries at, the 14 water front dumps as it agreed to. Owing to various mishaps, at the time the contract took effect it was able to furnish only 10 of these, supplying in the place of 3 of those originally specified, dumps located at other points and of a character less advantageous for the contractor in his work, and in the place of another one supplying no dump, but diverting the ashes, etc., to a private dump. The city undertook to repair and replace the lacking dumps, and 3 of them ultimately, but after the rescission of the contract hereinafter mentioned, were made fit for use. * * *

Notwithstanding plaintiff's claim of default upon the part of the city * * * it entered upon and continued in the performance of the contract from January 2d to April 11th, fully performing its work of loading and trimming at the water fronts which were furnished, and making its weekly payment of $600.51. It did this, however, under protest, each week serving upon the proper official a written notice in effect calling to his attention and notifying him that the city had failed to furnish specified dumps, * * * depriving plaintiff of its rights under the contract, causing it substantial loss, and that it reserved all rights, claims, and privileges under its contract for loss or damage aris-

[74] Parts of the two opinions are omitted.

ing out of the breach of the contract, and on April 11th it served upon said official a notice that it elected to rescind its contract upon the ground that the city had made breach thereof, and had substantially impaired its rights and rendered performance impossible.

When thereafter it brought this action based on such rescission it originally claimed damages aggregating a large amount for breach of the entire contract extending over three years. On the trial of the case, however, by acquiescence in the rulings of the court as well as by its own attitude, it limited its claim to a right to recover with interest the sum of $15,000 deposited as security for the performance of its contract and the damages which it had suffered by reason of the alleged default of the city during the period which intervened the commencement of the contract and the rescission. * * *

I think also that it was error as matter of law to permit the jury to find for defendant on the theory that the failure to furnish 4 out of 14 dumps was an unsubstantial default which did not materially impair performance of "the contract in its whole scope."

It will be remembered that in the place of 1 dump which was lacking none was supplied, and the ashes, etc., were diverted from it to private dumps, and that in the place of the other 3 dumps which were lacking dumps were supplied which were less convenient and beneficial for the contractor, and that the exchange resulted in loss. We are not embarrassed by the unanimous affirmance in respect of this evidence because the court substantially charged these facts, as matter of law.

Thus we have a contract under which as a fundamental, single, and indivisible agreement the city undertook to deliver all of its ashes, etc., from a certain territory (City of New York v. Paoli, 202 N. Y. 18, 94 N. E. 1077) at 14 specified dumps, with picking privileges, and in return for which the contractor by like single and indivisible agreement promised to perform labor at the entire collection of dumps and make payment for the privilege in an undivided sum of money. One agreement in its entirety is the foundation for and consideration of the other. There is in the contract no suggestion of or opportunity for divisibility and apportionment whereby the city might default in furnishing part of the dumps, and the contractor proportion performance of his obligations to what was left. He had a right to look to the profits of one dump as an offset to the possible losses at another, and to the entire collection as the source from which he might draw the benefits and profits which would enable him to perform his obligations and pay the single aggregate sum of money which he had promised. When the city defaulted in such an agreement it committed a material breach of its contract, which a jury might not find to be otherwise, and gave to the other party a right to rescind.

Applying to it familiar principles governing rescissions in such a case, the default was not of a covenant which was incidental, inconsequential, or subordinate to the main purpose of the contract which

would not support rescission. On the other hand, the breach was of a promise which was substantial, which lay at the basis of the entire contract, went to its entire consideration, and affected plaintiff's entire obligation thereunder, and hence furnished ample basis for rescission. Leopold v. Salkey, 89 Ill. 412, 31 Am. Rep. 93; Kauffman v. Raeder, 108 Fed. 179; 47 C. C. A. 278, 54 L. R. A. 247; Boone v. Eyre, 1 H. Bl. 273 (note); Osgood v. Bauder & Co., 75 Iowa, 550, 39 N. W. 887, 1 L. R. A. 655; Worthington & Co. v. Gwin, 119 Ala. 44, 24 South. 739, 43 L. R. A. 382.

The possibility that plaintiff might have waived for a period or indefinitely the failure to furnish dumps is not overlooked. It is sufficient to say here, however, that the evidence rebutted any such idea, and the case was not disposed of upon any such claim or theory.

The judgment so far as against plaintiff should be reversed, and a new trial granted, with costs to abide the event.

POUND, J. (dissenting). I think that the only arguable point presented to this court by a proper exception has to do with the question of entire dependent covenants and substantial performance. Unquestionably plaintiff might have performed on its part and claimed substantial damages for delay in full performance by the city. Was it limited to such an action for damages or might it rescind?

When the contract was made in August, 1913, it was the letter of the agreement that on January 1st 14 water-front dumps should be ready. The implied agreement was that the dumps known to both parties to be out of commission should be put in repair. The city was slow in getting 4 of them ready, but it was getting them ready when plaintiff undertook to rescind the contract. The city had showed not the slightest intention not to be bound by the contract nor to deliberately disregard its terms. Was its breach of minor importance or of such a material or essential character as to go to the root of the contract and excuse further performance by plaintiff?

"Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as condition precedent." Lord Mansfield in Boone v. Eyre, 1 H. Bl. 273, note; Kauffman v. Raeder, 108 Fed. 171, 179, 47 C. C. A. 278, 54 L. R. A. 247.

The principle thus established has been uniformly followed, but its application varies with the special circumstances of each case. It has recently been said by an eminent authority that—

"The test is whether on the whole, it is fair to allow damages merely or to excuse performance entirely." Williston on Contracts, § 841.

On the evidence it does not appear that the intention of the parties was that the delivery of the entire 14 dumps on January 1st was a con-

dition that went to the whole of the consideration on the other side, so that the failure to deliver promptly 1, 2, 3, or 4 dumps on that date, or by April 11th following, gave the injured party the right to treat the entire contract as at an end, and to recover damages for a total breach. The fact that the 4 dumps which were out of commission when the contract was signed were not ready on January 1st when plaintiff went into possession indicates that plaintiff would have been satisfied with damages for delay up to April 11th, at least if the 4 dumps had then been ready. One was ready on April 13, 1914, the date that plaintiff actually abandoned the work. One was completed May 15, 1914, one May 29, 1914, and one December 21, 1914. The trial judge thought the question of substantial failure to perform by the city was for the jury. Did the delay in completing the 4 dumps amount in law to a substantial impairment of plaintiff's entire consideration? Unless it can be said that plaintiff's promise to pay anything was absolutely dependent upon the delivery of all 14 dumps on January 1st, plaintiff had no right to rescind after entering into possession except for such unreasonable delay on the part of the city as either evinced a disposition on its part not to perform until it had substantially defeated plaintiff's purpose in making the contract or had that result.

Was the delay so unreasonable that it cannot be paid for in damages?

* * *

How does the case differ from an agreement to rent 14 houses, some finished, some being constructed, beginning at a future day? The covenant to have all the houses ready is not a condition precedent to pay rent if the partial breach may be paid for in damages. That is, if one house is lacking a coat of paint, which is being put on, that is not a breach of a condition precedent. If one house only is ready, that is a breach of a condition precedent. If the facts as to part performance are, as in the case before us, the question may be for the jury. I do not see that as matter of law the city's partial failure to perform on time was a large part of the consideration.

It may be noticed that the plaintiff when paying rent made no claim of total failure of consideration. It merely claimed that it was sustaining "a substantial loss," and asserted that paying rent in full was not a waiver of its rights under the contract. It makes no claim of any right to abandon the contract for breach and non-performance and impossibility of performance until April 11th. This at least indicates that plaintiff considered damages only up to the latter date and made no prior claim of impossibility of performance on its part.

The judgment should be affirmed, with costs.

*Judgment reversed, etc.*[75]

[75] In an earlier New York case, Oakley v. Morton, 11 N. Y. 25 (1854) it was held that plaintiff should have been nonsuited because, under a contract to keep twenty cows on his dairy farm and sell the butter made from the dairy to the defendant during a specified season, he did not show that he kept at

## PRESCOTT & CO., LIMITED *v.* J. B. POWLES & CO.

(Supreme Court of Washington, 1920. 193 Pac. 680.)

Action by Prescott & Co., Limited, against J. B. Powles & Co. Judgment for plaintiff, and defendant appeals. Reversed, with directions to dismiss action.

least twenty cows yielding milk during the dairying season, but on the contrary the evidence showed that while he started with twenty of such cows five of them went practically dry and were sold by him and not replaced by others. The action was for the price of butter alleged to have been delivered under the contract, and W. F. Allen, J., said:

"The right of action of the plaintiff depends upon the performance by him of a condition precedent, to-wit, the keeping of at least twenty cows for the dairying business, during the season of 1846, and delivering the butter made therefrom to the defendant at the time and place specified in the agreement. The plaintiff was bound to aver and prove a fulfilment of such condition, or some excuse for the non-performance; and if an excuse was relied on, he should have averred his readiness to perform, and the particular circumstances which constituted such excuse. 1 Chit. Pl. 321, 326. * * *

"The proof was, that the dairying season commenced in April, and ends during the month of November, and when the cows begin feeding on hay; that the plaintiff, in the spring, put twenty cows on his farm, three of which became dry about the first of September, and two others, from the first to the fifteenth of October; the five were disposed of and their places were not supplied. The quantity of butter, of course, depended upon the number of cows from which it was made, and there was evidence offered to show the value in market of butter made from a dairy of twenty cows was greater than that made from fifteen cows. * * * The covenant was co-extensive with the season, and a failure to perform it, at the latter part of the season was as much a violation of its letter and spirit, as would have been a failure in the earlier part. The agreement was to keep the entire number, during the entire season, and a strict performance was a condition precedent to his right to recover of the defendant, who could not be compelled to receive and pay for the butter from any less number of cows. Page v. Ott, 5 Denio 406; Smith v. Briggs, 3 Id. 73. * * * A keeping of twenty cows for three months, and fifteen for the next three months, is not literally, nor substantially, keeping the first number for the whole six months. The contract cannot be otherwise construed than if the defendant had undertaken to pay a gross sum for the butter to be made from a given number of cows; and under such a contract, it would not be claimed, that the dairyman could provide the whole number of cows, of such as would become dry in the midst of the season, and still compel a performance by the defendant. This case is in principle somewhat like Beatson v. Schank, 3 East 233, in which it was held, that the party who took upon himself to keep on his vessel a certain number of hands, was bound to provide against the contingency of any of them dying, as by taking an extra number on board. See also Inman v. Western Fire Ins. Co., 12 Wend. 452. * * *

"The plaintiff did not prove a substantial performance of this part of the contract, and the performance was not dispensed with or prevented by the defendant. The evidence did not tend to establish an excuse for nonperformance, even if, under the pleadings, an excuse could have been shown."

Problems of breach to the essence are as varied as the subject-matter of contracts. For instance, in Williams v. Sweet (Me.), 110 Atl. 316 (1920), a guest in a hotel, who had contracted to take and pay for rooms for two

TOLMAN, J.[76] On January 12, 1918, appellant ordered, through a merchandise broker representing the respondent in Seattle, 300 crates of Australian onions. The order reads:

"Sold to J. B. Powles Co. How ship, Boat. When, March. 300 crts. Australian onions, $94 per ton. Cost, freight and insurance Frisco. Acceptance Australia."

It appears to have been understood that there was but one ship each month plying between the Australian port of shipment and San Francisco, and that to comply with the order and ship in March the shipment would necessarily be by the Steamship Sonoma. About March 12, following, appellant notified the broker of its desire to cancel the order, and caused the broker to cable respondent to that effect; but the cable was not delivered until after the ship had sailed with the partial shipment of onions hereinafter referred to.

In due time the respondent had ready for shipment the full 300 crates of onions as ordered, but was permitted to load on the ship but 240 crates; the remainder of the space being taken at the last moment by the United States government for the purpose of shipping wheat to the United States. The 240 crates so shipped were consigned to the shipper's order, with directions to notify the buyer, and a draft with bill of lading attached was drawn on the buyer for the purchase price, with the privilege of inspection before payment. Appellant, the buyer, declined to receive the shipment or pay the draft. The goods were sold for its account, and this case was brought to recover the loss occasioned by the resale at a price less than that named in the order, plus the expenses of resale. The case was tried to the court without a jury, resulting in a

weeks, was held justified in leaving after three days and refusing to pay because numerous flies, about whose filthy habits the opinion discourses at length, were allowed in the dining room.

Closely connected with the topic of breach to the essence is fraudulent concealment of some fact so important that it entitles the party deceived to avoid the contract. With reference to mutual promises to marry, for instance, the following statement is inserted here because of its assertion of a single standard of virtue:

"The proposition that illicit intercourse of the plaintiff, prior to the promise and then unknown to the defendant, or subsequent to the promise, with another than the defendant is a defense to the action is fundamental and established beyond the reach of discussion. The law, through implication, reads into the promise of either party to the engagement the representation of chastity, and physical qualification for the relation, which, if false or a misrepresentation constitutes a fraud vitiating the whole contract. Boynton v. Kellogg, 3 Mass. 188; Palmer v. Andrews, 7 Wend. 142; Kniffen v. McConnell, 30 N. Y. 285; Goddard v. Westcott, 82 Mich. 180; Budd v. Crea, 6 N. J. L. 370. It is in this respect impartial between the sexes." Collin, J., in McKane v. Howard, 202 N. Y. 181, 183-184 (1911).

On defenses to actions for breach of promise to marry, see 40 Am. St. Rep. 172, note.

[76] Part of the opinion is omitted.

judgment against appellant for the full amount claimed, from which it appeals. * * *

2. It is contended, and generally held, that the delivery of goods under an executory contract must be of the exact quantity ordered, otherwise the buyer may refuse to receive them; and it is not necessary that he base his refusal on this specific ground, but, having refused to accept the goods on other grounds, he may yet defend, an action for the purchase price upon this ground. It was so held in Inman, Akers & Inman v. Elk Cotton Mills, 116 Tenn. 141, 91 S. W. 760, where the order was for 50 bales of cotton. The buyer sought to cancel the order, as in this case, and the seller refused to cancel. The buyer then refused to accept the goods, upon the ground that the delivery was not promptly made as the contract required. The seller resold for the account of the buyer, and sued for the loss sustained. It developed during the trial that the seller had tendered delivery of but 49 bales, and the buyer was permitted to amend his answer and defend upon this ground. The court said:

"A delivery of a less number was not a compliance with this contract. So far as it affected the contract relations of the parties, a failure in the matter of one bale was as much as a failure to deliver any greater number of bales. The complainants sue to recover for the breach of an entire contract, and in order to maintain their bill they must show a compliance or a willingness to comply with it as an entirety. Failing in this latter regard, they fail altogether. Tiedeman on Sales, § 101; Barker v. Reagan, 4 Heisk. 590. Their insistence that they were relieved from tendering 50 bales by reason of the repudiation of the contract by the defendant, under the facts found by the Court of Chancery Appeals, cannot avail them. If they had accepted the repudiation, or rather cancellation, of the contract contained in the telegram from the defendant, of July 7th, then this failure would not have affected, other matters out of the way, their right to recovery. This, however, they failed to do. They declined positively to accept the cancellation, and thus kept the contract alive between themselves and the defendant, and thus enabled the defendant, notwithstanding its attempted cancellation, to avail itself of any previous or subsequent breach on the part of the complainant."

See, also, Sun Publishing Co. v. Minnesota Type Foundry Co., 22 Or. 49, 29 Pac. 6; Barton v. Kane, 17 Wis. 37, 84 Am. Dec. 728; Price v. Engelke, 68 N. J. Law, 567, 53 Atl. 698; Newell v. New Holstein Canning Co., 119 Wis. 635, 97 N. W. 487.

3. Since the seller did accept the order in Australia and was bound to deliver the exact quantity ordered, may he be excused from making full delivery because our national government (rightfully as we must assume) as a war measure commandeered the only available shipping space for its necessities? Much as the writer would like to so hold, the authorities lay down the contrary rule. Had respondent been sued

for damages for failure to ship the full order, this act by the government might have afforded a defense; but, having sued on the contract, it is essential to a recovery that a full performance be shown, and no excuse not provided for in the contract will justify a recovery, where the performance is partial only, save only an act of the buyer rendering performance impossible, or a waiver by it. Newell v. New Holstein Canning Co., *supra;* Remy v. Olds, 4 Cal. Unrep. 240, 34 Pac. 216, 21 L. R. A. 645; The Harriman, 9 Wall. 161, 19 L. Ed. 629, and cases there cited.

We conclude that the judgment must be reversed, with directions to dismiss the action. It is so ordered.[77]

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## CYRUS MARK ET AL. *v.* STUART-HOWLAND CO.

## STUART-HOWLAND CO. *v.* CYRUS MARK ET AL.

**(Supreme Judicial Court of Massachusetts, 1917. 226 Mass. 35, 115 N. E. 42, 2 A. L. R. 678.)**

RUGG, C. J.[78] The action of Mark and others, who will hereafter be called the plaintiffs, was brought first. The declaration is in two counts, the first to recover damages for breach of a written contract dated May 25, 1908, and the second upon an account for goods sold and delivered to the Stuart-Howland Company, who will hereafter be called the defendant. * * * The second is a cross-action brought by the defendant against the plaintiffs. The declaration in this action contains one count for damages arising from the general breach of the contract

The contract provided in substance for the appointment of the defendant as the exclusive agent for the New England states for the plaintiffs' entire line of rigid iron conduit for a period of two years, with a privilege of written cancellation by either party on sixty days' notice, and an absolute privilege of cancellation on the part of the defendant by giving written notice. The plaintiffs quoted "a discount of 50, 10s & 5" from its regular published list, the price, however, to be raised or lowered according to market conditions, but the defendant always to be allowed a 5 per cent. preference below the price quoted by the "Associated Manufacturers." The controversy centers about an order given by the defendant to the plaintiffs on December 12, 1908, for twenty-five carloads of conduit, to be shipped to Boston unless otherwise directed, "prices not to be higher than last shipment." There was evidence tending to show that the order was not intended for immediate delivery nor delivery before January 1, 1909. On October 27, 1908, the plaintiffs had written the defendant withdrawing all outstanding prices on con-

[77] See Primos Chemical Co. v. Fulton Steel Co., 266 Fed. 945 (1920).

[78] The statement of facts and parts of the opinion are omitted.

duit and submitting a schedule of higher prices for goods to be shipped after December 31, 1908. The chief issue between the parties was whether upon all the evidence the plaintiffs were bound to accept the defendant's order of December 12 at the lower price, or whether they were justified in refusing to accept it unless at the higher price. There was much correspondence over this order and there were efforts at compromise of the differences. These were without avail and in May, 1909, the plaintiffs brought their action. * * *

There was no error in the denial of the defendant's requests 10 and 32, to the effect that, if the refusal by the plaintiffs to accept the defendant's order of December 12, 1908, was a breach of the contract between the parties, then the plaintiffs could not recover for the goods sold and delivered. It is a general rule that, where one breaks a contract to be performed for an entire price, he cannot recover on the contract, because he has not performed it,[79] nor on a *quantum meruit*, because his voluntary failure to complete his agreement prevents recovery, save in restricted instances where there has been an honest intention to go by the contract. Homer v. Shaw, 177 Mass. 1, 58 N. E. 160, s. c., 212 Mass. 113, 98 N. E. 697. A willful default in the performance of a stipulation not going to the essence of the whole contract bars recovery. Sipley v. Stickney, 190 Mass. 43, 76 N. E. 226, 5 L. R. A. (N. S.) 469, 112 Am. St. Rep. 309, 5 Ann. Cas. 611; Douglas v. Lowell, 194 Mass. 268, 273, 80 N. E. 510; Bowen v. Kimbell, 203 Mass. 364, 371, 89 N. E. 542, 133 Am. St. Rep. 302; Hennessey v. Preston, 219 Mass. 61, 106 N. E. 570.

But this principle is not applicable to the facts here disclosed. The

[79] "If there is anything well settled, it is that the party who commits the first breach of a contract cannot maintain an action against the other for a subsequent failure to perform. Loudenback v. Tennessee Phosphate Co., 121 Fed. 298, 58 C. C. A. 220, 61 L. R. A. 407. The defendant has not kept its contract, and shows no excuse for its breach. It is therefore in no position to demand that the plaintiff should go on and perform or answer for its refusal to recognize the contract as in force." Sanders, J., in Bradley v. Nevada-California-Oregon Ry., 42 Nev. 411, 178 Pac. 906, 908-909 (1919).

Where the plaintiff, a contractor, had intentionally failed to comply with the specifications in many respects, so that the architect refused to give him a certificate, but sought to recover because he had substantially performed, it was held, that "Under this state of the proof he is not entitled to the benefit of the equitable doctrine of substantial performance. That doctrine "is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contracts in all material and substantial particulars, so that their right to compensation may not be forfeited by reason of mere technical, inadvertent, or unimportant omissions or defects. It is incumbent on him who invokes its protection to present a case in which there has been no willful omission or departure from the terms of his contract.' Gillespie Tool Co. v. Wilson, 123 Pa. 19, 16 Atl. 36." Smyth, C. J., in Turner v. Henning, (App. D. C.), 262 Fed. 637, 638 (1920).

See also Lynch v. Culhane, (Mass.), 129 N. E. 717 (1921); Van Clief v. Van Vechten, 130 N. Y. 571 (1892). But see Henry W. Ballantine, Forfeiture for Breach of Contract, 5 Minn. Law Rev. 329.

instant contract has a double aspect; one was exclusive agency by the defendant for two years for one kind of goods manufactured by the plaintiffs; the other was sales of goods from time to time by the plaintiffs to the defendant at prices to be fixed by agreement of the parties, but in any event with at least a five per cent. preference over other manufacturers. So far as the successive sales are concerned, they are severable and each is a contract of sale by itself. Young & Conant Mfg. Co. v. Wakefield, 121 Mass. 91; West End Mfg. Co. v. Warren Co., 198 Mass. 320, 326, 84 N. E. 488; Badger v. Titcomb, 15 Pick. 409, 26 Am. Dec. 611; Raphael v. Reinstein, 154 Mass. 178, 28 N. E. 141; Bowker v. Hoyt, 18 Pick. 555; Barlow Mfg. Co. v. Stone, 200 Mass. 158, 86 N. E. 306; Knight v. New England Worsted Co., 2 Cush. 271, 290. Breach of the agency aspect of the contract arising from failure to honor orders for goods sent by defendant to the plaintiffs in accordance with the contract would not alone prevent recovery by the plaintiffs for goods already sold and delivered. * * *

***Defendant's exceptions*** [*as to other instructions*] ***sustained in action*** *of Mark et al. v. Stuart-Howland Company,* [*in which the trial court had directed a verdict for plaintiffs*]. * * *

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## CHOICE *v.* MOSELEY.

**(Court of Appeals of South Carolina, 1828. 1 Bailey, 136, 19 Am. Dec. 661.)**

This was a suit by summary process on a written contract, in these words: "On or before December 25th, 1827, I promise to pay or cause to be paid unto Daniel Hull, or holder, $50, to be discharged in a horse, for value received of him August 14th, 1826." This paper was signed by the defendant, and delivered to Daniel Hull, who subsequently transferred it, by delivery, to the plaintiff.

The day after that specified for payment of the money or delivery of a horse, the defendant went in search of Hull to tender a horse; but Hull having removed, he was unable to make the tender. Subsequently on being apprised that the contract had been transferred to the plaintiff, the defendant went to him and tendered a horse in satisfaction, which the plaintiff refused to accept, on the ground that he had the right to elect, and he preferred the money.

The presiding judge held, that, as to Hull, the right of election was in the defendant, by the terms of the contract; and the plaintiff could claim no higher right than Hull, although he might have taken the note as one for the payment of money; that the tender of a horse to the plaintiff was consequently a performance of the defendant's contract, and discharged the plaintiff's right of action. His honor, therefore, ordered a nonsuit; which the plaintiff now moved to set aside.

JOHNSON, J. The question, whether the note, on which this action was brought, was, or was not, transferable by delivery, so as to enable

the plaintiff to maintain an action on it in his own name, does not appear to have been made in the court below, and cannot therefore be considered here; and I concur with the presiding judge, in the opinion, that the plaintiff stood in no better situation, with respect to his power to accept, or refuse the horse, when tendered, than the original payee would, if the note had not been transferred, but the tender had been made to himself, and the action brought in his name. So that the only question is, whether the plaintiff was, or was not, bound to accept the horse when tendered.

I take it that the rule is very clear, that when one contracts in the alternative to do one of two things by a given day, he has, until the day is past, the right to elect which of them he will perform; but if he suffer the day to elapse without performing either, his contract is broken, and his right of election is lost. The present case sufficiently illustrates the reason of the rule. The payee of the note might reasonably calculate upon the value of a horse, at a particular day. He might want him at that time for a particular purpose. But if it were left to the defendant, at his election, to deliver a horse at any indefinite period afterward, he might select that time, at which the value of horses would be most depreciated; and thus gain an advantage inconsistent with his contract. The note in question was due on December 25th, 1827, and this action was brought in October, 1828. The tender is said to have been made shortly before, so that at least eight months had elapsed before the tender was made. The plaintiff was not bound to accept; and a new trial must therefore be granted.

*Motion granted.*[80]

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## AMOS J. DAWLEY, JUN., *v.* EARL H. POTTER.

**(Supreme Court of Rhode Island, 1896. 19 R. I. 372, 36 Atl. 92.)**

STINESS, J. This suit is based upon the following offer:

"PROVIDENCE, July 12, 1892.

"JOHN A. DAWLEY, ESQ.

"*Dear Sir:*—I will agree to give you two hundred and fifty dollars ($250.00) for a foal of 1893, by Aristocrat, out of Empress, provided

[80] "The defendant * * * had his election to pay the $400 at the end of six months, or account, or to pay the $600 at the end of one year, or account for the profits; but having totally failed, he has lost his election, and the plaintiff may now elect for himself. This is a settled principle. The case of 13 Edw. IV., pl. 12, and which is abridged in Bro., Dette, pl. 159, established this rule. That was debt upon an obligation to pay £20 or 20 bales of wool, and the plaintiff demanded the £20. Pigot and Brian, JJ., held, that before the day of payment, the obligor had his election to tender which of them he would, but that after the day of payment, and no tender made, the obligee had his election to demand which he would. But Brian, J., admitted, that if a man

such colt is a filly, all right and sound at five months' old, well marked, with no white on front feet, should you wish to sell her.

"Very truly,
"EARL H. POTTER."

A filly was born May 12, 1893, which became five months old October 12, 1893. The declaration and evidence showed that the consideration was a sale by the defendant to the plaintiff of the mare with a foal for the sum of $450, coupled with this offer, and the first ground of exception is the admission of testimony to that effect. We see no valid objection to it. Its evident purpose was to show that the offer was not a mere voluntary offer, which could be revoked at any time, but that it was founded upon a consideration which kept it alive according to its terms.

The main question, therefore, comes upon the proper construction of the proposal. The court instructed the jury that the plaintiff had a reasonable time after the expiration of the five months within which to signify his intention to sell the colt to the defendant pursuant to his offer. We think that this instruction was correct. By the terms of the offer the plaintiff could not make the sale until it appeared that the condition could be satisfied at the end of five months, and he was then to determine whether he wished to sell or not. This is enough to show that the contract was not to be consummated upon the very day that the time for determining the conditions expired, and to take the case out of that class of cases where the time is fixed for the performance of the contract, *e .g.*, Ives v. Armstrong, 5 R. I. 567, and where time is of the essence of the contract. Hicks v. Aylsworth, 13 R. I. 562; Potts v. Whitehead, 20 N. J. Eq. 55; Maclay v. Harvey, 90 Ill. 525.

This contract is silent as to the time of performance, and fixes only the time for the determining conditions upon which a sale shall be based. We do not think that the contract shows an intention of the parties to complete the whole transaction on the last day of the five months. In such a case the sale and delivery may be completed within a reasonable time. 2 Chitty on Contracts, 11th. Am. ed. 1062, and note.

*Petitions [of defendant for a new trial] dismissed.*[81]

be bound to pay £20 at Easter, or £10 at Michaelmas, here, although he paid not at the first day, he can pay at the second day. In Dyer, 18 a, Baldwin and Englefielde, JJ., recognized the same doctrine; and the cases cited from Cro. Eliz. and Cro. Jac. are to the same effect." Per Curiam in McNitt v. Clark, 7 Johns (N. Y.) 465, 466-467 (1811).

[81] Where the time for performance depends upon when the contract comes into existence, the problem is primarily one of offer and acceptance. The performance problem, however, also calls for determination.

## JOHN W. PEAD v. LARKIN T. TRULL, ADMINISTRATOR.

(Supreme Judicial Court of Massachusetts, 1899. 173 Mass. 450, 53 N. E. 901.)

HOLMES, J. This is an action of contract upon an indenture by which, in consideration of the plaintiff Pead's covenant, Whitman covenanted to convey certain land to Pead within forty-five days, and Pead, in consideration of Whitman's covenant, covenanted to convey certain land to Whitman within forty-five days, and further covenanted to pay him fifteen hundred dollars upon receiving a deed of Whitman's land; and to give Whitman a note for three thousand dollars secured by second mortgage on the Whitman land and to assume and pay a first mortgage with interest from the date of the conveyance to him. Then followed mutual covenants to pay five hundred dollars as indemnity and liquidated damages in case of failure to perform the agreement. Before the forty-five days elapsed Whitman died, and on the last day, no administrator having been appointed, the plaintiff, to save his rights, tendered performance on his side to the widow of Whitman and to the defendant Trull, who had been Whitman's attorney in other matters and who afterwards was appointed administrator, but, apart from other technical difficulties, the deed tendered by the plaintiff ran to Whitman, the dead man.

It appears to us that the covenants ought to be construed as mutually dependent. There is some little suggestion of independence to be drawn from them, but nothing on the whole strong enough to overcome the presumption that in an exchange performance on the two sides is to be concurrent. Goodisson v. Nunn, 4 T. R. 461. In actions upon such covenants the plaintiff must show performance on his side, or readiness to perform, and a refusal by the other party. Brown v. Davis, 138 Mass. 458; Hapgood v. Shaw, 105 Mass. 276, 279; Smith v. Boston & Maine Railroad, 6 Allen, 262, 273. But in a case like the present, under our statutes the administrator was the natural and proper person to perform the contract, as he was the one to receive the money from the plaintiff. Pub. Sts. c. 142, § 1. It was impossible to demand performance of him, or to offer it to him within the forty-five days, and therefore the plaintiff was not in default for not having done so, and the contract was not discharged at the end of that time. Of course the contract was not discharged by the death of a party.

The plaintiff's tender, although defective as such, is evidence that he was ready and willing to perform and that the administrator knew that he was. But it did not put the administrator in default. All that appears is that the latter has not caused the land to be conveyed to the plaintiff. It does not appear that he ever has repudiated the agreement. On the other hand, it does not appear that the plaintiff ever has renewed his offer since the administrator was appointed. Assuming as we do that the plaintiff had a right to demand performance within a reasonable time after the appointment of an administrator, it does not

appear that the judge has not found that he suffered more than a reasonable time to elapse, and so lost his rights. We are compelled by the terms of the report to direct a judgment on the finding. If in fact the finding was based solely on the ground that the plaintiff had lost his rights at the end of forty-five days, that ground is insufficient, and the rescript of this court will not prevent an application to the judge who heard the case to reopen the cause, or to enter what judgment he deems proper under this decision. Platt v. Justices of the Superior Court, 124 Mass. 353, 355; Kenerson v. Colgan, 164 Mass. 166.

*Judgment on the finding.*[82]

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## BUTLER *v.* MANNY.

(Supreme Court of Missouri, 1873. 52 Mo. 497.)

Action for breach of covenant in a lease to pay the value of improvements. The court, a jury being waived, found for the plaintiffs, rendering judgment in their favor for $1,500.00. Defendant appealed.

VORIES, J.† * * * It is contended by the defendant, that the covenant to pay rent and taxes on the part of the lessee, and the covenant to pay for the permanent improvements at the expiration of the lease, were mutual dependent covenants, and that if any part of the rent or taxes remained unpaid at the expiration of the lease, that the lessee could not recover for said improvements. By the terms of the lease, the lessee agrees to pay the rent semi-annually for ten years, to be paid on the first day of July and January of each year, and he also agrees to pay the taxes and assessments, but no time is fixed by the lease for the payment of the taxes, it is therefore left to the presumption that they will be paid as they became due; these covenants do not depend at all upon the covenant of the lessor to pay for the improvements after the lease has expired, but they are necessarily independent of such covenants, and may be sued on when broken, without any reference to the performance by the lessor of his covenants to pay for the improvements at the expiration of the term; and again, these covenants to pay the rents by installments and to pay taxes, each only goes to a part of the consideration of the performance of the contract on the part of the lessor, and cannot therefore be mutually dependent covenants; covenants to be dependent must be mutual, and go to the entire consideration. (Smith v. Busby, 15 Mo. 387; Bennett v. Pixley,

[82] Compare note on time for performance of contract for sale or exchange of land where the time fixed by the contract has been waived, in 4 A. L. R. 815.

† The brief statement as to the action is summarized from the opinion. Part only of the opinion is given.

7 John 249; 1 Saunders, 320; 30 John., 15; 15 Pick., 546.) The mere recital in the lease, that the agreements in the lease to be performed by the lessees being performed, the lessor will at the expiration of the lease pay for the improvements, etc., does not have the effect to make independent covenants in the lease, dependent;[83] these covenants, if violated at any time, can be sued on, and their violation compensated for in damages, and the lessor has expressly provided in the lease for the securing of the performance of these covenants, by providing that if the rent remains unpaid for sixty days he may exact double rent, or that if either the rent or the taxes shall remain unpaid, the lessor at his option may forfeit the lease. These provisions show that the covenants to pay rent and taxes are independent of the covenant to pay for the improvements at the termination of the lease. * * *

*Judgment affirmed.*[84]

[83] See Edge v. Boileau, 16 Q. B. D. 117 (1885), where a similar decision was made without any apparent appreciation of the fact that there was express condition language in the lease.

[84] We have seen that in the case of an ordinary bilateral contract a breach by one party of a material promise made by him, if that breach is so serious as to defeat the other party's justifiable expectations in making the contract to such an extent that it must be deemed to the essence, will justify the disappointed party in refusing to go on with performance on his part. But in many jurisdictions that doctrine has not received general application to leases, because leases with mutual covenants are not merely contracts but conveyances and so are treated conservatively. Consequently in a number of jurisdictions leases are governed by the general rule that stipulations not expressly made conditions are independent (1 Tiffany on Landlord & Tenant, sec. 51), though that rule is subject to various exceptions, mostly covered by actual or "constructive" eviction, and in addition the courts applying it seem occasionally to forget it and imply dependency. See, for instance, Sigmund v. Newspaper Co., 82 Ill. App. 178. Where, however, there are unusual covenants, the courts are more likely to enforce the equitable defenses fictitiously known as conditions implied in law, i. e., to find that the covenants are dependent. An instance of that kind is University Club v. Deakin, 265 Ill. 257 (1914), commented upon in 10 Ill. L. Rev. 61. In that case, an action by a landlord for rent, it was held to be a defense to the tenant, who had moved out, that he did so because the landlord violated a covenant not to lease during the term any other store in the building to any tenant making a specialty of selling certain goods sold by the defendant.

If the landlord actually evicts the tenant, the obligation to pay rent not previously due is suspended during the eviction, even though the eviction is of only part of the premises and the tenant retains the remainder.

"The rule contended for by the defendant that an eviction from a part of the premises suspends the rent in its entirety is established by the great weight of authority not only in England, but in this country. Mirick v. Hoppin, 118 Mass. 582; Fifth Ave. Bldg. Co. v. Kernochan (N. Y.) 117 N. E. 579; Kuschinsky v. Flanigan, 170 Mich. 245, 41 L. R. A. (N. S.) 430 and note, Ann. Cas. 1914 A, 1228." Powers, J., in Powell v. Merrill, 92 Vt. 124, 103 Atl. 259, 261 (1918).

In the case of constructive eviction, due to premises becoming untenantable through breach of the landlord's covenant to keep them in repair—and it is

## DANIEL G. LEAVITT v. CHARLES G. FLETCHER.

(Supreme Judicial Court of Massachusetts, 1865. 10 Allen 119.)

Contract brought by a lessee against a lessor to recover damages for a breach of the covenant to repair. The material portions of the lease and the agreed facts upon which the case was submitted to the determination of the whole court are stated in the opinion.

GRAY, J. By the indenture upon which this action is brought the defendant "does lease, demise, and let" to the plaintiff a brick stable standing on the lessor's own land, and a wooden carriage-house standing on land held by him under a lease from others, with a provision that if they shall require the termination of that lease and the removal of the carriage house, the plaintiff may terminate this lease. The lessor "agrees to make all necessary repairs on the outside of said building." The lessee agrees to pay a certain rent monthly, and to quit and deliver up the premises to the lessor at the end of the term "in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are or may be put into by the said lessor;" not to make or suffer any waste thereof; and "that the lessor may enter to view and make improvements, and to expel the lessee, if he shall fail to pay the rent as aforesaid, or make or suffer any strip or waste thereof. And said lessee is to make all necessary repairs on the inside of the building at his own expense."

The brick stable is the building mentioned in the lease next before the lessor's covenant to make outside repairs; but we have no doubt that this covenant includes all the premises leased by the defendant to the plaintiff, the carriage-house as well as the stable. Indeed in the duplicate indenture in the hands of the defendant the plural word "buildings" is substituted for "building" in this covenant.

The facts agreed by the parties are as follows: The carriage-house

necessary for the tenant to move out to make a complete demonstration of untenantability—the liability for rent also ends. And in at least one state that has been so by statute even in the absence of an express covenant by the landlord. May v. Gillis, 169 N. Y. 330 (1901).

On the effect of nonhabitability of leased dwelling or apartment, see 4 A. L. R. 1453, note.

In Oppenheimer v. Szulerecki, 297 Ill. 81, 86 (1921), Dunn, J., for the Illinois Supreme Court said, that "Counsel on both sides agree in their briefs that the remedies available to a tenant on the breach of his landlord's covenant to repair are correctly stated in Cromwell v. Allen, 151 Ill. App. 404, as follows: 'In case a landlord fails to make repairs in violation of his covenant the tenant may (1) abandon the premises if they become untenantable by reason of want of repair; (2) he may make the repairs himself and deduct the cost from the rent; (3) he may occupy the premises without repair and recoup his damages in an action for rent; (4) he may sue for damages for breach of the covenant to repair, and the damage recoverable in this last instance is usually the difference between the value of the premises in repair and out of repair.'"

was a frame covered with matched boards, had a shingled roof and a plank floor, and on the inside was left uncovered by lath or plaster. While the plaintiff was occupying the premises under the lease, a quantity of snow accumulated upon the roof of the carriage-house, until, at the close of a heavy snow storm, the carriage-house fell from the weight of snow, crushing and injuring the plaintiff's carriages kept therein. The plaintiff afterwards demanded of the defendant that he should restore and rebuild the carriage-house, but the defendant refused to do so. There is nothing in the case to show that any negligence of either party contributed to the accident.

For five months succeeding the fall of the carriage-house, the plaintiff paid to the defendant, under protest, the rent reserved in the lease; and then, ceasing to pay rent, was ejected by the defendant. The lessee's covenant to pay rent was not affected by the injury to the premises, nor limited by the exception of unavoidable casualty in his subsequent covenant, and is independent of the lessor's covenant to make outside repairs. Belfour v. Weston, 1 T. R. 310; Hare v. Groves, 3 Anstr. 687; Kramer v. Cook, 7 Gray, 550, and cases cited. And it is not now denied that the lessee was rightly required to pay rent, and lawfully ejected for failing to pay.

The lessee in this action claims damages, 1st, for the injury occasioned by the fall of the carriage-house; 2dly, for the failure of the lessor to rebuild it, after being expressly requested so to do.

It is well settled that in a lease of real estate no covenant is implied that the lessor shall keep the premises in repair or otherwise fit for occupation. Dutton v. Gerrish, 9 Cush. 89; Foster v. Peyser, id. 242, and cases cited; Welles v. Castles, 3 Gray, 326. The express covenant of the defendant in this case is only "to make all necessary repairs on the outside of the building." He does not covenant that the outside shall not give way, but that, if it does, he will repair it. He cannot therefore be held liable for the damages occasioned by the fall of the building.

But it has been the established rule of the common law for ages that an express covenant to repair binds the covenantor to make good any injury which human power can remedy, even if caused by storm, flood, fire, inevitable accident, or the act of a stranger. Yearbook 40 Ed. III. 6; Dyer, 33 *a;* Paradine v. Jane, Aleyn, 27; s. c. Style, 47; Compton v. Allen, Style, 162; Bullock v. Dommitt, 6 T. R. 650; Green v. Eales, 2 Q. B. 225; s. c. 1 Gale & Dav. 468; Phillips v. Stevens, 16 Mass. 238; Bigelow v. Collamore, 5 Cush. 231; Allen v. Culver, 3 Denio, 294; Dermott v. Jones, 2 Wallace, 7, 8. The defendant's covenant contains no exception of natural causes or inevitable accident. "The outside of the building" includes the whole outer shell of the building, or external inclosure of roof and sides. Green v. Eales, above cited. "The necessary repairs on the outside" are those which will make the building outwardly complete. When those are made,

then, and not before, the lessee will be bound by his covenant "to make all necessary repairs on the inside." The fact that rebuilding the outside will so far replace the whole building as to leave very little to be done on the inside, and thus make the performance of the lessee's covenant very easy, does not in any degree excuse the lessor from first performing his covenant. The defendant is therefore responsible for the damages suffered by the plaintiff by reason of the defendant's refusal to rebuild, from the time of that refusal until the ejection of the plaintiff for not paying his rent; and according to the agreement of the parties the case must stand for the assessment of those damages.

*Judgment for the plaintiff accordingly.*

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## MORSE ET AL. *v.* MOORE.

**(Supreme Judicial Court of Maine, 1891. 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783.)**

This was an action of *assumpsit* to recover for two cargoes of ice under a written contract. The verdict was for the plaintiffs, for the full contract price, with interest. The defendant excepted.

PETERS, C. J.[85] The controversy in this case grows out of an agreement between plaintiffs and defendant, made and delivered in this state, which runs as follows: "This agreement, made and entered into this seventh day of January, 1888, by and between Morse & Sawyer, of Bath, Maine, of the first part, and Warner Moore, of Richmond, Va., of the second part, witnesseth:

"That the said parties of the first part, for and in consideration of the sum of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, do hereby sell and agree to deliver at their wharves at Water Cove, (Cape Small Point, opposite Burnt Coal island, as seen in Coast Chart No. 6, from four to six miles west of Seguin Island light house,) Maine, after the ice has become twelve inches in thickness, of good quality, during the months of January or February, 1888, two thousand tons of good, clear, merchantable ice, not less than twelve inches in thickness, to be weighed by a sworn weigher, with all the proper fitting material necessary for the voyage included, at the price or rate of forty cents per ton of two thousand pounds. Each cargo to be paid for on presentation of sight draft or note for thirty days or sixty days, as may suit party of second part, for the amount accompanying bill of lading and weigher's certificate of said cargo. Cakes to be twenty-two by thirty inches."

The ice delivered under this contract was shipped to Richmond, Va.,

[85] The statement of facts and parts of the opinion are omitted.

where the defendant resides, to be sold in that market to his customers. It was to be paid for according to its weight and quality at the port of shipment in Maine, any deterioration of the article during transit being at the risk of the purchaser.

The first question submitted to the jury was whether the ice had been accepted by the defendant or not, and that was decided in favor of the plaintiffs.

That brought up the question whether having accepted the ice, the defendant could rely on a breach of the warranty of the quality of the ice to reduce the claim of the plaintiff, who sues in this action of *indebitatus assumpsit* for the contract price; the defendant alleging that the ice was not, at the time and place of delivery in Maine, of the quality called for by the contract.

The judge presiding, being of the impression that such a defense might be admissible in case of an executed agreement containing warranty, but not where the agreement is executory, ruled out the defense as a matter of law. It is to be noticed that the ruling was without qualification, admitting of no inquiry into the circumstances in which the ice was accepted. It determines that an acceptance in a case of this kind (in the absence of fraud, of course) absolutely terminates the obligation of the vendor. The judge further ruled that "when the defendant took [that is, by a hired carrier] the property and carried it away the property passed to him."

Our examination of this question leads us to the conclusion that the position of the defendant was well taken, and that the alleged defense should have been permitted to him.

That there is a warranty or a condition precedent amounting to warranty in the contract, there can be no doubt. Such a warranty will be found to be variously characterized in the books as executory warranty, a condition precedent amounting to warranty, in the nature of warranty, with the effect of warranty, equal to warranty, and the like. It is immaterial, for present purpose, whether it be regarded as an express warranty or an express condition implying warranty, as the effect must be the same. One kind within its limit is not a more potential ingredient in a contract than the other, the difference between them being only in the style of agreement to which they may be annexed. An express warranty may be also special, however. It is now well settled by the authorities generally—our own cases included—that a sale of goods by a particular description of quality imports a warranty that the goods are or shall be of that description; a warranty which becomes a part of the contract if relied upon at the time by the purchaser. Bryant v. Crosby, 40 Me. 9; Randall v. Thornton, 43 Me. 226; Hillman v. Wilcox, 30 Me. 170; Gould v. Stein, 149 Mass. 570, 22 N. E. Rep. 47, and cases cited. Here there is a clear description of both the kind and quality of the ice,—the quality to be merchantable.

It was conceded at the trial that the position relied on by the de-

fense would be legitimate were it an executed, instead of executory, contract that contained the warranty. Why should there be the difference? Certain early New York cases, which will be further considered hereafter, by which the rule given at the trial is more or less supported, give as a reason for the rule that in an executory contract any article of a particular quality may be tendered in the performance of the contract, and the vendee must see if the article agrees with the terms of the contract, while in an executed sale the agreement is that a particular article actually delivered possesses the quality stipulated for. This undoubtedly expresses correctly the distinction between the classes of contract, but it does not impress us that there should be such an essential difference in their effect. The reason is not palpable why the vendee in the one case more than in the other should have to see that he receives only merchantable articles when a delivery is made. It seems inconsistent that the warranty, which is a part of either contract, should terminate at delivery in one contract and not in the other. Each vendor makes virtually the same warranty, and the two vendors at the point of delivery would appear to stand upon common ground. The seller in an executory contract agrees to do what the seller in an executed contract has already done. When he tenders the articles that he has agreed to deliver, such articles become particularized and identified; and he then represents that such particular and identified articles possess the quality stipulated for by his executory agreement. The terms of the contract of sale become the terms of the sale. The condition precedent becomes a warranty. Prof. Wharton (Whart. Cont. § 564) expresses the idea in these words: "A substantial, though partial (defective) performance of a condition precedent, followed by acceptance on the other side, transmutes the condition precedent into a representation, (implying warranty,) not barring a suit on the contract, though leaving ground for a cross-action for damages."

Executory and executed contracts are very much alike in the elements that enter into them. There are executory steps in all executed contracts. A bargain precedes the sale. If there be a warranty, that is usually first a part of the bargain, and afterwards of the sale. So in an executory contract the warranty is part of the agreement of sale, and at delivery a part of the sale. Many contracts commonly spoken of as executed contracts are really wholly or partially executory. All orders for goods, whether for present or future delivery, are of an executory nature. All sales by sample are such. The author of Smith's Leading Cases (8th Ed., vol. 1, pt. 1, p. 339) says in discussing this distinction: "Where the vendor agrees to sell goods of a certain kind, without designating or referring to any specific chattel, the contract is essentially executory, whether it purports to be a present transfer or a mere undertaking to deliver at a future period, and the right of property does not pass until the merchandise is delivered to or set apart for the pur-

chaser." Every contract is executory on the one side or the other until the party has done what he has agreed to do.

The fact of acceptance, however, as a matter of evidence, may have great weight on the question of satisfactory or sufficient performance. In the first place, it raises considerable presumption that the article delivered actually corresponded with the agreement. In the next place, it is some evidence of a waiver of any defect of quality, even if the article did not so correspond; evidence of more or less force according to the circumstances of the case. If the goods be accepted without objection at the time or within a reasonable time afterwards, the evidence of waiver, unless explained, might be considered conclusive. But if, on the other hand, objection is made at the time, and the vendor notified of the defects, and the defects are material, the inference of waiver would be altogether repelled. But acceptance accompanied by silence is not necessarily a waiver. The law permits explanation, and seeks to know the circumstances which induced acceptance. It might be that the buyer was not competent to act upon his own judgment, or had no opportunity to do so, or declined to do so as a matter of expediency, placing his dependence mainly, as he has a right to do, upon the warranty of the seller. Upon this question the facts are generally for the jury, under the direction of the court.

The law of waiver more commonly applies to things that are not essential to a substantial execution of the contract; often such as relate to the time, place, or manner of performance, or that affect merely the taste or fancy, perhaps, and are such departures from literal performance as do not bring loss or injury upon the purchaser. Baldwin v. Farnsworth, 10 Me. 414; Lamb v. Barnard, 16 Me. 364.

We think the rule invoked by the defendant a just one. Speaking generally, it is the safer rule for both buyer and seller. The opposite rule imposes on either of them very great responsibility and risk. It might be ruinous to a vendee, who is in urgent need of an article, not to accept it, although even much inferior in quality to the description contained in the contract. Certainly it should not be considered a hardship to a seller to require of him a compliance with his contract, or damages for his non-compliance.

The present case illustrates the justness of the rule, if the facts are proved as the defendant alleges them. The plaintiffs agreed to deliver ice, which they warranted should be good, clear, and merchantable. Two cargoes were loaded for shipment to a southern port. Defendant furnished the vessels, though they were probably chartered by the plaintiffs on the defendant's account. There is nothing in the charge of the judge, in the exceptions, or on briefs of counsel, intimating that the defendant ever saw the ice, either by agent or personally, until it arrived in Virginia, or that he was notified to be present, or knew of the delivery at the time of it. It would seem to be a rather stringent construction of the contract that the defendant must watch the loading of cargoes, upon

the penalty, if he failed to do so, of having to pay full price for whatever defective ice might be delivered behind his back, after he had taken for his protection, and paying for it in the consideration of the contract, an agreement of warranty in such positive terms. Still it may be that the plaintiffs could legally refuse to deliver the ice unless the defendant after notice should be present to receive it. The cargoes, after reasonable passages, arrived in a very unmerchantable condition. There was no lack of objection or protest from the defendant. He wrote repeatedly, and telegraphed the plaintiffs, expressing his disappointment, and asking their advice as to the disposition of the ice. But no satisfactory answer came. What should he do? There was no possibility of reshipment, nor could the ice be preserved in that climate without the protection that his own ice-houses would afford for such purpose. Storage in any ordinary manner could not possibly save the property. He stored the ice, and sold it by enterprising expedients as rapidly as possible. He alleges that it was late spring ice, of poor texture, and in proximately worthless condition when shipped from Maine. If that can be shown by witnesses and in court at the home of the plaintiffs, it would seem to be an injustice if the defendant is not permitted to make the defense.

Mr. Benjamin, (Benj. Sales 3d Amer. Ed. p. 888,) in allusion to the buyer's remedies after receiving possession of the goods, says he has three remedies against the seller for breach of the warranty of quality: First, the right to reject the goods if the property in them has not passed to him; second, a cross-action for damages for the breach; third, the right to plead the breach in defense to an action by the vendor, so as to diminish the price. These remedies are mentioned without any distinction between kinds of sales. The propositions are general, without any intimation that the procedure does not apply to warranties in executory sales. In the text such a distinction is not even noticed. In the notes to the text, however, it is remarked by the American editor that there are New York decisions inconsistent with the rule stated in the text. The first of these remedies—that of rejecting the goods—seems especially applicable to executory and inapplicable to executed sales, because it precedes acceptance, while in executed sales there has been aceptance, and the title has passed. It is only in executory contracts and contracts that are merely *prima facie* executed that the title has not passed.

Mr. Benjamin states further that the buyer's remedies are not dependent on his return of the goods, nor is he bound to give notice to the vendor; "but," he adds, "a failure to return the goods or complain of the quality raises a strong presumption that the complaint of defective quality is not well founded." Prof. Parsons, in the text and notes of his work on Contracts, lays down the same legal propositions that Mr. Benjamin does, making not a word of allusion to there being any difference in the application of them between sales executed and sales executory. He also states that if the buyer accepts goods inferior to such as are stipulated for, his continued possession without complaint

will be a presumption against him on the question of damages. Pars. Cont. (6th Ed.) *591, and notes.

Mr. Smith, in Leading Cases, in notes to the case of Chandelor v. Lopus, (8th Ed., vol. 1, pt. 1, p. 294,) discusses and fully indorses the same rules, as deducible from the authorities, and he and the editors in the last American edition of that work cite and compare a great many of the decided cases on the subject, and they give no recognition to a distinction between executed and executory contracts in the application of such remedies. We quote a few passages from their comments: "When specific property is referred to, still, if the reference be through the medium of a sample, the contract will be so far executory as to fail of effect unless the bulk of the commodity corresponds with the sample." "Nor will his [buyer's] right to indemnity or compensation necessarily end on his acceptance and use of the goods with full knowledge of the defect, but he will be entitled to bring suit on the contract, and receive damages for the breach of the implied engagement that the bulk of the commodity should correspond with the sample exhibited at the time of the sale." In the case at bar there was an ideal or descriptive sample—a description equivalent to the exhibition of a sample. There can be no doubt that, if the vendee may bring an action of his own on the contract, he can as well defend against an action brought upon the contract by the vendor. "The right of the vendee to rely on the breach of warranty, or a failure to comply with the terms of an executory contract, as a defense to an action for the purchase money may now be regarded as established in England and in most of the courts in this country." "The course of decision at the present day tends towards the position that a partial failure of consideration may be given in evidence in mitigation of damages, even when the orginal contract remains in full force, and the suit is expressly or impliedly founded upon it." "In the case of Withers v. Greene, 9 How. 213, the Supreme Court of the United States receded from the ground taken in Thornton v. Wynn, 12 Wheat. 183, by holding that a partial failure of consideration, growing out of fraud or breach of warranty, may be set up as a defense to an action brought by the vendor. The same rule applies to sales under an executory contract or by sample, and the buyer may rely on the deficiency of value resulting from the failure of the property sold to correspond with the terms of the contract as a reason why he should not be compelled to pay the price in full. Mondel v. Steel, 8 Mees. & W. 858; Babcock v. Trice, 18 Ill. 420; Dailey v. Green, 15 Pa. St. 118." * * *

The length of this opinion reasonably precludes further discussion of points that may be regarded as merely theoretical. Whether, in the present case, it be a condition or a warranty, and that might be at the election of the defendant to determine as he pleased, we think the defense set up to the action should have been heard upon the ground of a breach of condition, or of warranty, or upon both grounds. * * *

The New York court held in earlier cases that warranty in an executory contract did not in ordinary circumstances survive delivery and acceptance. But the doctrine grew up from the theory of law, maintained for a great while by that court, that description of quality is not a warranty of quality. In Leading Cases, before cited, it is said, in distinguishing the New York theory from that of Massachusetts and Pennsylvania: "The authorities in New York assume that calling a thing by a particular name, or designating as of a certain quality, is no evidence of a warranty or contract that it should be as described." Certainly a thing cannot survive that does not exist. Wilde, J., in Henshaw v. Robins, 9 Metc. (Mass.) 90, declared upon that ground that the authorities in New York were without influence upon the question of effect of acceptance in Massachusetts, saying: "Opposed to these authorities are the cases in New York; but these were determined on the assumption that there was no warranty express or implied, and they therefore have no bearing on the question as to the effect of the inspection of the goods sold by the purchaser."

The last-named rule of the New York cases was found to be so much at variance with the authorities elsewhere that in the case of White v. Miller, 71 N. Y. 118, all previous cases which held that warranty did not follow from description of quality were overruled; and, as a natural, if not necessary, consequence thereof, the tendency of that court seems in later cases to have been progressive towards the adoption of the other rule, that acceptance in cases of executory sales with warranty does not preclude the vendee from afterwards claiming damages against the vendee for a breach of the warranty; if the court has not already arrived at that point. There are late cases in that state, of express warranties, the doctrine of which seems to completely vindicate the position of the defendant in the present case, even should he be obliged to stand or fall upon the interpretation of the law of his contract according to the New York authorities. In Brigg v. Hilton, 99 N. Y. 517, 3 N. E. Rep. 51, and in Canning Co. v. Metzger, 118 N. Y. 260, 23 N. E. Rep. 372, it is declared that an express undertaking to deliver in the future articles of a certain quality was an express warranty of such quality when the articles were afterwards delivered,—a warranty that survived an acceptance of the articles delivered; and that the rule would be the same whether the goods were in existence at the time of contract of sale or were to be manufactured.

Upon the authority of these cases the contract in the case at bar contains an express warranty. An express undertaking to produce a thing is an express warranty of the thing produced.

*Exceptions sustained.*[86]

[86] See English v. Spokane, 48 Fed. 196 (1891).

§ 49 of the Uniform Sales Act provides that "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for

## CRAIG *v.* LANE.

(Supreme Judicial Court of Massachusetts, 1912. 212 Mass. 195, 98 N. E. 685.)

Action by Frank H. Craig against John J. Lane. There was a verdict for plaintiff, and defendant brings exceptions. Overruled.

This was an action of contract for the purchase of three cars of potatoes at 90 cents per bushel.

SHELDON, J. We see no ground on which the exceptions can be sustained. The ruling asked for by the defendant could not have been given; and that is the only question presented.

The defendant's contract was an entire one for the purchase of three cars of potatoes; and it was not severed by the fact that the plaintiff shipped them at different times and drew a separate draft for the alleged contents of each car at the agreed price. We assume without deciding that upon discovering the shortage which he claimed in the load of the first car he might have declined to accept it and rescinded his contract. But he chose not to do this. Instead of doing so he accepted that car load and sold it to a customer of his own, thus putting it beyond his power to return it to the plaintiff. He could not then rescind the contract by reason of the shortage. He must seek his remedy under the contract by way of set-off or recoupment, or by an independent action. Morse v. Brackett, 98 Mass. 205; Mansfield v. Trigg, 113 Mass.

breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor." The "But if" qualification is not in the English Sale of Goods Act. The Uniform Sales Act has been adopted by New York, among other states.

In America Theatre Co. v. Siegel & Co., 221 Ill. 145, 147 (1906), Scott, J., for the court, said: "The law does not permit a person to receive goods under a contract, appropriate them to his own use, and then defeat an action for the purchase price on the ground that the goods were not of the exact quality or description called for by the contract. His remedy, in the absence of a warranty, is to refuse to accept the goods when delivered, or to return them within a reasonable time after the departure from the terms of the contract is discovered. Wolf v. Dietzsch, 75 Ill. 205; Tilley v. Enterprise Stove Co., 127 Ill. 147." But in 1915 Illinois adopted the Uniform Sales Act, with the provision quoted *supra*.

On right of buyer to retain goods and defeat action for price on discovering that goods do not comply with requirements of contract, see 4 L. R. A. (N. S.) 1167, note.

There seems to be a tendency in the cases to confuse defeating a recovery with recoupment or counterclaim. While the defendant cannot wholly defeat recovery where the goods are of any value, he may take the proper procedural method to get a deduction if he acts with reasonable promptitude. See 2 Williston on Contracts, § 715.

"It is not the law that the acceptance of the performance of one service or duty when two are due is an abandonment of all claim of damages for the service not performed." Stone, C. J., in Dicks v. Belscher, 80 Ala. 369, 371 (1885).

350; Barrie v. Earle, 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 126; Obery v. Lander, 179 Mass. 125, 130, 60 S. E. 378; Fullam v. Wright & Colton Wire Cloth Co., 196 Mass. 474, 476, 82 N. E. 711.

*Exceptions overruled.*[87]

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## RAUDABAUGH *v.* HART.

(Supreme Court of Ohio, 1899. 61 Ohio St. 73, 55 N. E. 214, 76 Am. St. Rep. 361.)

Action by Charles F. Hart against I. F. Raudabaugh. The action below was brought to recover damages for the alleged breach of a contract for the sale of certain interests in oil property. Judgment for the plaintiff. A motion for a new trial being thereupon overruled, and error prosecuted to the circuit court, that court affirmed the judgment of the common pleas. Raudabaugh brings error to this court to obtain a reversal of both judgments. Reversed.

SPEAR, J.[88] * * * The contract pleaded was one that contained reciprocal and mutual obligations, and the limit of performance was, by the terms of the agreement, fixed for October 1, 1894. Time was thus made of the essence of the contract, as clearly stated in these words: "Said agreement between plaintiff and defendant contained a condition that defendant would sell said plants and property above set forth to plaintiff, provided the deal was closed by October 1, 1894." Each party was thus duly apprised of the time within which the deal was to be concluded. What, then, was it necessary for either to do in order to put the other in default? With respect to such contracts, Hitchcock, J., in Courcier v. Graham, 1 Ohio, at page 342, observes: " * * * If one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act." And it would follow that neither party could, in such case, maintain any action upon the contract against the other without offering and proving performance, or a readiness and willingness to perform, and notice to the other party of such readiness and willingness. 1 Warv. Vend. 366. Under the ancient rule a purchaser could not maintain an action for breach of contract without having tendered a conveyance and the purchase money. 1 Sugd. Vend. 366. The later rule, and the one which has always prevailed in this state, is that, in the absence of stipulations in the contract to the contrary, the conveyance is to be prepared and furnished by the vendor; but the ancient rule otherwise [i. e., apart

[87] See Howie v. Rea, 70 N. Car. 559 (1874).

[88] The statement of facts and parts of the opinion are omitted.

from preparing and tendering a conveyance?], it is believed, has always prevailed here, and is the law today. So long, therefore, as there is no tender of the deed on the one hand, nor of performance on the other, neither party is in default. Irvin v. Bleakley, 67 Pa. St. 28; Leaird v. Smith, 44 N. Y. 618.[89]

To entitle the vendee to demand a deed, he must be ready and offer to comply with the contract on his part, and show ability to perform it. Smoot v. Rea, 19 Md. 398. Whether or not it is necessary to have present and offer, in legal-tender money, the exact sum due, as is required in making tender upon an obligation for the unconditional payment of money, except where waived, it is at least necessary that the purchaser show readiness and ability to comply. Nor does the transaction imply haste, but deliberation, rather. As expressed by Woodworth, J., in Fuller v. Hubbard, 6 Cow. 13: "There is, then, something more to be done than the simple payment or the tender of the purchase money. A conveyance must be demanded. Nor would this alone appear to satisfy the principle of the rule. A reasonable time should be allowed to the vendor to prepare the conveyance. The purchaser not having himself prepared it (which he may do), he shall not be allowed to retire immediately and bring his action, but should present himself to receive the conveyance which he has thus required to be furnished. Deliberation and advice of counsel may be necessary in settling its terms. The framing and execution of modern conveyances, even with us, where the titles to real estate are much less complicated than in England, are not like the payment of money or the delivery of a chattel." The rule here announced is followed in a number of other cases in New York and elsewhere. Wells v. Smith, 2 Edw. Ch. 78; Bruce v. Tilson, 25 N. Y. 196; Fuller v. Williams, 7 Cow. 54; Connelly v. Pierce, 7 Wend. 129; Slocum v. Despard, 8 Wend. 619; Hartley v. James, 50 N. Y. 43; People v. Mills, 17 Cal. 276.

[89] "In contracts for the purchase and sale of real estate there are important differences between the law of England and the law of this country as to what constitutes performance by the parties respectively. Thus in England the presumption [in the absence of a provision in the contract to the contrary] is that the deed of conveyance is to be prepared by the buyer and tendered to the seller for execution; while in this country [in such case] the presumption is that it is to be prepared by the party who is to execute it. Hence in an action by the seller, it is only necessary in England to aver a readiness and willingness to execute a deed of conveyance; while in this country it is necessary to aver an execution of it and an offer to deliver it. In an action by the buyer, on the other hand, it is necessary in England to aver a tender of a deed of conveyance for execution; while in this country it is only necessary to aver a readiness and willingness and an offer to pay the purchase money upon the delivery of a deed of conveyance." Langdell, Summary of Contracts, § 170.

"In general, where there is a contract to convey to a stranger, it will be construed to be an undertaking on the part of the person contracting to convey, that the stranger shall accept the conveyance, and an offer or tender to convey will not be equivalent to actual performance, as it would be where the conveyance is to be made to a party to the contract. See Co. Litt., 209a." Boyle, C. J., in Davis v. Parish, Litt. Sel. Cas. (Ky.), 153, 154 (1812).

The case of Smith v. Lewis, reported in 24 Conn. 624, and again in 26 Conn. 110, is authority for the proposition that "the word 'tender,' as used in connection with such a transaction, does not mean the same thing as when used with reference to the offer to pay money where it is absolutely due, but only a readiness and willingness to perform in case of the concurrent performance by the other party, with present ability to do so, and notice to the other party of such readiness."[90]

In Cutter v. Powell, 2 Smith, Lead. Cas. 12, the rule is given thus: "Where two acts are to be done at the same time, as when A covenants to convey an estate to B on such a day, and in consideration thereof B covenants to pay A a sum of money on the same day, neither can maintain an action without averring a performance, or an offer to perform his own part, though it is not certain which of them is obliged to do the first act; and this particularly applies to cases of sales."

But there seems no doubt as to the rule in this state. * * * Mowry v. Kirk, 19 Ohio St. 375, was an action to recover for nondelivery of certain railroad bonds purchased, in which a recovery was had in the trial court for the difference between the purchase price and the market value of the bonds. This judgment was reversed for error in the charge, and for that, upon the whole case, the judgment should have been for defendant. We quote from the opinion, at page 383: "But the court below further told the jury that when 'the defendant denied the agreement, and refused to perform on his part, this dispensed with the necessity of a tender.' In this we think there was error. I can find no authority to sustain the proposition given to the jury. In the interview between Kirk and Mowry the next morning after the bargain was made, Kirk simply demanded the bonds. He did not offer to pay for them, nor tender payment for them; nor does it even appear that he then had the money to pay for them. His right to demand and have possession of the bonds depended on his making or tendering payment, unless such payment or tender was waived by Mowry. Though the property in the bonds passed by the bargain, the right of possession did not pass without payment or its equivalent, and it seems to us that neither principle nor authority would authorize us to hold that the mere fact of a denial of the contract by the vendor alone amounted to a waiver of a tender of the price of the bonds. The vender might well say to himself, 'I deny the contract to be as it is claimed to be, but, if it be insisted on as claimed, I still have the right to insist on payment before delivery.' And if, in a transaction of this kind, where prompt action was evidently contemplated by both parties, a week's delay occurs in making either tender or payment, a rescission of the contract by the

With reference to the time of a tender, see Startup v. Macdonald, 6 M. & G. a refusal to accept, or by a failure to call for it, when it is offered by a party able to make his offer good.

90 But it would seem as if an actual tender must be made unless waived by 593 (1843).

mutual consent of both parties may well be presumed in favor of either. Mutual delinquency gives rise to the presumption of mutual assent to a rescission. See Pars. Cont. 667 *et seq.*, and Lewis v. White, 16 Ohio St. 454." And in the syllabus it is held: "The mere facts that the vendor denied having made the contract, and refused to deliver the bonds, did not imply a waiver by him of the vendee's obligation promptly to render payment. The delinquency of the vendee in failing to tender payment for a week after the contract was made gave rise to the conclusive presumption, as against him, of his assent to a rescission of the contract, and authorized the vendor to act on that presumption."

In the light of the rules thus ascertained, what is the attitude of the plaintiff below as shown by the petition? It is stated in the brief of defendant in error that the amended petition alleges "that plaintiff did all things on his part to be done and performed under said contract." Whether, if this were so, it would or not avail the plaintiff, we need not consider, because the allegations of the pleading do not justify this claim. On the contrary, the language is: "Plaintiff further says that from the 21st day of September, 1894, and until and including October 1, 1894, he was ready and willing to do and perform everything to be done by him in the carrying out of said sale and contract; but the defendant, although often requested so to do, has refused to comply with said contract, and has at all times refused to transfer and deliver said property to plaintiff." Of what consequence can this averment be, so long as there was no attempt to apprise the adverse party of such readiness and willingness, no tender of performance on his part, in any way or manner? The fact of readiness to perform, locked up in the breast of plaintiff, could neither give information to defendant, nor entail on him any duty. It is, in law, as though the pleading were without any averment as to willingness and readiness to perform on the plaintiff's part. Nor is this fault aided by the allegation of demand of performance. The allegation of demand is, at best, vague and uncertain. It does not even purport to have been made on or before October 1st. It would not, we think, have availed had it so stated; for, applying the doctrine of Mowry v. Kirk, *supra*, the defendant had the right to refuse to perform on his part so long as there was no effort at performance on the other side. To hold that a party so circumstanced may put the other party in the wrong by merely demanding of him that he make conveyance of the leasehold interests would be to countenance a scheme smacking of mere bluff. It would be to give him an advantage over his adversary without any show of readiness or ability to perform on his part. We are aware that there is a holding in a sister state that the demand implies that the demandant is himself ready and able to perform. For the reasons above stated, and many others, we cannot assent to the proposition. Nor can it be said, reasonably, that the pleading shows that defendant had put it out of his power to convey. For aught that is alleged, he could have acquired

the title, and could have completed the contract on his part, had the plaintiff come forward with the money, or given notice that he was able and ready to perform. In the absence of such action on or prior to October 1st, the defendant might well conclude, as in Mowry v. Kirk, that the contract had, by implied assent, been rescinded.

We are of opinion that the overruling of the demurrer to the amended petition was erroneous, and that both judgments should be reversed. The cause will be remanded to the court of common pleas, with directions to sustain the demurrer to the amended petition, and for further proceedings according to law.

*Reversed.*

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## ELIZA ROBINSON *v.* M. H. HARBOUR.

(High Court of Errors and Appeals of Mississippi, 1869. 42 Miss. 795, 97 Am. Dec. 501, 2 Am. Rep. 671.)

PEYTON, J.[91] In this case it appears that on the 16th day of December, 1859, one John J. Hall bargained and sold to Eliza Robinson certain land, situated in the county of Yallobusha, for the sum of $2,440, one-half of which was paid in cash at the time of the sale, and for the other half she executed her promissory note of that date, payable to the order of said Hall on the 1st day of January, 1861; and that the said John J. Hall at the same time executed and delivered to the said Eliza Robinson his bond, conditioned to make her a title to said land when said note for the balance of the purchase-money was paid, and placed her in possession of the land, which she has retained ever since.

On the 3rd of February, 1860, the said Hall assigned the said note for value to M. H. Harbour, who filed his bill in the Chancery Court of said county of Yallobusha to subject the said land to payment of the said note.

To this bill the defendant, Eliza Robinson, demurred, on the ground of the want of equity on the face of the bill, and that the complainant had not made or tendered to her a deed for the land and demanded the purchase-money, so as to put her in default before filing said bill. The demurrer was overruled by the said court, and the appellant brings the case to this court, and assigns for error the action of the court in overruling the defendant's demurrer to the complainant's bill.

There is no doubt that the vendor of land, who has taken the notes of the vendee and given bond, conditioned to convey the title when the purchase money is paid, can, by an assignment of the notes, pass his lien for the purchase-money, and that the assignee may proceed in equity

[91] Parts of the opinion are omitted.

to subject the land to the payment of his debt. Tanner v. Hicks, 4 S & M. 294, and Terry v. George, 37 Miss. 539.

The main question presented by the record for our determination is, whether the covenants of the vendor and vendee in this action are dependent or independent covenants? And upon this subject it must be conceded that there has been considerable oscillation of the judicial pendulum, and what is much to be regretted, a great want of uniformity and harmony in the decisions of our own courts.

Knowing the necessity of some certain, intelligible, and correct rules with respect to the construction and character of covenants in agreements, we have given this subject that thorough investigation and mature consideration which its importance demands.

The order of time in which covenants are to be performed is an important consideration in determining whether they are to be dependent or independent. And the rule seems to be clear and indisputable, that where there are several covenants, which are independent of each other, one party may bring an action against the other for breach of his covenants, without averring a performance or tender or offer of performance of the covenants on his part; and it is no excuse for the defendant to allege in his plea a breach of the covenants on the part of the plaintiff. But where the covenants are dependent, it is necessary for the plaintiff to aver and prove a performance, or tender and offer to perform his part of the agreement, and demand performance by the other party of his part of the agreement, to entitle himself to an action for the breach of the covenants on the part of the defendant. The difficulty lies in the application of this rule to the particular case. It is justly observed, that covenants are to be construed to be either dependent or independent of each other, according to the intention and meaning of the parties and the good sense of the case, and technical words should give way to such intention. * * *

Where the vendee of land covenants to pay for the same by instalments, and the vendor covenants to make him a title when the last instalment is paid, the covenants of the vendee to pay the instalments, except the last one, are independent covenants. But the covenant of the vendee to pay the last instalment and the covenant of the vendor to make title, are dependent covenants; and to entitle either of them to maintain an action against the other, he must aver and prove performance or tender or offer of performance of his part of the agreement. The payment of this instalment of the money, and the making of the title, are concurrent acts of the parties, to be done or performed at the same time, and are therefore dependent covenants. This rule is sustained by reason and authority, and accords with the justice of the case and the intention of the parties.

Suppose the whole of the purchase money had been payable at once, instead of being payable in instalments, and the stipulation had been to pay three thousand dollars in twelve months, the deed to be executed at

the payment; upon this statement of the question, is there a doubt that the agreements would have been mutually dependent and conditional? And what difference is there, whether the final payment is the whole or part? Where the whole of the purchase money is to be paid at once, and the deed is then to be given, the covenants are held to be dependent, because it is unreasonable to presume that the purchaser intended to pay the whole consideration without having the equivalent in a title to the land purchased. The same reason applies to the last instalment. An obvious reason why the prior instalments should be paid without having a deed, is, that the vendor was to withhold the title, as a security for the purchase money, and the vendee was content to rely on the vendor's contract for his future title; but no such reason applies to the final and complete payment of the purchase money. Whether we consider the particular language, or the general intent of the parties, the covenants between them were mutually dependent and conditional, and the vendor cannot recover without averring performance or an offer to perform on his part. Kane v. Hood, 13 Pick. 281; Runkle v. Johnson, 30 Ill. 328, 332.

This court has repeatedly decided that the vendor of land, who has given a bond to make title to the vendee on the payment of the purchase-money, cannot maintain a bill for the specific performance of the contract until he has put the vendee in default by a tender of a deed. The covenants to make title and to pay the money, are concurrent, mutual and dependent; and neither party can insist on a performance of the contract, without an offer or tender of performance on his part: and this rule applies with equal force in law and equity. Mobley v. Keys, 13 S. & M. 677; Eckford v. Halbert, 30 Miss. 273; Klyce v. Broyles, 37 Miss. 524; and McAlister v. Moye, ib. 258.

Courts will construe covenants to be dependent, unless a contrary intention clearly appears. A party shall not be forced to pay out his money, unless he can get that for which he stipulated. Stockton v. George, 7 How. 172; Peques v. Mosby, 7 S. M. 340, 347; Wadlington v. Hill, 10 S. & M. 560; Bank of Columbia v. Hagner, 1 Pet. 455. * * *

It has been held that a covenant to pay a certain sum of money, one-half on a certain day, and the other half on a certain subsequent day, at which time the covenantee was to execute and deliver a deed, so far as respects the first payment, was independent, but as to the other, was dependent; and in an action thereon, the tender of the deed must be averred. So in a declaration for the whole sum, after both instalments have become due. Biddle v. Corgell, 3 Harrison, 377, and Leonard v. Bates, 1 Blackford, 172.

In contracts where either party might be compelled to part with his money or his property, without receiving the stipulated equivalent, the latest and best action of the courts has been to hold that the party seeking to enforce the contract must make his own part of the agreement precedent, and allege either a performance or a tender and refusal.

Wadlington v. Hill, 10 S. M. 562. And a mere offer to make a deed and averment of readiness at all times to make it, will not do. Klyce v. Broyles, 37 Miss. 524.

This principle applies in all cases to the last instalment where the vendee gives the vendor his note to secure the payment of the purchase money, payable at different times, and takes from the vendor a bond for title when the money or last instalment is paid. For it is not to be presumed that the vendee intended to pay his money without receiving the stipulated equivalent in a title to the land purchased, nor that the vendor intended to part with the title to the land sold, without receiving the money. The conveyance and the last payment were intended to be simultaneous acts.

We have arrived at the conclusion, that, in this case, the covenants between the assignor of the appellee and the appellant were dependent covenants, and that the appellee could not maintain his bill without averring and proving a performance of the covenant on the part of the vendor, or tender or offer to perform, before the filing of the bill. The averment in the bill that the assignor of the note is ready and willing to execute a deed on payment of the purchase money is not sufficient to sustain it. And for this reason, we think the court below erred in overruling the demurrer to the bill.

Shackelford, C. J., dissenting, declines to write a dissenting opinion, but refers to the case of Bowen v. Bailey [42 Miss. 405 (1869)], for his views on the question decided in this opinion. The decree must be reversed, the demurrer sustained, and the bill dismissed.

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## DARIUS RUNKLE AND WILLIAM POLLOCK, APPELLANTS, *v.* AMOS M. JOHNSON ET AL., APPELLEES.

(Supreme Court of Illinois, 1863. 30 Ill. 328, 83 Am. Dec. 191.)

The appellees brought an action of debt to the February term of the Fulton Circuit Court, claiming fifteen hundred dollars debt and five hundred dollars damages. The declaration contains eight counts.

The first count is on a writing obligatory (bearing date 19th June, 1858,) by which appellees sell to appellants certain lands for the sum of $1,500, payable in three instalments of $500 each—$500 on the first day of December, 1858; $500 on the first day of December, 1859; and $500 on the first day of December, 1860—and the time is made the essence of the contract; said payments to be made at the office of the appellees in Vermont, in said county.

Special plea alleging "And the said defendants, for a further plea, in this behalf, say, plaintiffs *actio non*, because they say that the said causes of action in the said plaintiff's declaration mentioned are one and the same, and not other or different and that the said plaintiffs'

cause of action is the writing obligatory in the said first count mentioned; and the said defendants aver that the said plaintiffs, in and by the said writing obligatory, covenant that they will, on the payment of the money mentioned in said writing obligatory, convey to defendants the land in said writing obligatory mentioned, and in and by their deed covenant to warrant the title so conveyed to the said defendants against any person claiming by, through, or under the patentee of said land; and the said defendants aver, that neither at the time of the making of said article of agreement, or at any time since, have the said plaintiffs been the owner of the patent title to said land or had any right or title to the same whatever, nor have the said plaintiffs made or tendered to these defendants any such deed for the same as is mentioned in said declaration. And the said defendants further aver, the title to the land in the said writing obligatory mentioned was the only consideration and object of said contract by the said defendants, so signed as aforesaid.

The appellees filed a general demurrer to the said amended plea, and the court sustained the same, and the defendants abided the demurrer.

At the February term, 1862, a trial was had. The article of agreement, mentioned in first count, was read to the jury, and that was all the evidence in the case. The court then allowed the plaintiffs to enter a *nolle prosequi* as to the last payment and interest mentioned in the agreement. To which appellants excepted.

Verdict and judgment for the plaintiffs for one thousand dollars debt, and two hundred and seven dollars and fifty cents damages. The defendants bring the case to this court by appeal.

CATON, J.[92] We think the court erred in sustaining the demurrer to the defendant's special plea. By the instrument on which the action is brought, the plaintiff agreed to convey to the defendant a particular title to the land described, that is to say, the patent, and it was for this title to the land that the defendant agreed to pay fifteen hundred dollars. And now it is admitted by the demurrer, that the plaintiff never had such title, and is unable to convey to the defendant such a title. Had the plaintiff brought his action for the first two instalments before the time had arrived when the plaintiffs agreed to convey, it may be that the want of title would not have been a sufficient answer, for he might claim the whole time until the contract matured to acquire such title. Harrington v. Higgins, 17 Wend. 376. But the case is different where the party delays his action until the last payment is due, when the obligations under the contract become mutual and dependent, and the acts to be done in its execution are simultaneous. Then the party who insists upon the performance by the other party, must show performance on his own part, while he who desires to rescind the contract, need only show non-performance or an inability to perform by

[92] The statement of facts is abbreviated.

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Special plea alleging "And the said defendants, for a further plea, in this behalf, say, plaintiffs *actio non*, because they say that the said causes of action in the said plaintiff's declaration mentioned are one and the same, and not other or different and that the said plaintiffs'

cause of action is the writing obligatory in the said first count mentioned; and the said defendants aver that the said plaintiffs, in and by the said writing obligatory, covenant that they will, on the payment of the money mentioned in said writing obligatory, convey to defendants the land in said writing obligatory mentioned, and in and by their deed covenant to warrant the title so conveyed to the said defendants against any person claiming by, through, or under the patentee of said land; and the said defendants aver, that neither at the time of the making of said article of agreement, or at any time since, have the said plaintiffs been the owner of the patent title to said land or had any right or title to the same whatever, nor have the said plaintiffs made or tendered to these defendants any such deed for the same as is mentioned in said declaration. And the said defendants further aver, the title to the land in the said writing obligatory mentioned was the only consideration and object of said contract by the said defendants, so signed as aforesaid.

The appellees filed a general demurrer to the said amended plea, and the court sustained the same, and the defendants abided the demurrer.

At the February term, 1862, a trial was had. The article of agreement, mentioned in first count, was read to the jury, and that was all the evidence in the case. The court then allowed the plaintiffs to enter a *nolle prosequi* as to the last payment and interest mentioned in the agreement. To which appellants excepted.

Verdict and judgment for the plaintiffs for one thousand dollars debt, and two hundred and seven dollars and fifty cents damages. The defendants bring the case to this court by appeal.

CATON, J.[92] We think the court erred in sustaining the demurrer to the defendant's special plea. By the instrument on which the action is brought, the plaintiff agreed to convey to the defendant a particular title to the land described, that is to say, the patent, and it was for this title to the land that the defendant agreed to pay fifteen hundred dollars. And now it is admitted by the demurrer, that the plaintiff never had such title, and is unable to convey to the defendant such a title. Had the plaintiff brought his action for the first two instalments before the time had arrived when the plaintiffs agreed to convey, it may be that the want of title would not have been a sufficient answer, for he might claim the whole time until the contract matured to acquire such title. Harrington v. Higgins, 17 Wend. 376. But the case is different where the party delays his action until the last payment is due, when the obligations under the contract become mutual and dependent, and the acts to be done in its execution are simultaneous. Then the party who insists upon the performance by the other party, must show performance on his own part, while he who desires to rescind the contract, need only show non-performance or an inability to perform by

[92] The statement of facts is abbreviated.

the other party. Doyle v. Teas, 4 Scam. 265. Indeed, this inability to perform, is a good excuse on the part of the purchaser for not tendering the last payment, for the law will not require the performance of a useless act, and would be sufficient to entitle him to recover the money back if he had paid the first instalments. Sir Anthony Mayne's Case, 5 Coke, 21. There can be no difference in principle, whether the party never had the title, or having had it, has parted with it. In either case, it might be competent for him to show that he still owned it in equity, and could control it for the benefit of the purchaser, so that he could in fact perform his covenant. But here it is admitted that the plaintiff never had the title which he professed to sell, and agreed to convey, and this was, at least *prima facie*, a breach of his covenant the moment the time arrived when he might be called upon to perform it, and this authorized the purchaser to renounce it altogether, and treat it as if it had never existed.

The judgment is reversed, and the cause remanded.

*Judgment reversed.*[93]

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## BRIMMER *v.* SALISBURY ET AL.

(Supreme Court of California, 1914. 167 Cal. 522, 140 Pac. 30.)

Action by H. W. Brimmer against F. M. Salisbury and another. Judgment for defendants and plaintiff appeals. Reversed with directions.

HENSHAW, J.[94] This appeal is from the judgment upon the judgment roll alone. Plaintiff brought his action to enforce the collection of a

[93] In Taul v. Bradford, 20 Tex. 261 (1857), Hemphill, C. J., said:

"As a general rule, it may be sound law, that a covenant on the part of the vendee, to pay the purchase money at a particular date, and of the vendor to convey at some indefinite period, as for instance, after a patent is obtained from the government, are not dependent upon each other, and that the purchaser must pay the money when due, and rely on the covenant of the agreement for his remedy. But can this be the rule where it manifestly appears that there is a valid outstanding title, superior to the claim of the vendor, or which, as long as it is permitted to stand, would prevent the vendor from procuring a patent for his land, and deprive him of the power to convey according to the conditions of his bond? This would involve that circuity of action and multiplicity of suits, so much discountenanced by our law and so repugnant to the genuine and fundamental principles of our system of procedure. * * *

"The case stands on its allegations, as if the plaintiff had at the time of the contract, no knowledge of the difficulties about the title. The vendee in an executory contract may set up the defects of title as a defense against the recovery of the purchase money, and is not bound to allege his ignorance of these defects at the time of the sale. It is for the plaintiff to reply and prove notice of the condition of the title by the defendant."

[94] Parts of the opinion are omitted.

promissory note in the sum of $500 executed by defendants. Defendants answered, alleging lack of consideration and fraud in the procurement of the instrument. The facts in this regard alleged and found by the court are the following: In 1908 defendants entered into an agreement with the plaintiff to purchase a piece of land owned by plaintiff in Imperial county for the sum of $6,250, $2,500 of which amount was payable May 1, 1909, the remainder at a later date in the same year. On the 27th day of April, 1909, "the plaintiff rescinded the said contract in toto and sold the said property to one A. A. Cox, without the knowledge or consent of the defendants or either of them." Thereafter, on the 29th day of April, 1909, plaintiff came to defendants, who were unable to make the forthcoming payment of $2,500 upon May 1st, and, concealing from them the fact that he had sold the property, threatened them that he would commence an action against them for specific enforcement of their contract to purchase if they did not make the payment when due. The defendants did not know and had no means of knowing that plaintiff had theretofore sold the property to Cox, and being unable to meet the payment of $2,500 due on the 1st of May, and believing that their contract to this effect was in full force and effect and that plaintiff had a right to insist upon its due performance and would bring action against them to enforce such due performance, without any other consideration and so without any consideration at all, they executed to plaintiff in settlement of the controversy and for relinquishment of plaintiff's demands the note for $500 which is the subject of this litigation. Under these findings the court concluded that plaintiff was not entitled to recover and gave judgment for defendants accordingly. Plaintiff has appealed, asserting that under the authorities and rule of decision in this state he was neither in default nor had he violated his contract by the conveyance of the property to Cox; that he was under no duty to advise defendants of this conveyance, and that therefore his failure to do so was not a concealment amounting to fraud; that the single condition imposed upon him by his contract was to make a good and sufficient deed to the defendants when the last payment was due and tendered; that this duty did not run concurrently and interdependently with defendants' obligation to pay the installment of $2,500; that consequently defendants were in default, and he (plaintiff) was not (Hill v. Grigsby, 35 Cal. 656; Civ. Code, § 1439); that notwithstanding the conveyance of the property he had a legal right of action to enforce the instalment payment of $2,500; and that his forbearance so to do and his agreement with defendants to abandon the contract was a good and legal consideration for their promissory note.

Thus are presented the contentions upon this appeal, and for their proper consideration a review of our decisions becomes imperative. The first of these which may be mentioned is Easton v. Montgomery, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123. * * * The next of these is Joyce v. Shafer, 97 Cal. 335, 32 Pac. 320. * * * Here it is imme-

diately to be noted that a vendor under an executory contract of sale who has title may part with it under two essentially different conditions. He may part with it to a third person, who, if he be not charged with knowledge of the previous executory contract, takes it freed from the obligations of that contract. Such would be the case were the executory contract of sale unrecorded. He may, however, part with his title, subject to the rights of the vendees under the executory contract of sale, and thus not put it beyond his reasonable power to make title to his vendees under the executory contract of sale when in due time title may be demanded of him. In the one case the conduct of the vendor may with propriety be termed a fraud upon the vendee, since he has parted with the title, and consequently with the security upon which his vendee was entitled to rely in the making of his instalment payments, and after having done so he insists that these instalment payments should be continued without any legal assurance to him that, at the time when the vendee is entitled to demand a deed, the vendor will be in a position to convey title. Joyce v. Shafer therefore must be read in connection with Easton v. Montgomery, and bearing in mind that Joyce v. Shafer was before the court upon demurrer the decision amounts to this, that a pleading merely that during the life of such an executory contract of sale the vendor has parted with the title, is not sufficient to put the vendor in default or to show an abandonment by him of the contract. It must be further pleaded that the vendor did this without reserving and protecting his vendee's rights under the executory contract—allegations which did not appear in Joyce's complaint. * * *

The last of our cases is Crane v. Ferrier-Brock Development Co., 164 Cal. 676, 130 Pac. 429. * * *

This completes the review of our decisions, and, to summarize, they hold, first, that a contract to sell a piece of land by one without title will not be held fraudulent and void by virtue of the mere fact that the vendor had not such title. Deceit, concealment, or false representations upon which a vendee was entitled to rely will, of course, avoid such a contract; but where the dealings between the parties are openhanded, and where, as is the general rule, the vendee is charged with the duty of acquiring his own knowledge of the condition of the vendor's title, such contracts will be enforced upon the theory that the vendee contracted with his eyes open and contracted not in the belief that the vendor did have title, but in the expectation that he would be able to make title. Second, our adjudications hold that, in an action for breach of contract based upon a conveyance by the vendor to a third person during the existence of such an executory contract of sale, the averment merely that the vendor has sold does not state a complete cause of action. * * *

The gist of the matter then is this, that a vendee is entitled to rely upon the security of the vendor's title, whatever it may be, in the mak-

ing of his installment payments. A vendor will not have breached his contract if he shall have conveyed the property subject to or under circumstances such as do protect the rights of his vendee. But where his conveyance has been in disregard of those rights, under such circumstances that those rights are not protected, then this is a breach of contract and a fraud on the vendee. Where a vendee contracts with one having none or an imperfect title, he contracts in the hope or expectation that the vendor may be able to perfect the title. Such is not the case where the vendor has title and thereafter parts with it. Of the essence of the contract is the security to the vendee, in his payments, of the title which the vendor has, and, if the vendor parts with that title to the impairment or destruction of that security, the vendee may be heard justly to complain, and it is, of course, no answer to say that the vendor thereafter may be able to go into the open market and repurchase the property. Common experience tells us that such an expectation is in its nature but a remote possibility and that such a vendor has not the slightest intention of so doing.

Coming once more directly to the case at bar, the question of consideration or no consideration for the promissory note in suit will be answered as is answered the question: Were the vendees' rights under their executory contract protected under the sale which the plaintiff made? Herein it makes no difference whether the sale was made before or after the default of the vendees, and therefore the motion in this case to amend the record by striking from it a certified answer filed in the court of appeals need not be considered. The record here is not in such condition as to enable us to answer the question which we have propounded. The answer, as has been said, charged fraud and lack of consideration. The finding of the court is that the fraud was in the concealment from the defendants of the fact that plaintiff "had previously rescinded the contract and had sold the said property to the said Cox." As we have been at pains to show, the mere sale was not a rescission. The mere concealment could not therefore be a fraud. The vital question is whether the sale to Cox was made in disregard and in sacrifice of defendants' security growing out of plaintiff's ownership of the land. If the sale was so made, then unquestionably there was no consideration for the promissory note and plaintiff would not be entitled to recover. If, however, the sale was made with due regard to those rights, then, as plaintiff would have committed no breach of his contract and no fraud, it could not be said that there was no consideration under plaintiff's forbearance to sue and agreement to rescind the contract.

It appearing therefore that the judgment is not supported by the findings, it is reversed, with direction to the trial court to permit such amendments to the pleadings as will directly present the vital issue in

the case, and to retry and determine the action under the law as here set forth.[95]

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## EDWARD D. JAMES ET AL., APPELLANTS *v.* JOHN J. BURCHELL, RESPONDENT.

(Court of Appeals of New York, 1880. 82 N. Y. 108.)

Appeal from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, affirming a judgment in favor of defendant, entered upon a decision of the court on trial without a jury. (Reported below, 7 Daly, 531.)

This action was brought to recover damages for the alleged failure of defendant to perform a contract.

On January 11, 1871, the parties entered into a contract by which the plaintiff, Sarah James, in consideration of one dollar, agreed "to sell and convey, or cause to be conveyed," as hereinafter stated, to the defendant four lots of land in the city of New York, for the sum of $11,000 for each lot. It was further covenanted that the defendant should commence the erection of four houses upon the lots on or before February 10, 1871, and complete the same within seven months from that date; the plaintiffs to advance $4,000 on each house to aid in its erection, and upon being paid and reimbursed the price of said lots and advances thereon, either in cash or the bonds of the defendant, secured by mortgages on the premises, then the plaintiffs agreed "to convey, or cause to be conveyed," the same to the defendant, in fee by a full

[95] "It is the settled rule in this state that the vendor need not have even an inchoate title at the time of the contract; that he may sell land to which he has no title, and the contract will be valid and enforceable if, when the time for performance arrives, he is able to furnish the title he contracted to convey. His contract will not be held fraudulent or void by virtue of the mere fact that, when he made it, he did not have the title that he agreed to pass to his vendee. Hanson v. Fox, 155 Cal. 106, 99 Pac. 489, 20 L. R. A. (N. S.) 338, 132 Am. St. Rep. 72; Backman v. Park, 157 Cal. 607, 108 Pac. 686, 137 Am. St. Rep. 153; Brimmer v. Salisbury, 167 Cal. 522, 530, 140 Pac. 30. And even where the vendor fraudulently represents himself to be the owner of more land than he has title to, his vendee, nevertheless, may waive the fraud and his right to rescind the contract, and may sue to enforce specific performance; and, if in enforcing the contract the court finds itself unable to enforce conveyance of all the land the vendor agreed to convey, it will compel compliance with the agreement, so far as possible, by compelling the vendor to convey such title as he has on being paid therefor at the rate agreed upon between the contracting parties; the compensation allowed for the deficiency in quantity being at the rate of the average price agreed to be paid for the entire tract. Quarg v. Scher, 136 Cal. 411, 69 Pac. 96; Butte Creek, etc., Co. v. Olney, 173 Cal. 697, 707, 161 Pac. 260. This is precisely what was done by the trial court here." Finlayson, P. J., in Anderson v. Willson (Cal. App.), 191 Pac. 1016, 1019 (1920).

covenant warranty deed free from all reasonable objections and from all incumbrances, except such incumbrances as should be made, or caused or suffered to be made, by the defendant; the latter agreed to complete the contract and to take title within eight months. The plaintiffs also covenanted that Sarah James was seized in her own right of a good title to said premises in fee simple. It was also agreed that the plaintiffs at their election might mortgage each of said lots to the amount of $15,000, and convey the same subject to said mortgage in lieu of purchase-money for the same amount.

The court found that on the same day the contract was made, plaintiffs conveyed the premises by warranty deed to Isaac B. Findull, subject to no incumbrances whatever. Defendant never entered into possession of the premises, but refused to erect the buildings because the plaintiffs could give no valid title to the property.

It appeared that some months after, but before the expiration of the eight months, Findull reconveyed to Mrs. James. Findull was a former clerk of James, and the conveyance to him was without consideration. He knew at the time he received the deed of the contract between the parties.

MILLER, J. The plaintiffs, in their contract with the defendant, covenanted that Sarah James, one of them, was seized in her own right of a good title to the premises in fee simple which were to be conveyed to the defendant; and it was further provided that the plaintiffs. if they so desire, could mortgage each of the lots to the amount of $15,000. On the same day after the contract bears date, and when the parties acknowledged its execution, the plaintiffs conveyed the premises by warranty deed to one Findull, subject to no incumbrances whatever. The question presented is whether the plaintiffs had a right thus to impair the title, or in any other manner than by the mortgages provided for; and, as this conveyance was made to Findull, whether the plaintiffs had not violated the covenant, and the defendant was thereby released from any liability under the contract. The plaintiff's counsel insists that the fact that another person held the legal title for a portion of the intervening time, or that the defendant prior to the time fixed for taking title, was required by independent covenants to do certain acts and things toward the performance of the contract on his part, is immaterial. We think he is in error in this respect, and, under the provisions of the contract, the transfer of the title to Findull by the plaintiffs was important and material. By the contract, as will be seen by reference to the same, the defendant agreed to erect buildings upon the lots, of a certain style and quality, and of considerable value, within seven months from the date, the plaintiffs to advance money from time to time on each of such buildings. The lots were to be conveyed by the plaintiffs by warranty deed, free from incumbrances, except such as should be caused or suffered by the defendant, who was to take title and pay

for the same within eight months from date. It is apparent from the terms of the contract that the defendant must have relied to a considerable extent upon the personal responsibility of the plaintiffs. Upon the faith of an existing and perfect title in Mrs. James, he was to take possession, erect valuable buildings, and expend large amounts of money. The covenant that Mrs. James was seized and the permission given to mortgage the premises was not only an inducement for the expenditure of $60,000, to be made by the defendant, as the contract provided, but a guarantee that no other incumbrances should be placed upon the property. The covenant of seizin would be of no benefit if the plaintiffs could convey to a stranger without its violation, and compel the defendant to erect the buildings upon lands to which he might never acquire any title, and in that event to trust entirely to an action at law against the plaintiffs for reimbursement or indemnity. From the contract it is evident that the intention of the parties was that the defendant should be protected in taking possession of the premises and in the erection of buildings thereon, and under the circumstances of the case that the title should remain unimpaired in Mrs. James until the conveyance was delivered. Instead of this, on the very day the contract was acknowledged the plaintiffs conveyed the premises to Findull, who had been a clerk of Mr. James, and who took it in trust for Mrs. James and paid no consideration for the conveyance. They thus parted with all their right and title to the lot, and subjected the defendant to the hazard of losing what might be expended upon the same. As the testimony stood we think the defendant was not bound to proceed and complete the contract after the plaintiffs had parted with their title by a conveyance to a stranger.

The conveyance by the plaintiffs and the execution of the mortgages by the defendant, according to the contract for the price of the lots and advances, were to be simultaneous acts. In such a case the covenants are dependent, and there must be an existing capacity in the one who is to convey to give a good title. This distinction is stated fully by Spencer, J., in Robb v. Montgomery, 20 Johns. 15. The expenditure to be made, which was very large, should not, in view of the peculiar provisions of the contract, be regarded as an ordinary payment on account of the purchase-money, as the covenants were manifestly intended and must be considered as mutual and dependent. Judson v. Wass, 11 Johns. 525; Tucker v. Woods, 12 id. 190. We have carefully examined all the cases cited to sustain the proposition contended for by the plaintiffs' counsel, and we think that none of them uphold the doctrine that in a case presenting the characteristic features of the one at bar, a conveyance to a third party is not material.

Some stress is laid by the appellants' counsel upon the provision in the contract that the plaintiffs agreed "to sell and convey, or cause to be conveyed." This is not controlling; and taking the whole contract together, we think that the testimony shows that the defendant did not

intend to accept any other warranty than that of the plaintiffs. That Findull knew of the contract with the defendant at the time he took the deed, and therefore he took it subject to the rights of the defendant, and could have been compelled to convey, is not important, for as we have seen, the defendant lost the benefit of the plaintiffs' responsibility by the transfer of the title without any consideration whatever to a person of at least doubtful responsibility, and thus was not sufficiently protected in making the large expenditure required for the building of the houses. The defendant had a right to rely upon the responsibility of the plaintiffs under the contract, and the want of it may well have prevented the defendant from taking possession and from erecting the buildings as was intended. The subsequent reconveyance by Findull to Sarah James could have no effect in restoring the defendant's rights which were affected by the conveyance to Findull. The conveyance from Findull to the plaintiffs was not made until some months after the conveyance by the plaintiffs to him, and was recorded even long after that, and it is not proved to have been brought to the knowledge of the defendant. The defendant, with knowledge of the want of title in the plaintiffs, was not, under the covenants in the contract, bound to take possession and proceed with the erection of the buildings.

The question whether the deed to Findull was made and delivered before or after the making and delivery of the contract is not vital, as in either contingency the plaintiffs had broken the covenant of seizin, and as the covenants were dependent and mutual, the defendant was under no obligation to proceed and erect the buildings and fulfil the terms of the contract. In view of the covenants which have been considered, the contract was at an end when the conveyance was made to Findull. The finding of the judge, that the contract was executed and delivered upon the 11th day of January, 1871, being the time of its acknowledgment, instead of the day of its date, is therefore not material, and even if erroneous, cannot affect the result. For the same reason the refusal to find that the deed was delivered after the date of the contract was not erroneous. There was no error in refusing to send the case back for further findings, or in any of the refusals to find, or in any other respect.

*Judgment affirmed.*[96]

[96] In Eddy v. Davis, 116 N. Y. 247 (1889), the rule was applied to a contract to sell land whereby the vendor agreed to keep open a right of way back of the building to be conveyed. When the vendor sold to innocent purchasers the land over which the right of way was to be kept open and did not reserve the right of way or retain any land over which one could be granted as needed, and when the right of way was found "to constitute in value one half of the property agreed to be sold," recovery of instalments of the purchase price was denied to the vendor.

In Ziehen v. Smith, 148 N. Y. 558 (1896), the fact that unknown to both seller and buyer the property contracted to be sold was subject to a mortgage did not excuse the buyer from offering to perform since the incumbrance was re-

## TUCKER *v.* WOODS.

(Supreme Court of New York, 1815. 12 Johns. 190, 7 Am. Dec. 305.)

Assumpsit. The plaintiff gave in evidence the following memorandum—"I will sell my dwelling house, tan works, and all the buildings belonging thereto, for five thousand dollars, payable as follows: One thousand dollars on taking possession, and one thousand dollars annually thereafter, until the whole is paid; secured by bond and mortgage, or other good security, until the whole is paid; and will give possession of the house and part of the tan-works on the 1st of October next; or, I will take of Mr. David Tucker, of Whiteborough, all his landed property, consisting of nine acres of land, lying on both sides of the road, near Whitman's Mills in Whiteborough, with all the buildings, and appendages, in good order, for 4,500 dollars, towards my said works, and have possession of his when he takes possession of mine, and pays me, or secures it on interest for one year, the five hundred dollars, for odds. This proposition shall be binding on me until the first day of January next. Greenbush, October 13, 1807. John W. Woods."

The plaintiff proved by a witness, that in December, 1807, he went to Greenbush, and informed the defendant that he had come to fulfil the agreement on his part, and was then ready to convey the land at Whiteborough, and to secure the 500 dollars for the difference according to the terms of the contract; and demanded performance of the defendant on his part; but the plaintiff did not tender or offer a deed for his land, nor say that he had a deed ready; nor did he tender any sum of money for the 500 dollars. The defendant said he had changed his mind, and refused to do anything in the business, and said that the plaintiff must seek his remedy. The defendant made no objection to any encumbrance being on the plaintiff's land, but absolutely refused to perform the agreement.

The defendants counsel moved for a non-suit, on the ground that the writing produced was not a contract, but a mere proposition in writing without consideration or reciprocity, which might be rescinded by either party at his option; but the judge overruled the motion. The defendant then proved, that, at the time of the proposition or contract, there was a tenant on the property of the plaintiff, under a lease, and that about two years of the term was unexpired; and that the tenant was in possession in December, 1807, when the plaintiff offered to convey, and demanded a performance of the contract on the part of the defendant.

The judge charged the jury, that if there was an outstanding lease on the plaintiff's property, which would have prevented his giving possession, in case the defendant had been willing to carry the contract into

movable. See also Higgins v. Eagleton, 155 N. Y. 466 (1897). *Cf.* Heard v. Bowers, 23 Pick. (Mass.) 455, (1840); Thomas, J. Baird Inv. Co. v. Harris, 209 Fed. 291 (1913).

execution, the plaintiff was not in a situation to convey; and if they should be of that opinion, they ought to find for the defendant. And the jury found a verdict accordingly, for the defendant.

PER CURIAM. It might well be questioned whether the memorandum which is set up as the contract between these parties and upon which this action is founded, is not void for want of consideration. It would seem to be a mere proposition, on the part of the defendant, and without mutuality. * * *

But the ground upon which the judge, at the trial, put the case, is perfectly conclusive. For, admitting there was a consideration, and that the plaintiff was bound on his part, yet it appearing by the evidence that he was not in a situation to perform, the contract might be rescinded by the other side. (2 Com. Con. 52, 58, 59.) The proof in the case shows conclusively, that the property to be conveyed by the plaintiff to the defendant was under lease, and that the term would not expire until long after the bargain between these parties was to have been consummated; and this brings it within the principle decided by this court, in the case of Jackson v. Wass (11 Johns 525). The motion for a new trial must, therefore, be denied.

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## ROSENTHAL PAPER CO. *v.* NATIONAL FOLDING BOX & PAPER CO.

**(Court of Appeals of New York, 1919. 226 N. Y. 313, 123 N. E. 766.)**

Action by the Rosenthal Paper Company against the National Folding Box & Paper Company.

COLLIN, J. The action was for the recovery of royalties for the use of a patent. Originally brought in the City Court of New York City, the jury rendered a verdict for the plaintiff in the sum of $1,840.73. The judgment of the City Court set the verdict aside, upon the ground that it was contrary to law, and dismissed the complaint. The Appellate Term, upon the appeal of the plaintiff, reversed that judgment, reinstated the verdict, and upon it rendered judgment for the plaintiff. The Appellate Division, upon the appeal of the defendant, reversed the determination of the Appellate Term, and affirmed the judgment of the City Court. The Appellate Division permitted the appeal to this court.

The action is based upon a contract in writing of March, 1909, between Isse Seligstein and the defendant. January 22, 1912, Seligstein assigned to the plaintiff here the patent involved (and others), which Seligstein held, not as the inventor, but as the assignee of the inventor, and all of his "right, title, and interest in, to, and under" the contract of March, 1909. Plaintiff instituted this action in virtue of the assign-

ment. The contents of the contract of March 1909, may be adequately stated as follows:

The ownership of Seligstein of letters patent for the millinery or suit box and the desire of the defendant to acquire the exclusive right to manufacture and sell the box within a designated territory are recited. Seligstein sells to the company the exclusive right to manufacture and sell the boxes under said patent within the territory, "upon the following terms and conditions":

(1) The company "agrees to pay Seligstein a royalty of one dollar ($1.00) per thousand boxes up to an average daily sale of twenty (20) thousand boxes per day, per year of 300 days, and on all boxes sold in excess of said twenty (20) thousand boxes per day, per year of 300 days, the said the National Folding Box & Paper Company agrees to pay a royalty of seventy-five cents (75c.) per thousand boxes, but it is expressly understood that the payment by the said the National Folding Box & Paper Company to said Seligstein for the right to manufacture and sell boxes under said letters patent shall not be less than the sum of five hundred dollars ($500.00) for each and every year during the life of this contract.

"(2) The said Seligstein promises and agrees that he will faithfully protect said letters patent from any and all substantial infringements of said letters patent.

"(3) The said Seligstein further agrees that during the life of this contract he will not sell within the territory, above described, any box manufactured under said letters patent No. 906,138, nor any other clothing, millinery, or suit box, and further that he will not during the life of this contract sell any rights for any clothing, millinery, or suit box to any one for the territory hereinbefore described.

"(4) The term of this contract shall be five (5) years from and after the 1st day of March, A. D. 1909. * * *"

The defendant, through the period of five years, made and sold the boxes, and regularly paid, quarter-annually, to Seligstein the royalty of $1 per thousand boxes on all the boxes sold. Those paid royalties aggregated $917.79. The minimum aggregate royalty to be paid for the five years was $2,500; that is, not less than $500 each year. This action is to recover the sum of the difference between those aggregates, with interest.

The City Court set aside the verdict in favor of the plaintiff and dismissed the complaint upon the grounds: (a) Seligstein, by assigning the patent, put it out of his power to perform his agreement to protect the patent from any and all substantial infringements of the letters patent, and, in consequence thereof, the defendant was released from its agreement to pay the royalty; and (b) the defendant did not, by paying royalty throughout the period, waive its right to assert such release, because it did not know of the assignment of the patent until the five years and the contract had expired.

The Appellate Term reversed the order and judgment of the City Court, and reinstated and ordered judgment upon the verdict, upon the ground that the defendant had the full benefit of the contract for its entire period without molestation of any kind.

The Appellate Division reversed the determination of the Appellate Term and affirmed the order of the City Court, upon the grounds: (a) The agreement of the defendant to pay the minimum royalty and the agreement of Seligstein to protect the patent were concurrent and dependent. When Seligstein assigned the patent, he put it out of his power to protect the patent (because the owner of the patent alone had a standing to sue on account of an infringement), and therein and thereby committed a breach of the contract which relieved the defendant from the obligation of full performance on its part. (b) Defendant did not waive this breach, because, in the first place, it was ignorant of it, and, in the second place, plaintiff's complaint alleges full performance by Seligstein of this agreement; and (c) the contract was personal to Seligstein and unassignable.

We take up first the question whether or not the agreement of the defendant to pay the minimum royalty and the agreements of Seligstein to protect the letters patent from substantial infringement, and to refrain from selling, within the designed territory, any box manufactured under the patent, or any rights for any clothing, millinery, or suit box to any one for the territory were dependent or independent of each other. In Kingston v. Preston, cited at the bar in Jones v. Barkley, 2 Douglas, 684, Lord Mansfield expressed himself to the following effect:

"There are three kinds of covenants: (1) Such as are called mutual and independent, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant, to allege a breach of the covenants on the part of the plaintiff. (2) There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and therefore, till this prior condition is performed, the other party is not liable to an action on his covenant. (3) There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready, and offered, has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act."

The complexities of modern industrial and commercial transactions have not rendered the classification inaccurate or inadequate. By a long series of decisions, the rule has been established that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties, as ex-

pressed by them, and by the application of common sense to each case submitted for adjudication. Stavers v. Curling, 3 Bingham's N. C. 355; Tipton v. Feitner, 20 N. Y. 423; Pollak v. Brush Electric Association, 128 U. S. 446, 9 Sup. Ct. 119, 32 L. Ed. 474; Loud v. Pomona Land & Water Co., 153 U. S. 564, 14 Sup. Ct. 928, 38 L. Ed. 822; Griggs v. Moors, 168 Mass. 354, 47 N. E. 128; Leonard v. Dyer, 26 Conn. 172, 68 Am. Dec. 382. The efforts put forth in judicial opinions and by textwriters to define or formulate the distinctions of dependence and independence of promises or covenants have revealed their comparative futility and served, in the main, to strengthen the rule. Parties have the right to contract as they will for any lawful purpose, and the problem for the courts is to ascertain, in accordance with established rules of interpretation, the real contract or agreement. If they make their promises dependent or independent throughout, or dependent in part and independent in part, it is not for the courts to thwart them. Their expressed intention and meaning, ascertained from the whole instrument, rather than from technical or conventional expressions, are the guides in determining the character and force of their respective covenants.

In the contract under consideration the intention of the parties is not obscure. They contemplated that the letters patent prohibited to all persons except Seligstein, in the absence of his authorization, the manufacture and sale or the manufacture or sale of any box incorporating the patented invention or inventions and that the contract secured to the defendant the exclusive right, as against the whole world, to manufacture and sell, within the prescribed territory, the box. This exclusive right the defendant sought and Seligstein sold to it. The continued exclusiveness of the right throughout the period of five years was the root of the transaction. The defendant, presumably, could not, in the intention of the parties, pay Seligstein for the right to manufacture and sell a product which others, without price, were manufacturing and selling. It was essential to the purpose of the contract that the protection to and the exclusiveness of the right sold the defendant should be coexistent or concurrent with its ownership of it, and they were so created. The promises of Seligstein were to be kept and performed concurrently with those of the defendant. They were to be performed at all times during the licensed period. The promises of the defendant were dependent or conditional upon those of Seligstein. It is not reasonable to presume that the defendant intended to pay for the exclusive right through the five years without having it throughout the period. They intended that if it did not have the right it should not pay for it. Performance by the defendant was conditioned upon and subject to performance by Seligstein. The reciprocal promises were therefore concurrent and dependent.

The case of Wilfley v. New Standard Concentrator Co., 164 Fed. 421, 90 C. C. A. 543, has a close resemblance to that at bar. The agreements of the owners of the patent in the Wilfley case were broader than those

of Seligstein here. They were to protect the claims of the patent (and not merely to protect it from substantial infringement), and the rights of the licensees to its use, and to prosecute infringers of it. The principles upon which the decision was grounded are, if sound, applicable in part, here. A case of contrary import in Hard v. Seeley, 47 Barb. 428, in which, as it seems to us, there is fallacious reasoning. The promises there were held independent for the reason that the vendee of the perpetual exclusive right to make, sell, and use a proprietary medicine was to pay the vendor a sum annually, and therefore the vendor's rights to the money could not depend upon his fulfilling his covenant not to ever communicate the art of compounding the medicine itself. The reasoning was applied through the principle that performance on the part of the vendee was, by agreement, to precede performance by the vendor. It overlooked, however, the fact, which barred the principle, as we think, that the reciprocal performances were to be coexistent and to proceed in equal pace. Continuous performance by the vendor conditioned his right to the continuous payments of the vendee. In their nature and effect the covenants were to be performed at the same time, and are not within the rule that, where the acts stipulated to be done are to be done at different times, the covenants are generally construed to be independent. See Delaware Trust Co. v. Calm, 195 N. Y. 231, 88 N. E. 53.

The general rule exists that a covenant which goes to only a part and not to the whole consideration of the contract is not a dependent and is an independent covenant. Graves v. Legg, 9 Exch. R 709. It expresses one of the weighty considerations by which to determine whether covenants were intended as dependent or independent. It is inferior, and submissive, however, to the rule that the expressed intention of the parties is controlling.

When the promises of the parties are concurrent and dependent, either party defaulting in performance cannot, in the course of performance, sustain an action against the other because he has also defaulted. Neither party can maintain the action until he has performed or tendered performance of his part of the agreement. A plaintiff must aver and prove performance, or a tender or waiver of performance, or a fact excusing nonperformance. Dunham v. Pettee, 8 N. Y. 508; Morris v. Sliter, 1 Denio, 59; Oakley v. Morton, 11 N. Y. 25, 62 Am. Dec. 49.

The instant case is, however, presented to us in such a condition and form that those rules are not invocable to the defendant, as a further statement of the facts will disclose. The five-year period of the license contract expired on the last day of February, 1914. Throughout it, the defendant continued to manufacture and sell the boxes under the license and pay the prescribed royalty of $1 per thousand boxes. The defendant had not notice or knowledge of the assignment of January 22, 1912, of Seligstein to the plaintiff, until after the expiration of the license and the last payment of royalty, or until after March 1, 1914. This

action was commenced February 4, 1915. Upon the trial the assignment of Seligstein to the plaintiff was received in evidence, and the making of it and its legal effect were the grounds of the decision of the City Court. There was not for the purpose of, or within, our consideration, an actual infringement of the patent, or molestation or interference by infringers or infringements, or by Seligstein or his assignee, of the patent, or of the defendant's exclusive licensed right. The defendant had and enjoyed the whole interest or right Seligstein sold him.

We are to determine, under those facts, whether or not the sale and assignment by Seligstein to the plaintiff, on January 22, 1912, of his entire right, title, and interest in, to, and under the letters patent and the contract between Seligstein and the defendant in and of itself is a bar to this action. The sale and assignment by Seligstein put it out of his power to perform his covenants. In virtue of them he became a stranger to the patent and the contract. He conveyed to the plaintiff the entire and unqualified monopoly which he held. As to infringers and infringements of the patent, he became a person without interest and remediless. Pope Manufacturing Co. v. Gormully & J. Manufacturing Co., 144 U. S. 248, 12 Sup. Ct. 641, 36 L. Ed. 423; Littlefield v. Perry, 21 Wall. 205, 22 L. Ed. 577. The defendant, nevertheless, cannot have the aid of the doctrine that, where a party to an executory contract puts it out of his power to perform, as did Seligstein, the other party may regard the contract as terminated and demand whatever damages he has sustained. Lovell v. St. Louis Mutual Life Ins. Co., 111 U. S. 264, 274, 4 Sup. Ct. 390, 28 L. Ed. 423. The license contract ceased, by its terms and execution, to be executory on the last day of February, 1914. While the inexcusable breach of the contract by Seligstein conferred upon the defendant the right to terminate it while executory, the defendant did not exercise the right. It used the license to the contracted termination. The object of the agreement became fully performed.

Manifestly, the defendant could not, after the purpose and object of the contract were accomplished, regard it as executory; it could not rescind it; it could not deem itself deprived of the results accruing through the continuance of the contract and performance upon its part; it could only claim such damages, if any, as had been caused by the breach. Where a party to an executory contract, containing mutual obligations, disables himself from performing it during its performance, the other party has the option to treat the contract as ended, so far as further performance is concerned, and maintain an action at once for the damages occasioned by such anticipatory breach, or to wait until there was to be final performance. Ga Nun v. Palmer, 202 N. Y. 483, 96 N. E. 99; Central Trust Co. of Ill. v. Chicago Auditorium Ass'n, 240 U. S. 581, 589, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917 B, 580. The opinions in those cases state that the rule has its exceptions. The other party may, however, decline to deem the contract terminated and

may insist that it shall continue in force up to the time fixed for its final performance. A contract thus kept alive exists for the benefit of both parties. The party who refuses to regard it as terminated by the breach remains liable to all his obligations and liabilities under it. Frost v. Knight, L. R. 7 Exch. 111; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Bernstein v. Meech, 130 N. Y. 354, 29 N. E. 255; Johnstone v. Milling, L. R. 16 Q. B. D. 460; Lake Shore & Michigan Southern Railway Co. v. Richards, 152 Ill. 59, 80, 38 N. E. 773, 30 L. R. A. 33; Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953.

This doctrine also has its exceptions, none of which is relevant here. The action of Seligstein left the defendant free to continue as it did in the performance of the contract. The absence of notice to or knowledge of the defendant that Seligstein had assigned the contract does not affect the rights of the parties as presented to us. Seligstein did not violate a legal obligation or duty in keeping it unknown to the defendant.

By the terms of the contract the right of the defendant to manufacture and sell the boxes and its obligation to pay the rated or minimum royalty were conditioned upon the agreements of Seligstein and his performance of them. Seligstein's action gave it the option to cease performance and recover damages. It did not give it the option to manufacture and sell, and not pay the royalties. It manufactured and sold, and thus nullified the conditional quality of Seligstein's promises. Having kept alive the contract and secured the results, it cannot maintain that it is not subject to its obligations and liabilities, for the reason that Seligstein had renounced it. Its remedy is the recovery, in counterclaim or action, of the damages, if any, Seligstein's action or nonperformance caused it.

The assignment transferred to the plaintiff the cause of action and constituted it the real party in interest. Seligstein assigned to the plaintiff all of his "right, title, and interest in, to, and under" the contract. The contract did not, in terms, forbid the assignment. The fact that the promises of the defendant ran to Seligstein, and not to him and his assigns, is indecisive of the assignability of the contract. The general rule now prevailing (as the successor of the archaic view that a contract created strictly personal obligations between the parties and non-assignability was a logical attribute), that any property right, not necessarily personal, is assignable, is overcome only by agreement of the contracting parties or a principle of law or public policy. New York Bank Note Co. v. Hamilton Bank Note E. & P. Co., 180 N. Y. 280, 73 N. E. 48; Smith v. Craig, 211 N. Y. 456, 105 N. E. 798, Ann. Cas. 1915 B 937; Quinn v. Whitney, 204 N. Y. 363, 97 N. E. 724. In this jurisdiction the statute, in effect so provides. Code of Civil Procedure, §§ 1909, 1910. Seligstein's disqualification from a performance of the contract, consequent upon the assignment by him of the letters patent, casts serious doubt upon the legality, as to the defendant, of the assignment of the letters patent. Devlin v. Mayor, etc., of

New York, 63 N. Y. 8; Tolhurst v. Associated Portland Cement Manufacturers, Limited, [1902] 2 K. B. 660; New England Iron Co. v. Gilbert Elevated R. R. Co., 91 N. Y. 153.

There is not, however, cause for impeaching the assignment by Seligstein of his right and interest under the contract in the fact that it and the letters patent were assigned to the plaintiff by the same instrument. American Lithographic Co. v. Ziegler, 216 Mass. 287, 103 N. E. 909. The action of the plaintiff is based upon the contract and the assignment relating to it alone. The contract was not purely personal. Its subject did not involve the personal relation, integrity, or skill of Seligstein. In case he, owning the patent, had died during the performance, his executor or administrator could have performed. The assignment did not absolve him from its obligations. Resort could still be made to him for the stipulated protection or damages for a breach. There is not a reason for holding the assignment unlawful or inoperative. Devlin v. Mayor, etc., of New York, 63 N. Y. 8; Citizens' Loan Ass'n v. Boston & Maine R. R. Co., 196 Mass. 528, 82 N. E. 696, 14 L. R. A. (N. S.) 1025, 124 Am. St. Rep. 584, 13 Ann. Cas. 365; Knevals v. Blauvelt, 82 Me. 458, 19 Atl. 818; Hawley v. Bristol, 39 Com. 26.

The judgment of the Appellate Division should be reversed, and the judgment of the Appellate Term affirmed, with costs in this court and Appellate Division.

*Judgment reversed, etc.*

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## KISSACK ET AL. *v.* BOURKE.

**(Supreme Court of Illinois, 1906. 224 Ill. 352, 79 N. E. 619.)**

Action by William Kissack, trustee, and others against William Bourke. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

HAND, J. This was a bill in chancery, filed in the circuit court of Cook county by the appellants against the appellee, to enforce the specific performance of the following contract in writing for the sale of the tract of land described therein: "In consideration of $100 to me in hand paid by William Kissack, trustee, the receipt whereof is hereby acknowledged, I agree to sell and convey to said William Kissack, trustee, the remaining seventy-nine acres of land, more or less of the farm owned by me in the town of Algonquin, in McHenry county, Illinois (after deducting the portion thereof heretofore sold by me to said William Kissack, trustee), for the sum of $9,900, provided said William Kissack deposits said sum of $9,900 for said land with the First National Bank of Elgin, Illinois, within sixty days after the date hereof, to be delivered to me by said bank on receipt of a warranty deed from

me to said William Kissack, trustee, of said seventy-nine acres of land, more or less, free and clear of all incumbrances, with the abstract of title to said premises now owned by me brought down to date; but in case said William Kissack, trustee, shall fail to deposit said sum of $9,900 with said bank, as aforesaid, within sixty. days from this date, this instrument is to be returned to me by said bank, where it is to be deposited and held in the meantime. Dated this 27th day of October, A. D. 1905. William Bourke. [Seal.]" The bill, as amended, alleged that appellee, on December 4, 1905, delivered the possession of the premises, in pursuance of the terms of said contract, to the appellants, and that the appellants have continued to be, and now are, in possession thereof and have made valuable improvements thereon; that the appellant William Kissack and the appellee, on the 26th day of December, 1905, met in the city of Elgin by appointment for the purpose of closing said sale; that on that occasion the appellee presented to said appellant an abstract of title to said premises which showed the title of appellee to said premises to be defective, and that by mutual agreement between the parties the time in which said transaction was to be closed was extended 30 days from that date; that subsequently, and within said 30 days, the parties met in the city of Chicago, where they all resided, when the appellants offered to pay to the appellee the balance due upon said contract of sale and to accept his warranty deed for said premises, or to deposit the money for his benefit in the bank in the city of Elgin, where said contract of sale had been deposited in escrow, if he would make to them a deed; that the appellee refused to accept either of said propositions or to carry out said contract of sale, and asked the appellants the sum of $16,000 for said premises, whereupon this bill was filed. The appellee filed a general and special demurrer to the bill, which was sustained, and the bill was dismissed, and the complainants have prosecuted this appeal.

The first contention made by the appellee in support of the decree is that the bill does not aver that the appellants deposited said sum of $9,900 in the First National Bank of Elgin, in accordance with the terms of said contract; that the deposit of said sum of money was a condition precedent to the right of the appellants to receive a conveyance of said premises from the appellee; and that for want of such averment in said bill the demurrer thereto was properly sustained. We are of the opinion that the deposit of the balance of said purchase money in said bank was a condition precedent to appellants' right to a deed to said premises, and that the contention of the appellee in that regard would have been properly sustained, had it not been for the averments of the bill, which showed that the deposit of said purchase money in said bank had been waived by the appellee. The bill avers that when the parties met on the 26th of December, 1905, in the city of Elgin, the abstract of title presented to said appellants by the appellee was not brought down to the date of said contract of sale, and in the condition in which it then was

showed appellee's title to said premises to be defective, and that by mutual consent the time of closing the sale was extended 30 days from that date.

It is, however, urged that said agreement of extension was invalid, as the bill does not show said extension agreement was supported by a valuable consideration and was evidenced in writing. We think the mutual agreement of the parties a sufficient consideration to support the agreement for an extension of the time in which to close the sale under said contract, and that to permit the appellee, according to the averments of said bill, to escape the performance of his contract upon the ground that no money consideration was paid by him for such extension, would be a fraud upon the appellants. In Thayer v. Meeker, 86 Ill. 470, on page 473, it was said: "It is also claimed that, even if the extension was given, it was not founded on any consideration. In equity a party is not permitted to deceive and defraud another by agreeing to such an extension, and then disregard it, and thus gain an unjust and inequitable advantage." And generally a promise for a promise is a good consideration and will support a contract.

It is also urged the agreement of extension was not evidenced in writing, and it is said for that reason to be within the statute of frauds and void. In Vroman v. Darrow, 40 Ill. 171, on page 173, it was said: "Any party has a right to waive a strict compliance with the terms of a contract, and proof of such waiver may consist of acts *in pais.*" And in Moses v. Loomis, 156 Ill. 392, 395, 40 N. E. 952, 953, 47 Am. St. Rep. 194: "Rights arising under sealed instruments may be waived by parol." And in Ebert v. Arends, 190 Ill. 221, 232, 60 N. E. 211, 214: "While it is true that a court of equity has no more right than a court of law to dispense with an expressed stipulation of parties in regard to time in contracts of this nature, yet, when the vendee has failed to make payment of any part of the purchase money at the stipulated time, a court of equity will interfere in his behalf if any fraud, accident, or mistake has intervened. Relief, in such cases, from a strict, technical performance of the contract at the time stipulated will be granted if by reason of mistake, or for any other cause falling within its legitimate province, a court of equity can see that essential justice demands the exercise of its jurisdiction."

It appears that prior to the expiration of the period covered by the extension the parties met in Chicago, and the appellants offered to pay appellee the balance of the purchase money and to accept his warranty deed for the premises, or to deposit the money in the first National Bank of Elgin, if he would convey to them the premises, and that the appellee declined to accept either proposition and repudiated the agreement, and refused to convey said premises to the appellants unless they would pay him therefor the sum of $16,000. We think, when the appellee declined to accept the purchase money or to permit it to be deposited in the First National Bank of Elgin within the time covered by

said extension and make a deed conveying said premises to appellants, and repudiated his contract and raised the price of said premises to $16,000, he waived the right to have said purchase money deposited in said First National Bank of Elgin, and that the appellants might maintain a bill for a specific performance of said contract of sale without averring and proving a compliance with said condition precedent, which required said $9,900 to be deposited in the First National Bank of Elgin prior to the delivery by appellee to appellants of a deed to said premises, as a court of equity will not generally require a party to do a useless thing, and in view of the fact that the appellee had repudiated his contract and refused to convey unless he was paid the sum of $16,000, it would have been a useless act for the appellants to have deposited the balance of said purchase money in said Elgin bank. In Monson v. Bragdon, 159 Ill. 61, 65, 42 N. E. 383, 384, the court said: "It is well settled by our previous decisions that, although the vendor in a contract like this may have the right to declare a forfeiture for noncompliance with its terms in making prompt payment, time being made of the essence of the contract, that right may be waived by his conduct in dealing with the vendee."

It is also said the bill is defective in this: that it does not aver that appellants were able to perform their contract of sale by paying the balance of the purchase money to the appellee or by depositing the same in the First National Bank of Elgin. The bill averred the appellants were "ready, eager, and willing to comply with the terms of said contract," which was sufficient. Hoyt v. Tuxbury, 70 Ill. 331; Morse v. Seibold, 147 Ill. 318, 35 N. E. 369; Forthman v. Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145. In the Forthman Case, on page 168 of 206 Ill., and page 100 of 69 N. E. (99 Am. St. Rep. 145), it was said: "In a proceeding for specific performance the complainant must prove that he has been ready, willing, and eager to perform, and the burden is upon him to show a full and complete performance, or offer to perform, on his part." We are of the opinion if the appellants can establish the allegations of their bill they are entitled to a specific performance of said contract of sale, even though it be optional in its character. We think, therefore, the bill should be answered by the appellee, and that the circuit court erred in sustaining a demurrer thereto.

The decree of the circuit court will therefore be reversed, and the cause remanded to that court, with directions to overrule said demurrer.

*Reversed and remanded, with directions.*[97]

[97] "The original contract contains this stipulation:

"'No charges for extra work will be allowed unless same be ordered in writing by the owner, price stated in the order and accepted by the contractor and owner, signed in duplicate, and the same applies to any change of material used.' * * *

"The provision of the contract above was manifestly intended for the protection and benefit of the owner, and no reason can be suggested why it might

## SMITH *v.* BUTLER.

(Court of Appeal. [1900] 1 Q. B. 694.)

Appeal from the judgment of Bucknill, J., at the trial of the cause without a jury.

The defendant was lessee for a term of years of a public-house. The lessor, who was the owner, had lent the defendant a sum of 900*l.* upon mortgage of the house, the money being payable on demand, and there being an understanding that the loan should be diminished by an annual payment of 50*l.* Only one such payment had been made, so that the loan stood at 850*l.* On September 10, 1898, the plaintiff entered into a contract with the defendant, whereby, for a certain sum of money, the defendant agreed to assign to the plaintiff the lease of the public house and all the defendant's interest therein for the residue of the unexpired term, and November 10, 1898, was fixed as the date for the completion of the purchase; 100*l.* was paid by the plaintiff as a deposit, and the agreement contained a provision that in case of default by the purchaser the deposit money should be forfeited, and also a clause stating that the agreement was entered into on the condition that the mortgagee would consent to the transfer of the existing loan of 850*l.* to the plaintiff. On October 4 the plaintiff, the defendant, and a broker acting for both parties, had an interview with the mortgagee, at which the latter refused to allow more than 700*l.* to remain on the mortgage. The plaintiff thereupon said that the contract with the defendant was at an end. Later in the day the broker again saw the mortgagee, who, after some discussion, agreed to transfer the loan of 850*l.* upon the existing conditions, including the understanding that it should be reduced by payment of 50*l.* per year. The plaintiff was informed of this, but he adhered to his view that the contract had come to an end, and on November 11, he brought this action to recover the deposit.

The learned judge gave judgment for the plaintiff. The defendant appealed.

not be waived. The authorities are quite uniform in holding that, notwithstanding such a provision, the parties may make subsequent independent oral agreements which, when executed, have the effect of modifying the original contract, and the rule has been recognized in this jurisdiction. Wortman v. Kleinschmidt, 12 Mont. 316, 30 Pac. 280; Piper v. Murray, 43 Mont. 230, 115 Pac. 669; Interstate Lumber Co. v. Western M. & W. T. Co., 51 Mont. 190, 149 Pac. 975." Halloway, J., in Roberts v. Sinnott, 55 Mont. 369, 177 Pac. 252, 253 (1918).

"The contract provided that extra work should not be paid for, except on written order from the architects, countersigned by the owner, and also that no provision of the contract or specifications 'can be waived by either party unless such waiver is expressed in writing and duly signed.' There would seem to be no valid legal reason, however, for holding this provision could not in turn be waived, if the parties saw fit to do so. Bartlett v. Stanchfield, 148 Mass. 394, 19 N. E. 549, 2 L. R. A. 625; Headley v. Cavileer, 82 N. J. L. 635, 82 Atl. 908, 48 L. R. A. (N. S.) 564." Frazer, J., in Cramp & Co. v. Central Realty Corp. (Pa.), 110 Atl. 763, 766 (1920).

A. L. SMITH, L. J.[98] * * * The question is whether the plaintiff after the interview of October 4th had a right to say that the contract was off. In my opinion he had not that right, because the defendant had until November 10th, the day fixed for completion, to procure the consent of the lessor to the condition as to the mortgage. The plaintiff might have receded from the position that he took upon October 4th when he found that the condition had been agreed to by the lessor. It was in this power to say that he was ready and willing to complete, and had he done so there would have been nothing to prevent him from suing the defendant if there were a breach of contract on his part. The plaintiff never did recede from the position he had taken up. It was through his default that the contract was not completed, and therefore he cannot be entitled to recover back the deposit. The appeal must be allowed.

ROMER, L. J. But for the arguments that have been adduced to us, I should have thought that the law on this matter was sufficiently settled. Such conditions as that which occur in this case are not uncommon in cases of the purchase of real estate, the contract being that the vendor shall procure that persons who have lent money on the security of the property should accept the purchaser as mortgagor instead of the vendor. To my mind it is reasonably clear that the vendor has until the time fixed for completion, or, if no time for completion is fixed, then a reasonable time, in which to procure the assent of the mortgagee to the acceptance of the purchaser as mortgagor. Though the condition is one that may be fulfilled at any time before completion, yet the purchaser is not always bound to wait until that date. I can suggest four such cases, though I by no means say that the list is exhaustive. One case is that the purchaser may be able to show by sufficient evidence that the condition cannot be practically fulfilled by the date fixed. A second case is where the vendor has substantially admitted that the condition is incapable of fulfilment. The third case is that there may be an agreement between the vendor and the purchaser that a particular refusal of the mortgagee to accept the purchaser as mortgagor should be taken as conclusive, and this agreement may be implied from the circumstances and need not be express. The fourth case is that of a refusal by the mortgagee so treated by the vendor as to justify the purchaser in regarding the matter as at an end. It lies upon the purchaser to establish an agreement or special circumstances which justify him in treating the contract as at an end, and, if he goes back from his contract, without sufficient justification, the vendor may treat the purchaser as having broken his contract, and would be relieved from further carrying it out or performing the condition. The purchaser in that case cannot recover the deposit. I need not consider what might happen if the purchaser retired from the position which he had taken up after

[98] The opinion of Collins, L. J., and parts of the other opinions are omitted.

ascertaining that the vendor refused to treat the repudiation of the contract as justifiable.

All the cases that were cited were, with one exception, cases in which the purchaser ascertained before the time for completion that the vendor had not the title which he professed to have, and had no legal means then available to complete the contract. In such cases the purchaser is entitled at once to treat the contract as at an end, because the vendor cannot ask the purchaser to wait on the chance that the former may acquire the property. These cases have no bearing on the one before us. * * *

It seems to me clear that the present case does not come within any of the illustrations that I have given, and it is plain that the vendor did not treat the refusal of the mortgagee as final. The purchaser under these circumstances was not entitled to treat the contract as determined, and that makes an end of the case.

As to the stipulation that the existing arrangement as to paying off by instalments the money secured by the mortgage should remain in force, it is sufficient to point out that the money was payable on demand, and the stipulation imposed no burden on the plaintiff.

I agree therefore that the appeal must be allowed.

*Appeal allowed.*

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## GRANT *v.* JOHNSON

**(Court of Appeals of New York, 1851. 5 N. Y. 247.**

This was an action of covenant to recover the second instalment of purchase money of land sold by the plaintiff to the defendant, by a contract, under seal, bearing date the 24th August, 1845.

By this agreement, Grant, the plaintiff, contracted to sell to Johnson, the defendant, a piece of land, lying in the town of Neversink, known as part of the Reed Farm, and therein particularly described, for the consideration of $950, to be paid as follows: $200 the 1st day of April, then next; $200, on the 1st of April, 1847; and the residue in two annual payments, of equal amount, to be paid on the 1st of April of the two succeeding years, with interest from the 1st of April, 1846. The vendor also thereby agreed to give the purchaser the quiet and peaceable possession of the premises on the 1st November, then next, with the exception of certain privileges granted to third persons; and to give him a good and sufficient deed for the same, on the 1st May, 1846, "if the above conditions are complied with."

This suit was brought to recover the instalment of $200, which fell due on the 1st of April, 1847. The plaintiff, in his declaration averred, that he gave the defendant possession of the premises, on the 1st November, 1845, and was ready to convey, according to the true intent and mean-

ing of the articles of agreement, on the 1st May, 1846; but there was no averment of a tender of a deed, or of a readiness or willingness to execute one. Verdict and judgment for the plaintiff, and defendant took this appeal.

GARDINER, J.[99] The question in this case is, whether the plaintiff can sustain an action for the second instalment of the purchase money secured by the agreement, without averring and proving the delivery, or an offer to deliver, a deed of the premises. The parties have declared that certain payments were to be made, and certain acts performed by them, respectively at the times specified in the agreement. They must be held to have intended the performance of these acts, when, and, of course, in the order of time indicated in their covenants. The plaintiff was to give the defendant possession, on the first of November, 1845. The performance of this requirement preceded anything to be done by the defendant, and it might, consequently have been enforced, without any offer upon the part of the defendant; but if no possession had been given, the plaintiff could not have recovered the $200 to be paid by the vendee on the first of April, 1846.

The possession, however, was given, and the first $200 was paid, and on the first of May, 1846, the vendee was entitled to his deed, as the thing next to be done, in the order prescribed by the parties in their agreement. It was not executed, nor a willingness to execute it, either averred or proved. The payment of the $200 for which the suit is brought, was fixed upon a day subsequent to that agreed upon for the delivery of the deed. The case is, therefore, brought directly within the letter and spirit of the second rule suggested by Seargent Williams in his note to Pordage v. Cole, 1 Saund. 320 b, that, "when a day is appointed for the payment of money, &c., and the day is to happen after the thing which is the consideration is to be performed, no action for the money can be sustained, without averring performance."

The plaintiff relies upon the third rule of Seargent Williams in his note to the case above cited, that, "where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained, without averring performance." The rule is not free from obscurity. It was given by Lord Mansfield, originally, in Boone v. Eyre, (1 H. Black. 273, Note a). The defendants in that suit, after having received a conveyance of the equity of redemption of a plantation, and the negroes upon it, when sued for a part of the consideration, set up a breach of a collateral covenant on the part of the plaintiff, relating to the title and possession of the negroes, in bar of the action. The warranty extended both to the estate and negroes. (4 Mees. & Welsb. 311). The covenant of the plaintiff, it will be perceived, em-

[99] The statement of facts is abbreviated and part of the opinion of Gardiner, J., is omitted.

braced the whole and every part of the subject conveyed. If the title failed to a single negro, or the defendant was evicted from an acre of land, the covenant was intended to afford redress, and enable a jury to apportion the damages, according to the agreement of the parties. A "breach of the plaintiff's covenant might be paid for in damages," because a failure of title as to any part of the consideration could be compensated for, according to the standard fixed by the parties. In other words, the consideration for the defendant's promise was divisible and the damages arising from a breach of the covenant of warranty were apportioned to each parcel of that consideration, by the agreement itself. This, it is supposed, is what is meant by the expression above quoted, that the breach may be paid for in damages. (5 Mees. & Welsb. 701). Accordingly, it is stated in the note to Pordage v. Cole, *supra,* that "when the consideration for the payment of the money is entire and indivisible, so that the money payable is neither apportioned by the contract, nor capable of being apportioned by a jury, an action is not maintainable."

The doctrine is thus stated in Chanter v. Leese, 4 Mees. & Welsb. 311: "The party contracting to pay his money, is under no obligation to pay for a less consideration than that for which he has stipulated. If, indeed, he does accept a partial performance, and to a certain extent enjoys the benefit of that for which he has stipulated, it may become a question, whether he may not be liable upon an implied contract to pay for what he has had. And when the consideration is in its nature capable of being divided, and the payment apportioned by the terms of the contract, there may be still a right to recover the portion due on the original contract." This decision was affirmed in the Exchequer Chamber (5 Mees. & Welsb. 701), in 1839, and may be considered as the established doctrine in England at that day.

The rule of Lord Mansfield, according to its original application, and as expounded in the decision above mentioned, is reasonable; it brings us back to the contract, to learn the intention of the parties. Courts are not required to speculate upon the inequality of loss to the parties, nor to look beyond the agreement, to its performances, in order to ascertain its character, as suggested by some judges and commentators. (1 Saund. 320 a). These inquiries are proper, where the question arises, whether the plaintiff has any remedy for what he has done, or parted with, or whether the defendant is not estopped by his acts, subsequent to the agreement, from insisting upon a condition precedent in his favor. Much of the confusion in the books, it is believed, arises from confounding the doctrine of waiver by matters *ex post facto,* with a rule of construction applicable to the agreement as it came from the hands of the parties. (Havelock v. Geddes, 10 East 555). A defendant may waive the performance by the plaintiff, in case of a covenant clearly dependent, and thus render himself liable in some form of action (Mitchell v. Darthez, 2 Bing. N. C. 555; Lucas v. Godwin, 3 Id. 737), but it

is only when the consideration is divisible, and the payments are apportioned by the agreement to the different parts of the consideration, that the covenant becomes independent, and a recovery can be had upon the original contract without averring performance, or an excuse for non-performance.

A covenant, therefore, which goes only to a part of the consideration, is not, necessarily, independent; nor is it conclusive upon this point, that the consideration is divisible in its own nature, or that a part of it has been received by the defendant; nor will the circumstance, that one or any number of covenants in an agreement are independent, render others so. In Chanter v. Leese, (5 Mees. & Welsb. 311), the agreement was, that the defendants should have the exclusive use and sale of six different patents, and they were to pay 400*l.* in half-yearly payments, for one of which payments the action was brought. The defense was a failure of title as to one of the patents. The grant of the exclusive right was an independent covenant, which the defendants could have enforced, without any averment; the consideration for the undertaking of the defendants was divisible in its own nature. The undertaking upon which the action was brought, went only to a part of the consideration to be paid; and the court remarked, that although it had appeared affirmatively that the other five patents had been enjoyed by the defendants, the plaintiff could not have recovered on the contract. Terry v. Duntze (2 H. Bl. 389), which was followed in our supreme court, in Sears v. Fowler, (2 Johns 272), in Havens v. Bush (Id. 387), and in Wilcox v. Ten Eyck (5 Id. 77), to be the contrary, is not law in this state or in England. * * *

The question then returns, was the consideration in this case divisible, and were the payments apportioned by the agreement to the different parts of the consideration, within the principles above stated? According to the contract, the $950 to be paid by the defendant, as therein stipulated, was the entire consideration, for a complete title to the premises. The possession was incident to the title, the whole of which the defendant was to receive, as the consideration for his payments. He received one element of a complete title, to wit, the possession, on the first of November, 1845; he then paid on the first of the following April all that he was to advance by the terms of the agreement, until the fee should be added to the possession, by a conveyance from the plaintiff, and the title of the defendant be then perfected. The plaintiff refuses or neglects to convey, and yet, by this action, claims the purchase money of the defendant.

If we assume that the consideration of the defendant's undertaking was divisible, yet, by the terms of the agreement, he was to receive both the possession and a deed of the premises, before he could be called upon for the payment of the instalment in controversy. These things were "to be done to him," according to the rule of Lord Holt, adopted in 10 Johns. 206; he was not to trust to the personal responsibilty of

the plaintiff. (9 Wend. 134.) The plaintiff had covenanted that the thing stipulated should be performed, before the defendant could be required to pay; nor, by the contract, were the payments to be made by the defendant apportioned to any particular part of the consideration. He was not to pay anything for the possession, as distinguished from the fee of the land, but a gross sum for both, by separate instalments. If he had refused to accept a deed, all that the plaintiff could have recovered would have been the balance of the purchase money with interest. On the contrary, had the plaintiff refused to convey, the recovery on the part of the defendant would have been confined to the difference between the contract price and the actual value of the land, with interest. In a word, the covenant sought to be enforced against the defendant in this action, went to the whole consideration, on the other side, and depended on it. The judgment of the Supreme Court should be reversed.

FOOT, J. The question is, whether the covenants to pay the second and subsequent instalments are dependent.

So many decisions have been made on the vexed question of what are, and what are not, dependent covenants, and so many of them are irreconcilable, that they rather perplex than aid the judgment, in determining a given case. One rule is universal, and that is, that the intent of the parties is to control. On reading the covenant in this case, it is clear to my mind, that giving the deed was to precede the payment of the second and subsequent instalments; the parties have said so in so many words. The deed was to be given on the first of May, 1846; and the second and subsequent instalments paid on the first day of April, in the following years. If each had fulfilled his contract, the appellant would have had his deed, when the second instalment was payable. The clause, "If the above conditions are complied with," can only apply to such conditions as were to be performed by the appellant, before the deed, by the terms of the contract, was to be given. The possession is a mere incident which follows the title, and cannot be retained independently of it.

*Judgment reversed.*

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## BEECHER *v.* CONRADT.

**(Court of Appeals of New York, 1855. 13 N. Y. 108, 64 Am. Dec. 535.)**

Action commenced in the Supreme Court, in 1851, to recover the amount agreed to be paid by the defendant in and by the contract hereinafter mentioned. The complaint alleged the making of the contract; that it had been duly transferred to the plaintiff; that the party of the first part to the contract and the plaintiff had always fulfilled and

kept all things therein contained on their part to be performed; that the defendant had neglected to pay the amount agreed to be paid by him, and that the whole amount of the principal and interest, named in the contract, was due and unpaid, and judgment for this amount was demanded. The answer put all the allegation of the complaint in issue. The cause was tried at the Oneida County Circuit, held by Gridley, J. The plaintiff read in evidence the contract mentioned in the complaint. It was dated January 3d, 1839, and executed by Abraham Varick, as surviving executor of the will of one Walker, deceased, as party of the first part, and by the defendant as party of the second part. By the terms of this contract the party of the first part, in consideration of one cent to him paid, and "upon the express condition that the party of the second part shall, and do well and faithfully perform the covenants hereinafter mentioned, and to be performed on his part," covenanted for himself and his assigns to execute and deliver to the party of the second part a deed of conveyance in fee, containing covenants of warranty against the acts of the grantor, of and for a parcel of land which was described in the contract; and the defendant, the party of the second part, covenanted to pay to the party of the first part or his assigns "the sum of three hundred and ninety-six dollars in five equal annual payments, with interest annually on all sums unpaid." The plaintiff further proved that the land mentioned in the contract was conveyed, and the contract assigned to him in December, 1850, and rested. Thereupon the counsel for the defendant moved the court to nonsuit the plaintiff, on the ground, among others, that inasmuch as the action was brought to recover the whole amount of the purchase-money, after the same had become due by the contract, the plaintiff could not recover without proving that he tendered a conveyance of the land, or offered to convey the same to the defendant before the commencement of the action. The court overruled the objection, refused to nonsuit the plaintiff, and decided that he was entitled to recover the amount of the purchase-money mentioned in the contract. The counsel for the defendant excepted. The judgment, rendered at the circuit, was affirmed by the Supreme Court at a general term, held in the fifth district. The defendant appealed to this court.

GARDINER, C. J. The plaintiff has neither averred nor was there proof of any other breach of the contract upon the part of the defendant, except the non-payment of the purchase-money. The plaintiff had a right to sue for each instalment as they severally became payable; but this right he has waived, and now seeks to recover the whole purchase-money in this action, without an averment or proof of a tender of a conveyance, or a readiness or willingness to convey. It is not denied by the court below, that if the several payments had been made as they fell due, and the suit had been commenced for the last instalment

alone, that the plaintiff must have made such an averment and sustained it by proof, if questioned; the point is too plain to admit of discussion. It is, however, said that a right of action accrued as the instalments became payable, which the nonperformance of the plaintiff would not discharge. This doctrine assumes a right, upon the part of the plaintiff, to divide his cause of action into as many suits as there were instalments. The first answer to this suggestion is, that the consideration for the conveyance by the vendor was an entire sum, to be paid by instalments; that the whole was due at the commencement of the action, and the plaintiff has sued for the whole purchase-money without attempting to distinguish, in his complaint or evidence, between the different instalments. The second answer is, that the plaintiff having elected to wait until the fifth and last instalment became due, and upon the payment of which, as this case stands, the defendant would be entitled to a deed, cannot now sustain his action for either instalments, without proof of performance or readiness to perform on his part. The covenants, as to the four first instalments, were originally independent; but the plaintiff, by his omission to insist upon a strict performance by the defendant, has lost the right to bring more than one suit for the money, which formed the consideration for his conveyance. The defendant, by a tender of the whole, which he has now a right to pay, would be entitled to his deed. The plaintiff, on the other hand, must establish his right to the consideration as an entirety, or he cannot recover anything. If he recovered in this action for $50, the judgment would be a complete bar to any further claim for the purchase-money, and when that judgment was paid the defendant would be entitled to his deed.

The defendant could not protect himself against an action by an offer to pay the first, or all of the four first instalments; as the consideration was entire, and all due, the plaintiff could insist upon the whole. And yet, if because the covenants were originally independent they must always continue so, the defendant must have the right to discharge by payments what the plaintiff could enforce by action.

The truth is, the parties, by lapse of time, are in the same situation as though the purchase-money was all payable at one time. The defendant has lost his right to pay the instalments separately, and the plaintiff his right to enforce collection by separate suits. There is but a single cause of action, one and indivisible. The defendant, if he would obtain his deed, must pay all; and the plaintiff, if he would recover, must show such a performance on his part as would entitle him to all the unpaid consideration. The condition attaches to the whole debt and every part of it. The judgment of the Supreme Court should be reversed, and a new trial ordered.

DENIO, JOHNSON, MARVIN, and DEAN, JJ., concurred.

CRIPPEN, J. (Dissenting.) The first and fifth grounds on which the motion for a nonsuit was asked may properly be resolved into one and considered together, as they both present the same identical question. If the plaintiff was bound to prove the tender of a deed or an offer to give such a deed to the defendant as the contract called for, prior to bringing his action to recover the purchase-money, then he failed to maintain the action, and the court in that event erred in refusing the nonsuit. In order to determine this question, it will be necessary to refer with care to the terms of the agreement between Varick, the trustee, and the defendant. By this contract Varick agreed to convey lot No. 3, in Walker's patent, on the condition of a full and faithful performance of all the covenants contained in the contract to be performed by the defendant. On the part of the defendant, the first covenant made by him was that he would pay the trustee, Mr. Varick, his heirs or assigns, the just and full sum of $396 in five equal annual payments, with interest annually on all sums unpaid. The contract bears date on January 3d, 1839; consequently, the last annual payment became due on January 3d, 1844. This covenant of the defendant is not made to depend on any contingency or act of the other party, or on any condition to be found in the contract. When, then, let us inquire, did the defendant become entitled to the deed of said premises? The parties, by the plain language of the contract, have said that the defendant shall be entitled to such deed on the express condition that he shall pay the sum of $396, in five equal annual payments from January 3d, 1839, with annual interest. It is not easy to mistake the meaning of parties when they use language so plain and emphatic in making their contracts.

The defendant, most clearly, was not entitled to a deed when the first, second, third, or fourth instalments became due, even if they had been punctually paid by him. So also in relation to the last instalment, the time for its payment was fixed by the agreement; when the time arrived the money became due and payable from the defendant. No act was agreed to be performed on the part of the trustee or the plaintiff as assignee of the contract, in order to entitle him to the money due on the last payment. The premises were to be conveyed on the express condition of the payment of the whole amount of the purchase-money.

No act whatever was agreed to be done by the trustee to entitle him to the money; or, in other words, the defendant agreed that he had no right to call for a conveyance except upon the express condition that he paid the whole amount of the purchase-money. The case is clearly distinguishable from that of Grant v. Johnson, 1 Selden, 247. In that case the contract did not require the defendant to pay the whole amount of the purchase-money before obtaining a deed. He was entitled, by the terms of the agreement, to receive both the possession of the premises and a deed thereof before he could be called upon for the

payment of the instalment in controversy in that action. Not so in the case at bar, and in this particular the cases are manifestly and clearly different. The defendant in this action had no right to ask for a deed, except upon the express condition that he first paid the full amount of the purchase-money. I have not been able to find any adjudged case conflicting with the plaintiff's right to recover, in this action, the amount due upon the contract.

The judgment should be affirmed.

HAND, J. (Dissenting.) I am of the opinion that the covenants to pay the purchase-money and to convey the land are independent. The defendant agreed to pay the purchase-money, and at certain specified times; and the vendor agreed to convey "upon the express condition" that he did so. No suit was commenced until all of the purchase-money became due. But that circumstance did not make the covenants dependent which before were independent. Where the last payment and the conveyance are to be simultaneous acts, and the prior payments have not been made, in a suit for the purchase-money, a performance, or an offer to perform, is necessary. Johnson v. Wygant, 11 Wend. 48; Grant v. Johnson, 1 Seld. 247. But that is not this case as I understand this contract. The payment of all the purchase-money was a condition precedent to the right of the defendant to demand a conveyance. Having covenanted absolutely to pay certain sums at the expiration of certain fixed periods, and the vendor having promised a deed on condition that the payments were made, the clear intention of the parties must have been that payment of all the money should precede the conveyance. There was no duty for the vendor to perform until the vendee had performed all the covenants on his part. By inserting the word "condition" or "*sub conditione*," a condition is created. 10 Co. 42 *a*; 2 Bac. Abr., "Condition," (A.); Platt on Covenants, 72 "Upon condition" is an expression from which a condition precedent usually arises. (Platt on Covenants, *supra*.) The agreement here was not merely to convey "upon" payment being made, but "upon the express condition" that the vendee should perform; while the covenant to pay is without condition. And besides, the meaning of the words "upon condition" has been settled by construction, which should not be disturbed.

For this reason I think the judgment should be affirmed.

*Judgment reversed.*[100]

[100] "Where a contract for the sale of land provides for partial payments of the purchase-money prior to the delivery of the deed, the vendor may sue for such instalments when due without tendering a conveyance. Paine v. Brown, 37 N. Y. 228; Harrington v. Higgins, 17 Wend. 376.

"But when, after the instalments are all due, the vendor brings an action for the purchase-money, he is not entitled to recover without proving an offer before suit to convey the land to the defendant on receiving the purchase-price. When the last instalment falls due the payment of the whole of the unpaid

## SHEEREN *v.* MOSES.

(Supreme Court of Illinois, 1877. 84 Ill. 448.)

SHELDON, C. J. This was a suit brought on June 10th, 1876, by the executors of the estate of Robert McCracken, deceased, against Patrick Sheeren, upon three promissory notes, under seal, made by the latter, for the sums, respectively, of $500, $500, and $1,000, bearing date September 17th, 1870, payable to Robert McCracken, the first on December 10th, 1870, the second on December 10th, 1873, the third on December 10th, 1875, all with six per cent interest from June 10th, 1870, and ten per cent interest after due.

The only question raised is as to the sufficiency of two pleas, to which demurrers were sustained by the court below.

One plea sets up that the notes were given as the consideration of an agreement entered into between the plaintiffs' testate, Robert McCracken, of the first part, and the defendant, Patrick Sheeren, of the second part, as follows:

"The party of the first part doth sell to the party of the second part an eighty-acre lot of land, known and described as follows—viz.: The west half of the southeast quarter of section three (3), township thirteen (13), range eleven (11) west, containing eighty (80) acres, in Scott county, and state of Illinois; and for and in consideration of said land, and a clear deed for the same, as soon as the last payments are made, the party of the second part engages to pay the party of the first part $25 per acre, in the following payments—viz.: In six months from this date, five hundred dollars ($500); five hundred dollars in three years from date, and one thousand dollars in six years from date, with interest commencing from this date, to be paid yearly on all the notes, at six per cent, and when the cash payment is made, the party of the first part, his heirs or assigns, shall execute a clear deed for said land, this 10th June, 1870; and the party of the second part is to pay the taxes."

(Signed by the parties.)

purchase-money and the conveyance of the land become dependent acts. Beecher v. Conradt, 13 N. Y. 108.

"And the same rule applies when an action is brought for any instalment payable at or after the term fixed for the delivery of the deed. Grant v. Johnson, 5 N. Y. 247; Pordage v. Cole, 1 Saund. 320*b*, Sergeant Williams' note." Brown, J., in Eddy v. Davis, 116 N. Y. 247, 252 (1889).

"It is a well established proposition of law that if a contract provides for payment by instalments, due at different times, the instalments may, of course, be successively sued on as they become payable, but each action should include every instalment due when it is commenced, unless a suit is, at the time, pending for the recovery thereof or other special circumstances exist." Woodward, J., in Seed v. Johnson, 63 N. Y. App. Div. 340, 343 (1901).

On successive actions for breach of a contract performable in instalments, see 6 Ann. Cas. 63, note; 3 L. R. A. (N. S.) 1042, note.

The plea averring the defendant, in pursuance of the agreement, had ever been ready and willing to pay the notes, but there had never been any offer or tender to him of a deed for the land described in the agreement.

The other plea alleges that the notes were given as the consideration for the purchase of the above described tract of land; that previous to the making of the notes there had been made, and at that time existed, between the defendant and Robert McCracken, an agreement in writing, setting it out as above, and that on September 17th, 1870, in pursuance of such agreement, the defendant executed the notes declared upon; that the first one was correctly drawn, but that the second and third notes were, by the scrivener, incorrectly and improperly drawn as to their times of payment, in this, that the scrivener drew the last two notes as maturing on December 10th, 1873, and on December 10th, 1875, when the same should have been written to mature as by the terms of the above agreement, and as was the intention of the parties—viz., on June 10th, 1873, and on June 10th, 1876, respectively; that the defendant, in pursuance of the agreement, had entered into the possession of said premises, but there had never been offered or tendered to him a clear deed to the land, although the defendant had always been ready and willing to pay the notes.

The notes appear, by the averments of the pleas, to have been given for the moneys due and payable by the agreement of June 10th, 1870. They were given, then, for the purchase money of land, the deed for the land to be given, as we understand the agreement, upon making the last payment, which is represented by the last note. The payment of the last note, and the making of the deed, we must regard as mutual and dependent acts, and that to maintain an action upon that note there should have been a tender of a deed before bringing suit. Headley v. Shaw, 39 Ill. 354; Hunter v. Bilyeu, 39 Ill. 368; Johnson v. Wygant, 11 Wend. 48.

But it is different with the two other notes. They were to be paid before the time fixed for the conveyance of the land, and as respects them, the agreements were independent of each other, and tender of a deed before suit was not necessary. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act, before performance, for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent. 1 Saund. 320, note 4. The obligation of the defendant to pay the first two notes at the times stipulated, was absolute and unconditional. A cause of action accrued upon each note as soon as it became payable, and there is nothing in the agreement to defeat the right of action afterward.

By neglecting to enforce payment of the first two notes when they became due, and by waiting until the last note became due and the time for making the conveyance had elapsed, the promises to pay the first two notes, once absolute and independent, did not become mutual and dependent. This was so expressly decided in Duncan *et al.* v. Charles, 4 Scam. 561.

That was a parallel case, and decided the exact point made upon these pleas. Under its authority, the first two notes, here, are recoverable without a tender of a conveyance, and the pleas must be held bad, as respects them.

The demurrers to the pleas were, then, properly sustained, and the judgment is affirmed.

*Judgment affirmed.*[101]

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## EWING *v.* WIGHTMAN.

**(Court of Appeals of New York, 1901. 167 N. Y. 107, 60 N. E. 322.)**

Action by Henry O. Ewing, receiver of the Cardiff Coal & Iron Company, against George B. Wightman. From a judgment of the Appellate Division (65 N. Y. Supp. 187) affirming a judgment in favor of defendant rendered on a report of the referee, plaintiff appeals. Affirmed.

CULLEN, J. * This action is brought to recover on a series of promissory notes made or indorsed by the defendant to the Cardiff Coal & Iron Company under a number of contracts by which said company contracted to sell and convey to Wightman certain parcels of land in the state of Tennessee. One of the defenses pleaded by the respondent was that these notes were delivered to represent the deferred payments to be made for said lands, upon the payment of which the lands were to be conveyed to him, and that the company at the day fixed for the con-

[101] See Gray v. Meek, 199 Ill. 136 (1902). In Spiller v. Westlake, 2 B. & Ad. 155 (1831), Lord Tenterden, C. J., said: "Where, by one and the same instrument, a sum of money is agreed to be paid by one party, and a conveyance of an estate to be at the same time executed by the other, the payment of the money and the execution of the conveyance may very properly be considered concurrent acts, and in that case no action can be maintained by the vendor to recover the money, until he executes or offers to execute a conveyance; but here the vendee by a distinct instrument agreed to pay part of the purchase-money on February 2d. I can see no reason why he should have executed a distinct instrument whereby he promised to pay a part of the purchase-money on a particular day, unless it was intended that he should pay the money on that day at all events. In the cases cited, the concurrent acts were stipulated for in the same instrument; here the payment of the £200 (which was part only of the purchase-money) was separately provided for."

* Part of the opinion is omitted.

veyance of the land was unable to give the respondent title thereto, and tendered no deed or conveyance to him. The following are the forms of the contract and of the note, which bear the same date: "For and in consideration of the sum of four hundred and sixteen and $^{7}/_{100}$ dollars ($416.70) in hand paid on the delivery of this instrument, the receipt of which is hereby acknowledged, and the further sum of eight hundred and thirty-three and $^{30}/_{100}$ dollars ($833.30) to be paid in equal instalments in six and twelve months from date, to be evidenced by two notes executed by the said bargainor hereinafter named, due and payable, respectively, six and twelve months after date, with interest from date, the Cardiff Coal and Iron Company, a body corporate under the laws of the state of Tennessee, has bargained and sold, and hereby agrees and binds itself to convey by deed in fee simple, with covenants of general warranty, on payment in full of the purchase money at the times and in the manner hereinbefore set forth, unto George B. Wightman, his heirs or assigns, a lot or parcel of lands lying in the 13th civil district of Roane county, Tennessee, being lot No. five in block thirty-four in the town of Cardiff, as shown by the plat of said town in the register's office of Roane county." Note: "$416 $^{60}/_{100}$. Twelve months after date, I promise to pay the Cardiff Coal and Iron Company, or order, four hundred and sixteen and $^{60}/_{100}$ dollars, for value received, with interest from date. This note is given in part consideration for land this day bought of the said Cardiff Coal and Iron Company, and a lien is retained on said land to secure the payment of this note. If this note is not paid at maturity, and is placed in the hands of an attorney for collection, ——— agreed to pay ten per cent attorney's fees, to be taxed as costs. This 30th day of April, 1890. George B. Wightman." The referee before whom the cause was tried rendered a short form of decision, in which he held that the agreements to convey the land and pay the notes were concurrent and dependent, and that the plaintiff could not maintain the action on the notes, as no tender of conveyance had been made to the defendant.

The unanimous affirmance by the Appellate Division leaves open for our determination but one question,—whether the payment of the notes and the conveyance of the land were dependent covenants. The law is firmly established in this state that, in a contract for the purchase of lands or for the sale of chattels, the covenant to convey or to deliver possession and the covenant to pay the purchase money, when concurrent in time, are dependent (Glenn v. Rossler, 156 N. Y. 161, 50 N. E. 785; Vandegrift v. Engineering Co., 161 N. Y. 435, 55 N. E. 941, 48 L. R. A. 685), and that, even in case the purchase money is payable in instalments, if the vendor awaits the maturity of the last instalment, upon the payment of which a conveyance is due, he cannot maintain an action to recover any instalment without first putting the vendee in default by tendering him a deed. Beecher v. Conradt, 13 N. Y. 108, 64 Am. Dec. 535; Morange v. Morris, *42 N. Y. 48; Thomson v. Smith, 63

N. Y. 301; Eddy v. Davis, 116 N. Y. 247, 22 N. E. 362. The contract of the Cardiff Company was not a present conveyance of the land, but an executory agreement to convey in the future on the payment of the purchase money; and the defendant agreed to pay in consideration of the actual conveyance of the land, and not in consideration of the mere obligation or executory contract of the vendor. Therefore, if the action had been brought on the contract, it could not, within the rule stated, have been maintained, because of the failure of the vendor to tender a deed; and the only question remaining is whether a different rule applies where, as in the present case, separate obligations in the shape of promissory notes are given for the purchase money.

Some learned text writers have asserted the doctrine that promises contained in unilateral contracts cannot be dependent, though each is given in consideration of the other, and have criticised the cases in this country holding a contrary rule. Whatever may be the force of the arguments of those writers, or whatever the rule in England (Spiller v. Westlake, 2 Barn. & Adol. 155; Moggridge v. Jones, 14 East, 486), the general current of authority in this and other states is opposed to that doctrine. * * *

In Hunt v. Livermore, 5 Pick. 395, it was held that an action could not be maintained on a non-negotiable promissory note given for the purchase money on an executory contract for the sale of land, without a previous tender of the deed. The same principle seems to have been recognized, though the question was not necessarily involved, in Murphy v. Lockwood, 21 Ill. 610. No American case has been cited to us holding a contrary rule, except that of Lewis v. McMillen, hitherto discussed. We think the weight of authority justified the decisions of the courts below. Nor do we think the doctrine established by this decision is subject to criticism on principle. "It is a familiar rule that several instruments made between the same parties at the same time, and relating to the same subject-matter, are to be read as one instrument." Marsh v. Dodge, 66 N. Y. 533; Draper v. Snow, 20 N. Y. 331, 75 Am. Dec. 408. And, if one of the writings is a negotiable instrument, the same rule applies in an action between the parties to it, or their representatives. Rogers v. Smith, 47 N. Y. 324. "In contracts of this description, the undertakings of the respective parties are always considered dependent, unless a contrary intention clearly appears. A different construction would in many cases lead to the greatest injustice, and a purchaser might have payment of the consideration money enforced upon him, and yet be disabled from procuring the property for which he paid it." Bank of Columbia v. Hagner, 1 Pet. 455, 464, 7 L. Ed. 223, cited with approval by Martin, J., in Glenn v. Rossler, *supra*. These rules are firmly settled in our jurisprudence, and I think it follows as a necessary corollary from those rules that the law is the same where a promissory note is given for the purchase money on an executory contract for the sale of lands or chattels as obtains in a case where the only

promise to pay is found in the contract of sale itself, provided the action is between the original parties. The judgment appealed from should be affirmed, with costs.

*Judgment affirmed.*[102]

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## MORRIS *v.* LUTTEREL.

**(Court of Common Pleas, 1598. Cro. Eliz. 672.)**

Debt on an obligation, conditioned for saving harmless from another obligation made to C and H for the payment of 100*l.* at a day and place, etc. The defendant pleads, that at the day of payment, he was going *ad solvendum* the said 100*l.* to the place, to the said C and H and that the plaintiff, by covin betwixt him and another stranger, caused the defendant to be imprisoned, and to be detained in prison until after sunset of the same day, to the intent the said 100*l.* should not be paid; and that the obligation, by reason thereof, should be forfeited; and therefore he could not come to the said C and H to pay them the said 100*l.* *Et hoc, &c.*—It was thereupon demurred; and adjudged for the plaintiff, that such a bare surmise was not any bar.[103]

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## UNITED STATES *v.* PECK.

## PECK *v.* UNITED STATES.

**(Supreme Court of the United States, 1880. 102 U. S. 64, 26 L. Ed. 46.)**

Appeals from the Court of Claims.

Peck the claimant, entered into a contract with the proper military officer to furnish and deliver a certain quantity of wood and hay to the

[102] "The notes, mortgages and contract [to furnish support] bear a common date on which they were simultaneously transferred, and having been given and received in consideration for each other, they are to be construed as dependent promises, even if in form they are unilateral. Hunt v. Dinsmore, 5 Pick. 395; Story v. Fowle, 22 Pick. 166, 174; Fort Payne Coal & Iron Co. v. Webster, 163 Mass. 134." Braley, J., in Bryne v. Deroy, 221 Mass. 399, 403 (1915). The great weight of American authority is in accord.

[103] But the rule has long been *contra* to the above case. See Patterson v. Meyerhofer, 204 N. Y. 96 (1912), where Willard Bartlett, J., said (pp. 100-101): "In the case of every contract there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part. This proposition necessarily follows from the general rule that a party who causes or sanctions the breach of an agreement is thereby precluded from recovering damages for its nonperformance or from interposing it as a defense to an action upon the contract."

military station at Tongue River, in the Yellowstone region, on or before a specified day. He furnished the wood, but failed to furnish the hay, which was furnished by other parties at an increased expense. The accounting officers of the government claimed the right to deduct from the claimant's wood account the increased cost of the hay. Whether this could lawfully be done was the principal question in the cause.

The court, upon an examination of the contract and of the surrounding circumstances of the case, were of opinion that the contracting parties, in stipulating relating to hay, contemplated hay to be cut in the Yellowstone valley, and specially at the Big Meadows near the mouth of Tongue River,—which was, indeed, the only hay which the claimant could have procured within hundreds of miles, and which it was known he relied on. The government officers, fearing that the claimant would not be able to carry out his contract, and it being absolutely necessary that the hay should be had, allowed other parties to cut the hay at Big Meadows, and therewith to supply the Tongue River station. The claimant complained of the double injury: First, of giving the hay which he relied on to other parties; and, secondly, of charging him for the increased expense of getting it. The question was whether the surrounding circumstances could be taken into consideration in the claimant's excuse, although the contract made no mention of the source from which he was to procure the hay to be supplied by him to the government.

BRADLEY, J. We think that the facts of the case clearly bring it within the rules allowing the introduction of parol evidence: First, for the purpose of showing, by the surrounding circumstances, the subject-matter of the contract, namely, hay to be cut and gathered in the region where it was to be delivered; secondly, for the purpose of showing the conduct of the agents of the defendants by which the claimant was encouraged and led on to rely on a particular means of fulfilling his contract until it was too late to perform it in any other way; and then was prevented by these agents themselves from employing those means. The supply of hay which he depended on, and which under the circumstances he had a right to depend on, was taken away by the defendants themselves. In other words, the defendants prevented and hindered the claimant from performing his part of the contract.

That the subject-matter of a contract may be shown by parol evidence of the surrounding circumstances, see Bradley v. Washington, Alexandria, & Georgetown Steam Packet Co., 13 Pet. 89; Thorington v. Smith, 8 Wall. 1; Maryland v. Railroad Company, 22 Id. 105; Reed v. Insurance Company, 95 U. S. 23; 1 Greenl. Evid. sect. 277; Taylor, Evid. sect. 1082. And that the conduct of one party to a contract which prevents the other from performing his part is an excuse for nonperformance, see Addison, Contracts, sect. 326; Fleming v. Gilbert,

3 Johns. (N. Y.) 528. In the case last cited, the defendant was sued on a bond obliging him by a certain time to procure and cancel a mortgage of the plaintiff and deliver the same to him. The defendant was allowed to prove by parol that he procured the mortgage, and, having inquired of the plaintiff what he should do with it, was directed to place it in the hands of a third person. This was held to be an excuse for not having fully performed the condition. Judge Thompson said: "It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned. Had not the plaintiff dispensed with a further compliance with the condition of the bond, it is probable that the defendant would have taken measures to ascertain what steps were requisite to get the mortgage discharged of record, and would have literally complied with the condition of the bond." So when A gave to B a bond to convey certain premises, but they subsequently agreed by parol to rescind the contract, and A thereupon sold the premises to a third person, it was held that though the bond was not cancelled or given up, nor any of the papers changed, yet by the parol agreement and the acts of the parties under it the bond was discharged. Dearborn v. Cross, 7 Cow. (N. Y.) 48; and see 2 Cowen & Hill's Notes to Phillips on Evid. 605. The principle involved in these cases is applicable to the present.

*Judgment affirmed.*[104]

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## LIBMAN *v.* LEVENSON.

## LEVENSON *v.* LIBMAN.

**(Supreme Judicial Court of Massachusetts, 1920. 128 N. E. 13.)**

Suits by Louis Libman against Joseph Levenson and by Joseph Levenson against Louis Libman. On report to the Supreme Judicial Court.

[104] In Anvil Min. Co. v. Humble, 153 U. S. 540 (1894), Brewer, J., said: "A party who engages to do work has a right to proceed free from any let or hindrance of the other party, and if such other party interferes, hinders, and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue for the damages which it has sustained by reason of the nonperformance which the other has caused."

In Deborich v. Emeric, 12 Cal. 171 (1859), where there was a contract for the sale of fruit on the trees with a provision that the buyer should be allowed to gather it without molestation, and where the buyer found that the parties in possession would let him have part but would not let him have the rest without a fight, it was held that he might refuse to take any and might recover damages as for a total breach.

In the suit of Libman v. Levenson, decree ordered dismissing the bill; in that of Levenson v. Libman, decree ordered for plaintiff.

RUGG, C. J. These are cross-suits in equity. On March 31, 1920, the parties entered into a contract in writing whereby Libman agreed to sell a tract of real estate for $2,000 above an existing mortgage and Levenson agreed to purchase and pay for the same, "papers to pass on or before April 10, 1920." The real estate "as described in the agreement consists of a parcel of land numbered 202-208a Washington Street, Dorchester district of Boston, comprising 7,030 square feet of land and a one-story brick block of six (6) stores thereon," built in 1916.

On or about April 5, 1920, a retaining wall on the rear of the premises, without any fault on the part of Libman, collapsed on account of erosion and other natural causes, and fell onto and across a yard about fifteen feet in width situated between the retaining wall and the building, and onto and against the rear of the building, causing the greater part of the real wall of four of the stores to collapse and breaking the windows in the front of the four stores.

No repairs were made on the premises after the collapse, and the building and premises have since remained and now are in the same damaged condition as they were immediately following the collapse.

The question is whether Levenson can be compelled to take conveyance and pay for the real estate under these circumstances or whether he is entitled to cancellation of the contract and recovery from Libman of the money already paid on account of the contract.

It is manifest from the facts that there has been a destruction or loss of a substantial part of the real estate constituting the subject matter of the contract occurring before the time fixed for performance without the fault of either party. The real question is where that loss must fall.

This hardly can be regarded as an open question in this commonwealth. In Thompson v. Gould, 20 Pick. 134, a contract had been made for the purchase and sale of land but before the time for performance the house thereon was burned. It was said at page 138:

"Nor could this contract be enforced by a court of equity having jurisdiction of the subject matter, for by the destruction of the house the defendant is no longer able to perform his part of the contract. He may make compensation for the destruction of the house, but generally a purchaser, independently of special circumstances, is not to be compelled to take an indemnity, but he may elect to recover back the purchase money, if paid in advance, and if the vendor refuses or is unable on his part to perform the contract, and the purchaser has no legal remedy to recover damages."

It is true that this was an action of contract and the contract was not enforcible under the statute of frauds, but with the amplitude of discussion of legal questions lying within the field of the point actually involved customary with the court of that day, the whole subject was

surveyed in the opinion. The statement above quoted appears to have been accepted as the law of the commonwealth. In Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65, an action of contract was before the court for breach of a written agreement to purchase land, where the buildings were destroyed before the deed was tendered. It was said by Mr. Justice Gray, relying in part upon Thompson v. Gould as well as upon other previous decisions fully reviewed by him:

"When property, real or personal, is destroyed by fire, the loss falls upon the party who is the owner at the time; and if the owner of a house and land agrees to sell and convey it upon the payment of a certain price which the purchaser agrees to pay, and before full payment the house is destroyed by accidental fire, so that the vendor cannot perform the agreement on his part, he cannot recover or retain any part of the purchase money."

The question again was presented in an action for breach of contract in Hawkes v. Kehoe, 193 Mass. 419, where at pages 424 and 425, 79 N. E. 766, 767 (10 L. R. A. [N. S.] 125, 9 Ann. Cas. 1053), occurs this statement:

"We need spend no time upon the numerous cases in England and in this country which the industry of counsel has brought to our notice as to the rights of parties to such agreements upon a total or partial destruction of the buildings by fire. See the cases collected in 29 Am. & Eng. Encyc. of Law (2d Ed.) 712 *et seq.*, and in Ames, Cases in Eq. Jur. 228, note 2. We are of opinion that in this commonwealth, when, as in this case, the conveyance is to be made of the whole estate, including both land and buildings, for an entire price, and the value of the buildings constitutes a large part of the total value of the estate, and the terms of the agreement show that they constituted an important part of the subject-matter of the contract, it is now settled by the decision in Wells v. Calnan, 107 Mass. 514, that the contract is to be construed as subject to the implied condition that it no longer shall be binding if, before the time for the conveyance to be made, the buildings are destroyed by fire. The loss by the fire falls upon the vendor, the owner; and if he has not protected himself by insurance, he can have no reimbursement of this loss; but the contract is no longer binding upon either party. If the purchaser has advanced any part of the price, he can recover it back. Thompson v. Gould, 20 Pick. 134, 138. If the change in the value of the estate is not so great, or if it appears that the buildings did not constitute so material a part of the estate to be conveyed as to result in an annulling of the contract, specific performance may be decreed, with compensation for any breach of agreement, or relief may be given in damages. Kares v. Covell, 180 Mass. 206; Davis v. Parker, 14 Allen, 94."

See also Adams v. North Am. Ins. Co., 210 Mass. 550, 96 N. E. 1094.

It seems to us that the weight of authority in other jurisdictions is

to the same effect.[105] Phinizy v. Guernsey, 111 Ga. 346, 36 S. E. 796, 50 L. R. A. 680, 78 Am. St. Rep. 207; Gould v. Murch, 70 Me. 288, 35 Am. Rep. 325; Wilson v. Clark, 60 N. H. 352; Smith v. McCluskey, 45 Barb. (N. Y.) 610; Wicks v. Bowman, 5 Daly (N. Y.) 225; Powell v. Dayton, Sheridan & Grande Ronde R. R., 12 Ore. 488, 8 Pac. 544; Huguenin v. Courtenay, 21 S. C. 403, 53 Am. Rep. 688; Elmore v. Stephens-Russell Co., 88 Ore. 509, 171 Pac. 763; Kinney v. Hickox, 24 Neb. 167, 38 N. W. 816.

There are decisions to the contrary collected in an article in 33 H. L. R. 813, 822 to 834. In view of the positive statements of the law already quoted from our own decisions, it does not seem necessary to review those not in harmony with them. In the suit of Libman v. Levenson decree is to be entered dismissing the bill, and in that of Levenson v. Libman decree is to be entered declaring the agreement terminated, for the repayment to the plaintiff of the $200 paid by him on account of the contract and for his costs.

*So ordered.*[106]

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## TURNER *v.* SAWDON & CO.

(Court of Appeal. [1901] 2 K. B. 653.)

Application by the defendants for judgment or for a new trial in an action tried by Kennedy, J., with a jury.

The defendants carried on business as cotton-warp agents at Bradford, Yorkshire, and in March, 1898, an agreement was entered into by them with the plaintiff, who was in their employment, which contained the following clauses: "(1) The said G. E. Sawdon & Co. agree to continue to engage and employ the said Ernest Turner as their servant and representative salesman from the 1st day of March, 1898, for a period of four years ending February 28, 1902. * * * (2) The said G. E. Sawdon & Co. further agree to remunerate the said Ernest Turner for his services by a payment to him of a salary of 200*l.* per annum,

[105] Professor Williston disagrees with this statement as to the weight of authority. See 2 Williston on Contracts, § 928. A satisfactory estimate is difficult.

[106] The contrary rule is based on the idea that the buyer is the owner in equity.

"'It is the rule in this state that, after a contract for the conveyance of real estate has been entered into by the execution of a bond for title and notes for the purchase money, the property is the risk of the purchaser. If it burns up, it is his loss; if it increases in value, it is his gain.' Snyder v. Murdock, 51 Mo. 175. This is the view later announced by the Supreme Court, as shown in Ranck v. Wickwire, 255 Mo. 42, 61, 164 S. W. 460." Ellison, P. J., in Mahan v. Home Ins. Co. (Mo. App.), 226 S. W. 593, 594 (1920). That rule goes back to Paine v. Meller, 6 Ves. 349 (1801).

to be paid in monthly instalments, for the space of two years, and 250*l.* per annum for the remaining two years. * * * (3) The said Ernest Turner agrees to devote the whole of his time to the business of the said G. E. Sawdon & Co., to faithfully serve them as heretofore in soliciting orders and generally in aiding to conduct the business, and not to divulge to any competitor or other person any of the business secrets of the said G. E. Sawdon & Co. whilst in their service, and to carefully obey their directions from time to time, and will keep, protect, and promote the success of the said business as far as he can. * * *"

The plaintiff acted as salesman for some time; but on December 31, 1900, a letter was handed to him by the defendants, which was as follows: "We have decided that you shall take a month's holiday—that is to say, that although you will still be in the employ of the firm and at their disposal, you will not after today be required to perform any duties. You will please call for your salary on January 31, when any further instruction will be given you." The plaintiff came to the office of the firm on the following day, but was requested to leave. Immediately afterwards circulars were issued by the defendants to their customers stating that the plaintiff had no authority to transact any business on their behalf. The plaintiff then commenced business on his own account, and brought this action against the defendants for damages for breach of the agreement of March, 1898, on the ground that the defendants "after the 31st December, 1900, have neglected and refused, and still neglect and refuse, to continue to engage and employ the plaintiff as their servant and representative salesman, in accordance with the terms of the said agreement."

The learned judge left the following questions to the jury:

(1) Was the plaintiff ready and willing to perform the agreement according to its terms? Answer, Yes.

(2) Did the defendants' conduct on December 31, 1900, and January 1, 2, 3, and 4, 1901, constitute a breach of their obligations under their contract towards the plaintiff? Answer, Yes.

(3) Was it such a substantial breach as to justify the plaintiff in treating it as a refusal on the part of the defendants to perform and abide by the contract? Answer, Yes.

(4) If the above questions are answered in the affirmative, what damages is the plaintiff entitled to? Answer, 125*l.*

On further consideration, the learned judge gave judgment for the plaintiff for the amount of the damages found by the jury.

The defendants appealed.

A. L. SMITH, M. R. This is an action tried before my Brother Kennedy with a special jury. The matter has given rise to some complication, chiefly, as it appears to me, because the learned judge left the construction of an agreement to the jury. There was no term of

art and no question of custom the meaning or the existence of which might properly be left to the jury. It was for the judge at the trial to construe the written agreement, and we have now to say what construction should be put upon it. I do not say that the meaning of the document is clear, but I have arrived at the conclusion that the result of the trial was not right. The action is by a man who was in the employment of the defendants, and it was not brought for wages, because it is clear that the defendants were always ready and willing to pay all that was due under the contract. The real question which the plaintiff thought to raise, and which was raised, was whether beyond the question of remuneration there was a further obligation on the masters that, during the period over which the contract was to extend, they should find continuous, or at least some, employment for the plaintiff. In my opinion such an action is unique—that is an action in which it is shown that the master is willing to pay the wages of his servant, but is sued for damages because the servant is not given employment. In Turner v. Goldsmith, [1891] 1 Q. B. 544, the wages were to be paid in the form of commission, and that impliedly created a contract to find employment for the servant. This contract is different; being to employ for wages which are to be paid at a certain rate per year. I do not think this can be read otherwise than as a contract by the master to retain the servant, and during the time covered by the retainer to pay him wages under such a contract. It is within the province of the master to say that he will go on paying the wages, but that he is under no obligation to provide work. The obligation suggested is said to arise out of the undertaking to engage and employ the plaintiff as their representative salesman. It is said that if the salesman is not given employment which allows him to go on the market his hand is not kept in practice, and he will not be so efficient a salesman at the end of the term. To read in an obligation of that sort would be to convert the retainer at fixed wages into a contract to keep the servant in the service of his employer in such a manner as to enable the former to become *au fait* at his work. In my opinion, no such obligation arose under this contract, and it is a mistake to stretch the words of the contract so as to include in what is a mere retainer an obligation to employ the plaintiff continuously for the term of his service. I asked whether the employment must be *de die in diem*, and the answer was that this was not necessary, but I could not gather what, short of this, was the suggested obligation. It seems to me that the only argument open to the plaintiff was that his employment should be continuous, and I cannot find that obligation in the contract.

I think, therefore, that the case should not have been left to the jury, and that we ought to direct that judgment be entered for the defendants.

VAUGHAN WILLIAMS, L. J. I entirely agree. In my opinion, if the facts are taken to be exactly in accordance with the plaintiff's evidence,

there was no case to go to the jury. So far as the pleadings are concerned, the action is for breach of the terms contained in a written contract. It was put on behalf of the plaintiff that the action was based on a repudiation by the master of the contract with the plaintiff, and it was said that the plaintiff had a right to treat the case as if it were an action for wrongful dismissal, and is entitled to recover damages on that footing none the less because the master has been ready and willing to pay the wages agreed upon. For the purposes of my judgment I accept that suggested basis of action, but I still say that there was no case to go to the jury.

The first clause of the agreement contains the words "engage and employ," and the argument for the plaintiff is that because these words are used some obligation is thrown on the master which is not ordinarily created by the relation of master and servant. If it is said that the word "employ" must be so construed, the authority against this view is conclusive. In Emmens v. Elderton, 13 C. B. 495; 4 H. L. 624, the plaintiff, who was an attorney, was to receive 100*l.* a year as attorney and solicitor of a company. The promise set out in the second count was to "retain and employ" the plaintiff as attorney. The only matter that had to be argued in that case was whether the expression "retain and employ" added anything to the duty of the company towards their solicitor as expressed in the earlier part of the count. If it did, then the count was a bad one, and though the verdict of the jury had been for the plaintiff the defendant would have been entitled to have the verdict set aside. If, however, the words added nothing to the ordinary obligation on the company, the count was good. It was held in the Exchequer Chamber and in the House of Lords that the words did not of necessity add a jot to the contractual obligation of the employer. This is clearly set out in the opinions delivered by Crompton and Wightman, JJ., in the House of Lords. We have to consider in the present case whether there is anything in this agreement to engage and employ the plaintiff which places on the defendants a wider obligation than that which a master ordinarily incurs towards his servant. I think that the first clause of the agreement is merely a clause of engagement or retainer. The second clause relates to remuneration, and the third to the duties to be performed by the servant in return for the remuneration. Of course, when a servant is engaged the capacity in which he is engaged is mentioned, and I do not think that the expression "representative salesman" which occurs in the agreement makes the case any stronger or throws any further obligation on the master. The case of a servant who is to be paid by commission as in Turner v. Goldsmith, is entirely different. There the master is bound to give the opportunity of earning the remuneration. In Bunning v. Lyric Theatre, Limited, 71 L. T. 396, there is a good deal in the terms of the contract to show that the having an opportunity of appearing as musical director

was one of the considerations which the servant bargained that he should have from the master.

As my Lord has said, it was the duty of the judge to construe this contract, and we must now put a construction upon it. Looking at the matter in the way that is most favorable to the plaintiff, I think that there was no case to go to the jury, and that judgment should be entered for the defendants.

STIRLING, L. J. Throughout the argument and at the present moment I feel more doubt as to the construction of this contract than my learned brethren. It is an agreement by which the defendants agreed to engage and employ the plaintiff, and the plaintiff agreed to devote the whole of his time to their service. The question is, What is the meaning of the word "employ" as used in this agreement? It seems to me clear, and if authority be required we find it in the case of Emmens v. Elderton, that the word "employ" is capable of two meanings—to retain in service, or to give actual work to be done by the person employed. There are many cases in which the nature of the work to be done shows which of these meanings should be adopted. Take the case of a medical man engaged for a term at a fixed payment. No one would say that employment must be found for him. On the other hand, in the case of an actor who accepts an engagement, it may be an important consideration with him to have an opportunity of displaying his abilities before the public, and it may be that there is an implied obligation on the part of the master to afford such an opportunity: Fetcher v. Montgomery (1863), 33 Beav. 22. So in the case of a commission agent, to which reference has been made. The term "employ" being one with a flexible meaning, I feel the force of the argument that the plaintiff was to be employed in the capacity of salesman to serve and to solicit orders, and so there should be a correlative duty on the employers to give him the opportunity of doing this. There was evidence given at the trial that in order that a salesman may duly perform his duties he must be in constant contact with the market. In that state of things there is some approximation to the case of an actor; but, as there are other elements pointed out by my learned brethren to which they attach weight, I am not prepared to differ from the conclusion at which they have arrived.

*Appeal allowed.*[107]

[107] In Turpin v. Victoria Palace, [1918] 2 K. B. 539, 551, McCardie, J., said of the contract before him for the defendants to pay plaintiff, a music hall artiste, 25*l.* per week under the contract which engaged her to perform at their well known and engagement sought place of amusement. "I have arrived at the conclusion that there was no implied obligation on the defendants to permit the plaintiff to appear at their hall during the contract periods. I state this result with regret, and I trust that a new form of contract may be devised which will give a wider measure of protection to the legitimate interests of music hall artistes." Previously, in Rubel Bronze Metal Co., Ltd., and Vos,

## COOPER *v.* STRONGE & WARNER CO.

(Supreme Court of Minnesota, 1910. 111 Minn. 177, 126 N. W. 541, 27 L. R. A. (N. S.) 1011.)

Action by Maude E. Cooper against the Stronge & Warner Company. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Affirmed.

O'BRIEN, J. Defendant is a manufacturer and retailer of millinery goods. In part, its business consists in maintaining millinery departments in stores located in different localities. Plaintiff had been employed by defendant as manager of one of those departments, maintained by it in Dubuque, and claims to have subsequently entered into a contract with defendant for similar employment from March 1 to August 1, 1909, at a salary of $25 per week. In February, 1909, plaintiff was directed to take charge of a millinery department conducted by defendant in a store at Duluth. She continued in that position for two weeks, when she was superseded by another woman, but requested to remain in the department as a sales clerk at the same salary. This she refused to do, insisting that her contract with the defendant was that she be employed as the manager of some one of the departments owned by the defendant, and offered to accept such position in any locality defendant might designate. The defendant failed to furnish plaintiff with a position as manager, and on the trial insisted that the contract was only to pay the plaintiff $25 per week between the dates mentioned, without reference to the particular grade of the position in which the plaintiff should be employed. It further appeared that plaintiff was offered another position as a saleswoman by another firm at $20

[1918] 1 K. B. 315, 324, where the plaintiff was to receive a commission upon net profits of the business he was appointed to manage and where, accordingly, he was allowed to recover for wrongful dismissal, although the defendants were not found to be unwilling to continue the payment of the plaintiff's salary, the same judge said of Turner v. Sawdon & Co., *supra:* "I need not point out the serious results which might follow if Turner v. Sawdon & Co. were to apply to all cases of employment. The judgment of Sterling, L. J., recognizes that the decision of the Court of Appeal may not apply to certain occupations, e. g., to an actor or public singer. In many cases, moreover, a man may enter into the service of another for a long period and at a low wage for the direct purpose of gaining business experience or mechanical skill. It will suffice to say that in my view Turner v. Sawdon & Co. does not apply to the present case. There the servant was paid by salary only. Here the plaintiff might become entitled to a large commission on the net profits (if made) of the company. He had, therefore, the right to ask that he should have a full opportunity of earning such commission. The defendants wholly deprived him of such opportun'ty. A vital distinction, therefore, exists between the facts here and the facts in Turner v. Sawdon & Co." Compare Meyer-Bridges Co. v. American Warehouse Co., 94 Kans. 288 (1915), where an employer of one who was engaged to sell on commission was held obligated to fix reasonable prices so that the sales might be made and commissions earned.

per week, which she refused to accept. The action was tried by a jury in the municipal court of Duluth, and a judgment in plaintiff's favor was affirmed on appeal to the district court.

The contentions of the respective parties as to the terms of the contract were fully submitted to the jury; but the instructions were to the effect that, if the contract of hiring was that plaintiff was to be employed as manager, she was not required to accept employment as saleswoman. Defendant claims this as error, arguing that there is practically no difference in such employments, inasmuch as the manager of the department acts also as a saleswoman, her duties as manager being merely additional responsibilities, and that relieving the plaintiff of them involved no degradation or loss of caste, and imposed upon her no duties which were dissimilar to some of those formerly performed by her.

The authorities seem to support the conclusions upon this subject given in Wood's Master & Servant, § 127. The servant, discharged in violation of the contract of hiring, *prima facie* is entitled to recover the agreed wages for the full term, subject to his duty to be reasonably diligent in seeking other employment of a similar kind, and, if obtained, the compensation received therefor is to be deducted from the aggregate agreed amount. "By other employment is meant employment of a character such as that in which he was employed, or not of a more menial kind." Id. § 127; Bennett v. Morton, 46 Minn. 113, 48 N. W. 678; Wilkinson v. Black, 80 Ala. 329; Farrell v. School District, 98 Mich. 43, 56 N. W. 1053; Costigan v. Mohawk & Hudson R. R. Co., 2 Denio (N. Y.) 609, 43 Am. Dec. 758; Fuchs v. Koemer, 107 N. Y. 529, 14 N. E. 445; Kramer v. Wolf Cigar Store, 99 Tex. 597; 91 S. W. 775; Leatherberry v. Odell, Ragan & Co. (C. C.) 7 Fed. 641.

Under the evidence in this case, we consider it a very close question whether the positions of manager and saleswoman in one of defendant's departments are so dissimilar that an employé, when tendered the same salary, is not required to accept either (Squire v. Wright, 1 Mo. App. 172), but have concluded that, if the master deliberately enters into a contract providing for the employment of another as manager, the employé has a right to insist upon retaining that grade, in the absence of any showing which would justify the master in reducing the rank of the servant. The grade of the employment may have been the inducing cause for this contract. When the change was proposed, the season for obtaining positions of that character had advanced, and while, perhaps, a very slight cause might have been sufficient to have justified defendant's action, we think, in the absence of a showing of some cause, the defendant must be held to have broken the contract.

***Order affirmed.***

## EX PARTE CHALMERS.

## IN RE EDWARDS.

**(Court of Appeal in Chancery, 1873. L. R., 8 Ch. App., 289.)**

This was an appeal from a decision of the Chief Judge in Bankruptcy.

On the 19th of October, 1870, Messrs. Hall Brothers & Shaw, of Widnes, contracted to sell to the bankrupt Edwards 330 tons of bleaching-powder, upon terms which were stated in the following letter written by their agent:—

"Dear Sir,—I have this day sold to you, on account of Messrs Hall Brothers & Shaw, Widnes, 330 tons of bleaching-powder, 35 per cent, at 8*s.* 6*d.* per cwt., free on board here, to be delivered thirty tons per month from February to December, 1871 both inclusive. To be packed in oak casks, and to be unbranded. Payment by cash in fourteen days from date of each delivery, deducting 2½ discount."

Under the terms of this contract the monthly instalments up to and including the October instalment were delivered and paid for. The November instalment was delivered, but was not paid for.

On the 20th of December, 1871, Edwards called a meeting of his creditors, at which he declared himself insolvent. Messrs. Hall & Co. attended this meeting, and on the 23d of December they wrote a letter to Edwards in the following terms:—

"We give you notice that we refuse to deliver any more bleaching-powder upon contract."

Accordingly, the December instalment of bleaching-powder was never delivered.

On the 1st of January, 1872, Edwards filed petition for liquidation by arrangement; but on the 19th of January it was resolved to proceed in bankruptcy, and he was adjudicated a bankrupt on the 8th of February following. Mr. Chalmers was subsequently appointed trustee.

Under these circumstances the trustee claimed the delivery of the thirty tons of bleaching-powder, and on Hall & Co. refusing to deliver them, he claimed, in the County Court of Liverpool, damages amounting to £150 against Hall & Co., for their breach of the contract. The County Court Judge having refused his application, the trustee applied to the Chief Judge in Bankruptcy, who affirmed the decision of the County Court Judge. The trustee now renewed the application before the Court of Appeal.

SIR G. MELLISH, L. J. The first question that arises is, what are the rights of a seller of goods when the purchaser becomes insolvent before the contract for sale has been completely performed? I am of opinion that the result of the authorities is this—that in such a case the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and that, if a debt

is due to him for goods already delivered, he is entitled to refuse to deliver any more till he is paid the debt due for those already delivered, as well as the price of those still to be delivered. In Bloxam v. Sanders, 4 B. & C. 941, 948, Bayley, J., says: "If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute, it is liable to be defeated if he becomes insolvent before he obtains possession. Whether default in payment when the credit expires will destroy his right of possession if he has not before that time obtained actual possession, and put him in the same situation as if there had been no bargain for credit, it is not now necessary to inquire, because this is a case of insolvency, and in a case of insolvency the point seems to be perfectly clear: Hanson v. Meyer, 6 East, 614. If the seller has despatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them *in transitu*. Why? Because the property is vested in the buyer so as to subject him to the risk of any accident; but he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats that right. And if this be the case after he has despatched the goods, and whilst they are *in transitu, a fortiori* is it when he has never parted with the goods, and when no *transitus* has begun. The buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price, or they may still act upon their right of property if anything unwarrantable is done to that right."

In Wentworth v. Outhwaite, 10 M. & W. 436, 452, Parke, B., says: "What the effect of stoppage *in transitu* is, whether entirely to rescind the contract or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down, is a point not yet finally decided, and there are difficulties attending each construction. If the latter supposition be adopted (as most of us are strongly inclined to think it ought to be, on the weight of authority), the vendor is entitled to retain the part actually stopped *in transitu* till he is paid the price of the whole, but has no right to retake that which has arrived at its journey's end. His right of lien on the part stopped is revested, but no more."

And in Griffiths v. Perry, 1 E. & E. 680, 688, Crompton, J., says: "A vendor's lien on specific goods sold is gone when a bill is given for the price, but revives if that bill is dishonored before he has parted with possession of the goods; or rather, he then acquires, not a lien, strictly speaking, but a right of withholding delivery, analogous to the right of an unpaid vendor to stop *in transitu*. Miles v. Gorton, 2 Cr. & M. 504, and many other cases, show that a part delivery of the goods does not do away with the right to withhold delivery of the rest, unless such part delivery is intended as a delivery of the whole. Then does

it make any difference here that the goods were not specific goods? I think that Valpy v. Oakeley, 16 Q. B. 941, is conclusive to show that it does not; and I consider that case to have been rightly decided. * * * When, then, is the position of the parties upon the bill becoming dishonored and the vendee insolvent? According to Lord Abinger's view of the law in Miles v. Gorton, the contract to deliver is thereby put an end to altogether. I am not inclined to go so far as to say that; but I think that, at all events, the vendor has a right, in such a state of things, to say to the vendee, 'I will not deliver the goods until I see that I shall get my price paid.' So, in the present case the plaintiff, or his assignees in bankruptcy, could not, I think, call upon the defendant to deliver the rest of the iron without paying him for it."

In both Bloxam v. Sanders and Wentworth v. Outhwaite there had been a sale of specific goods, not merely an agreement to sell goods to be delivered by instalments; but it would be strange if the right of a vendor, who had agreed to deliver goods by instalments were less than that of a vendor who had sold specific goods; and the judgment of Crompton, J., in Griffiths v. Perry, to which I have referred, shows clearly that there is no difference between the two cases.

I am, therefore, of opinion that, in the present case, when the insolvency of the purchaser had been declared, the vendor was not bound to deliver any more goods until the price of the goods delivered in November, as well as those which were to be delivered in December, had been tendered to him. The only question then is, what was the effect of the vendor's letter of the 23d of December? Mr. Russell argued that the refusal to perform a contract before the time arrives for its performance is in itself a breach of the contract. But that can only be the case where the person who refuses to perform the contract is not entitled to refuse. Had the vendor in this case a right to refuse? In my view that depends upon the question whether the insolvent purchaser was ready and willing to pay the price both of the November and December instalments. It is clear that he was not. I admit that the mere non-payment of the price of the November instalment did not of itself give a right to the vendor to refuse to perform the contract; and I agree with what was said by Crompton, J., in Griffiths v. Perry, that the mere fact of the insolvency of the purchaser did not put an end to the contract. It certainly would be very unfair if it had that effect; for if the insolvent had any beneficial contracts remaining, it would be hard on him as well as on his creditors if they could not have the benefit of those contracts. But if an insolvent has any such beneficial contracts, it is his duty to inform his creditors or the Court of Bankruptcy, if the case be within its jurisdiction, of the fact, and he can then apply to have a sufficient part of his assets applied for the completion of the contracts, and if the contracts were beneficial this would, without doubt, be allowed by his creditors or by the court. If this were done, and due notice were given to the vendor, I entertain no doubt that he would be

bound to complete the contract on his part, and would not be allowed to take advantage of the insolvency of the other party to put an end to the contract. But where the insolvent or his trustee does nothing of the kind, he practically gives notice to his creditors and those with whom he has contracted that he does not mean to pay any of his debts or perform any of his contracts. In the present case, Edwards, by calling his creditors together and informing them of his insolvency, practically gave notice to Hall & Co. that he did not mean to pay them either for the November or the December instalment. Indeed he could not pay for the November instalment without the consent of the other creditors; it would have been a fraudulent preference. Both parties knew that he had no intention of paying any further sum; and Hall & Co.'s letter of the 23d of December only means that on the assumption, which assumption they were, under the circumstances, justified in making, that the November and December instalments would not be paid, they refused to deliver any more bleaching-powder. In my opinion they had a right to say that, and they committed no breach of the contract by writing the letter. The appeal must therefore be dismissed with costs.[108]

[108] Ordinarily the insolvency of a party to an executory contract, or an adjudication that he is a bankrupt, does not constitute a breach of the contract, and the same is true of his discharge in bankruptcy if the statute does not make it apply to the contract. Phenix Nat'l Bank v. Waterbury, 197 N. Y. 161, 1910.

"The insolvency of one party to a contract does not release the other from its obligations, provided always the consideration promised, if money, be paid, or if the consideration be the note or other obligation of the insolvent, money be tendered in its place." Field, J., in Florence Mining Co. v. Brown, 124 U. S. 385, 389 (1888). See Pratt v. Mfg. Co., 115 Wis. 648 (1902).

"The only question of difficulty is concerning the duty of the solvent party to tender performance on the chance that the trustee in bankruptcy may wish to assume the contract. It has been held that bankruptcy does not discharge the solvent party from making such a tender. It seems, however, that this rule is a harsh one. In most cases contracts made by bankrupts are not carried out, and it seems a justifiable assumption for the solvent party in a particular case that the contract is not going to be carried out, in the absence of an assertion by the trustee in bankruptcy of his intention to adopt the contract." Williston on Sales, sec. 662, p. 1112.

In Hanna v. Florence Iron Co., 222 N. Y. 290, 295 (1918), Hiscock, C. J., for the majority of the court, said of receivers of a company which had become involved in financial difficulties: "It would not have been enough that after their appointments they did not repudiate and refuse to carry out said contract. It was necessary for them to do more than this and under authority of the court affirmatively indicate their election to proceed with the same and hold the other party to the obligations thereof."

On the rights of a trustee in bankruptcy with respect to executory contracts of the bankrupt, see L. R. A. 1917 F, 657, note.

In Hobbs et al. v. Columbia Falls Brick Co., 157 Mass. 109 (1892), Morton, J., in an action on a contract for the sale and delivery of brick, where the buyers had become insolvent and had made a voluntary assignment for the benefit of creditors, of which they gave notice to the seller, said for the court: "The jury

## CRUMMEY *v.* RAUDENBUSH.

(Supreme Court of Minnesota, 1893. 55 Minn. 426, 56 N. W. 1113.)

Action by George B. Crummey against S. W. Raudenbush for breach of contract of sale. Judgment was ordered for defendant, and plaintiff appeals. Affirmed.

MITCHELL, J. Stated according to its legal effect, the contract, upon which this action was brought, was an executory one for the sale of a piano by defendant to plaintiff, a part of the price being paid at the date of the contract, and the balance to be paid in quarterly installments from and after the date of the delivery of the piano. The action is for damages for a refusal to supply the piano according to the contract. It is not alleged that the balance of the price has ever been paid or tendered, the plaintiff standing on the terms of the contract that it was to be furnished on credit. Much of the answer consists of entirely irrelevant matters, the only defense alleged being that since the making of the contract the plaintiff had become, and still is, insolvent, and the only important question in the case is whether the defendant has established a defense justifying his refusal to deliver the piano on that ground. Where a vendor contracts to sell personal property on credit, he thereby agrees to waive his lien for the purchase money; but he does so on the implied condition that the vendee shall keep his credit good. If, therefore, before payment, and while the vendor still retains possession of the property, he discovers that the vendee is insolvent, he may hold the goods as

could properly have regarded the giving of the notice of the assignment as equivalent to the plaintiffs saying that they could not go on with the contract, especially when taken in connection with all the other circumstances. Morgan v. Bain, L. R., 10 C. P. 15; In re Steel Co., 4 Ch. Div. 108; Ex parte Stapleton, 10 Ch. Div. 586; Ex parte Chalmers, L. R., 8 Ch. App. 289.

"While the fact that the plaintiffs became insolvent after entering into the contract would of itself not have terminated the contract, it was competent for the jury to find that the notice which they gave to the defendant of the assignment, and their subsequent conduct [in failing to list the contract among their assets], justified the defendant in the assumption that they had abandoned the contract. The conduct of the assignees, assuming that the contract passed to them, does not put the matter in any better shape for the plaintiffs. It was their duty within a reasonable time after the assignment to elect whether to proceed or not with the contract, and to notify the defendant accordingly. Ex parte Chalmers, *supra;* Ex parte Stapleton, *supra.* They did not do this. On the contrary, when the defendant's treasurer inquired whether they were going to claim the contract, the reply which he got left on his mind the impression that they were not. They did nothing to indicate that they were going to claim it, and did not offer to pay or in any way secure the defendant for the performance of the contract. They continued to hold the property assigned to them till April 17th [more than three months after the notice of the assignment], without taking any action in reference to the contract, when they reconveyed it to the plaintiffs, who could derive no higher right from the assignees than they themselves possessed."

security for the price. The insolvency of the vendee does not rescind the contract, and is not of itself a ground for rescission. It merely entitles the vendor to demand payment in cash before parting with possession of the property. Courts have differed as to the name to be given to this right, but they all recognize its existence. Like the analogous right of stoppage *in transitu*, it grows out of the vendor's original ownership and dominion, and is founded on the equitable principle that one man's property ought not to go to pay another man's debt. The right is not limited to cases where the insolvency of the vendee occurred after the date of the contract, but exists also even where the insolvency existed at that time, but was not discovered by the vendor until afterwards; and, as the presumption of both reason and law is that, where a vendor sold goods on credit, he believed that the purchaser was solvent and able to pay, the burden is on the vendee to prove that the vendor had knowledge of the insolvency at the time, and entered into the contract with that knowledge. The right is not affected by the fact that part of the price has been paid; and it makes no difference whether the sale was of a specific article appropriated to the contract, or, as in this case, a contract to supply an article of a certain description. The term "insolvent" is not used in any technical sense. It is not necessary that the vendee should have been adjudged a bankrupt or insolvent, or have made an assignment of his property. Insolvency, as applied to this branch of law, means a general inability to pay one's debts or to meet one's financial engagements. Passing to the facts of this case, an examination of the evidence satisfies us that it amply justified the trial court in finding that the plaintiff was insolvent in the fullest sense of the term. It follows that defendant had a right to refuse to deliver the property without payment in full of the price, provided he properly asserted that right, and had not in some way waived it.

The contract was made in April, 1889. The evidence is practically undisputed that for some two years afterwards the defendant was not only able and ready to furnish the piano, but repeatedly urged the plaintiff to come and select an instrument, but that he failed to do so, giving as a reason his inability to meet the payments. Finally, in the winter or early spring of 1893, after defendant had ceased to represent that make of piano in the trade, and hence no longer kept it in stock, the plaintiff for the first time formally demanded the delivery of the instrument within a specified time. Failing in some efforts to induce plaintiff to accept a piano of another kind, the defendant required some assurance that, if he procured a piano of the kind called for by the contract, the plaintiff would be ready to pay for it in cash, or give a mortgage on the instrument to secure the purchase price. The plaintiff positively refused to agree to do either, and insisted on the terms of the original contract for the delivery of the property on credit, which defendant as positively refused to do. The evidence would fully justify the conclusion that the defendant was always willing to furnish the piano if plaintiff would pay

the price in cash, or secure it by mortgage on the property, and that his refusal merely went to the extent of refusing to furnish it on credit without security. But at no time during the negotiations did defendant assign the insolvency of the plaintiff as his reason for demanding cash or security, or give any special reason for doing so, except that when demanding the mortgage he said it was the custom of the trade. On this ground plaintiff's counsel invoke the doctrine that if a person, when called upon to deliver, places his right to retain the goods upon a ground inconsistent with a claim by virtue of a special lien, this is a waiver of the lien; and that on the trial he will not be permitted to rest his refusal on a different and distinct ground from that on which he claimed to retain the property at the time of the demand. An examination of the authorities on the subject, from the early case of Boardman v. Sill, 1 Camp. 410, down, satisfies us that they all proceed upon principles essentially of equitable estoppel, and limit the application of the doctrine invoked by counsel to cases where the refusal to deliver the property was put on grounds inconsistent with the existence of a lien, or on grounds entirely independent of it, without mentioning a lien. Thus it has been repeatedly held that a lien is not waived by mere omission to assert it as the ground of refusal, or by a general refusal to surrender the goods, without specifying the ground of it, except in certain cases, where the lien was unknown to the person making the demand, and that fact was known to the person on whom the demand was made. In such cases, if the ground of the refusal is one that can be removed, the other party ought in fairness to have an opportunity to do so. But no such state of facts exists in this case. While defendant did not specify his vendor's lien by reason of plaintiff's insolvency as the ground of his refusal, yet he never placed his refusal on any ground inconsistent with or independent of it. On the contrary, from first to last, what he insisted on was payment of, or security for, the price of the property; and the ground of his refusal was the refusal of plaintiff to give either. True, at the last, he announced his positive refusal to furnish the piano unless plaintiff would agree to give a chattel mortgage on it,—a thing which he had no legal right to insist on; but it is very evident that this demand on defendant's part was merely an alternative for payment in cash, which he had a right to demand, but which plaintiff had refused. The plaintiff probably had a right to be informed, as he was, that the property was held for the purchase money, for that was a matter which he could remedy by payment, but it would have availed him nothing to be informed that defendant's right to retain the property for the price was based on his insolvency, for that was a fact which he could not have changed. We can see nothing in defendant's acts of omission or commission that amounted to a waiver of his title, or which should estop him from now asserting it.

The rulings of the trial court on the admissibility of evidence as to plaintiff's insolvency were not always correct, or even consistent; but

the only error of which plaintiff could complain is that, in one instance, the defendant was allowed to give his opinion that plaintiff was insolvent. We think, however, that this was error without prejudice, for the reason that the other evidence, such as plaintiff's own admission of inability to pay; the inability of others, after search and inquiry, to find any property belonging to him; and that he was not in any business in this state, of which he had practically ceased to be a resident,—was such as, in the absence of any rebutting evidence, to require a finding that he was insolvent.

*Order affirmed.*[109]

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## WITHERS *v.* REYNOLDS.

(Court of King's Bench, 1831. 2 Barnewall & Adolphus, 882.)

ASSUMPSIT for not delivering straw to the plaintiff pursuant to agreement. At the trial before Lord Tenterden, C. J., the agreement proved was as follows:

"John Reynolds undertakes and agrees to supply Joseph Withers with wheat straw of good quality sufficient for his use as a stablekeeper, and delivered on his premises as above" (that is, at Long Acre, London) "till the 24th of June, 1830, at the sum of thirty-three shillings per load of thirty-six trusses, to be delivered at the rate of three loads in a fortnight, in a dry state and without damage. And the said J. W. hereby agrees to pay to the said J. R. or his order the sum of thirty-three shillings per load for each load of straw so delivered on his premises from this day till the 24th of June, 1830, according to the terms of this agreement.

(Signed.) "JOSEPH WITHERS, JOHN REYNOLDS."

The straw was regularly sent in from October 20th, 1829, when this agreement was made, till the end of January, 1830. At that time the plaintiff being in arrear for several loads of straw, the defendant called

[109] "We do not deny that under some circumstances a refusal to accept goods for a stated reason may operate as a waiver of other objections which might have been properly made. This may be so in cases where the silence of the purchaser and his conduct operate to mislead the seller and prevent him from protecting himself, in other words, where the conduct of the buyer would raise an estoppel against him. See Johnson v. Oppenheim, 55 N. Y. 280, 291; Smith v. Pettee, 70 N. Y. 13, 16-17. But when the buyer has absolutely rejected the goods, for whatever reason, his silence as to other objections which would justify his refusal to accept, when unaccompanied by conduct which may have misled and prejudiced the vendor, cannot be construed as a waiver of the buyer's right to insist on his plea of nonperformance on those grounds." Davis, J., in The List & Sons Co. v. Chase, 80 Oh. St. 42, 50-51 (1909).

In Green v. Edgar, 21 Hun (N. Y.) 414 (1880), it was held, "that a servant may be discharged by the master from his employment, provided a sufficient cause actually exists, whether the same was known to or assigned by the master at the time of the discharge or not."

upon him for the amount, and he thereupon tendered to the defendant £11 11s., being the price of all the straw delivered except the last load, saying that he should always keep one load in hand. The defendant objected to this; but was at length obliged to take the sum offered, and he then told the plaintiff that he would send no more straw unless it was paid for on delivery, and accordingly no more was sent. On the part of the defendant it was submitted that there must be a non-suit, inasmuch as the plaintiff, on his own showing, had not performed his own part of the contract, which was, in effect, to pay for each load on delivery. Lord Tenterden, C. J., was of this opinion, but directed a verdict for the plaintiff, reserving the point. A rule *nisi* was afterward obtained for entering a nonsuit.

LORD TENTERDEN, C. J. I am of opinion that the plaintiff is not entitled to recover. There is, I think, no doubt that by the terms of this agreement the plaintiff was to pay for the loads of straw as they were delivered. If that were not so, the defendant would have been liable to the inconvenience of giving credit for an indefinite length of time, and, in case of non-payment, bringing an action for a very large sum of money, which does not appear to have been intended by the contract. Then the only question is, whether upon the plaintiff's saying, "I will not pay for the goods on delivery" (for that was the effect of his communication to the defendant), it was incumbent on the defendant to go on supplying straw; and he clearly was not obliged to do so.

PARKE, J. The substance of the agreement was, that the straw should be paid for on delivery. The defendant clearly did not contemplate giving credit. When, therefore, the plaintiff said that he would not pay on delivery (as he did in substance, when he insisted on keeping one load in hand), the defendant was not obliged to go on supplying him.

TAUNTON, J. The contract does not say merely that so much straw shall be supplied at thirty shillings a load, but it adds, that the plaintiff shall pay that sum "for each load of straw delivered on his premises," from the date of the agreement till June 24th, 1830. That *prima facie* imports that each load was to be paid for as delivered.

PATTESON, J. If the plaintiff had merely failed to pay for any particular load, that, of itself, might not have been an excuse to the defendant for delivering no more straw, but the plaintiff here expressly refuses to pay for the loads as delivered; the defendant, therefore, is not liable for ceasing to perform his part of the contract.

*Rule absolute.*[110]

110 "The question then arises whether the persistent maintenance of an untenable construction of a contract on a matter of essential substance should be regarded as not consistent with a continuing intention to observe the contractual obligations. I think that the answer should be in the affirmative." Lord Parmoor in Morris v. Baron & Co., [1908] A. C. 1, 41.

"Making a demand that defendants give a guaranty for future fulfillment of

## HJORTH ET AL. *v.* ALBERT LEA MACHINERY CO.

(Supreme Court of Minnesota, 1919. 142 Minn. 387, 172 N. W. 488.)

Action by William Hjorth and others, co-partners under the name and style of Wm. Hjorth & Co., against the Albert Lea Machinery Company,

the contract, 'and without which we shall consider the contract at an end,' was a repudiation of it." Eakin, C. J., in Armsby v. Grays Harbor Commercial Co., 62 Ore. 173, 181 (1912).

"It is a familiar principle of law that a valid contract cannot be abrogated or modified unless both parties assent, and if one of the parties, when the other is not in default, manifests in unequivocal language his intention not to perform the contract unless it is modified, he breaches the contract, and is liable therefor." Roraback, J., in Trowbridge v. Jefferson Auto Co., 92 Conn. 569, 573 (1918).

In Chess & Wymond Co. v. La Crosse Box Co. (Wis.), 181 N. W. 313 (1921), there were two orders, treated as resulting in one contract for eleven cars of material and after six cars were delivered the buyer, who was to pay for each shipment within 30 days, but who insisted that the material was defective in quality, sent word through its bank that to make sure that the remaining cars would be shipped it would hold a balance of about $400 due to be paid on the arrival of another car. The seller first refused to go on with deliveries until paid and then wrote cancelling the contract. In affirming a judgment for the seller, in denial of any right of the buyer to counterclaim for failing to deliver, Rosenberry, J., for the court, said:

"Prior to the enactment of the Uniform Sales Act, the great weight of authority in this country sustained the proposition that failure to pay for one installment by the buyer excuses the seller from delivering the rest, and this generally without regard to the reason for the buyer's failure. 2 Williston on Contracts, 867, and cases there cited; 32 L. R. A. (N. S.) 2, note. The matter is thoroughly treated in 5 Page on Contracts, at paragraphs 3008-3022. A renunciation by one party of the terms of a contract of sale is, under all the authorities, a breach of the contract, and justifies the opposite party in treating the contract as broken and rescinding and avoiding it at his election. Murphy v. Sagola Lumber Co., 125 Wis. 363, 103 N. W. 1113; 5 Page on Contracts, 3013.

"In this case we are not dealing with the mere inadvertence of the buyer to make payment for an installment, nor with a situation where payment is delayed by reason of some controversy as to quantity or quality, but with a straight-out refusal to pay in accordance with the terms of the contract.

"This, as was held in Ambler v. Sanaiko, 168 Wis. 286, 170 N. W. 270, constitutes, as a matter of law, a breach of the contract. This is true both under the Uniform Sales Act and under the law as it stood prior to the passage of that act. While in a particular case, whether the breach by reason of the failure to deliver an installment or to accept and pay for it is a material breach or not, is generally a question for the jury (Dupont v. United Zinc Co., 85 N. J. Law, 416, 89 Atl. 992), where the conduct of the buyer amounts to a renunciation of the contract, the seller may elect to treat it as a breach.

"In this case the buyer not only refused payment, but proposed to hold the moneys then in his hands belonging to the plaintiffs as security for the further performance of the contract. This constituted a clear departure from the contract, and amounted, as was said in Murphy v. Sagola Lumber Co., to an announcement that the buyer had declined to carry out the contract according to its terms, and justified the plaintiff in its refusal to further perform. Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366. See, also,

with counterclaim by defendant. From a judgment allowing counterclaim, plaintiffs appeal. Affirmed.

HALLAM, J.[111] Plaintiff sued to recover $966.51, the price of merchandise sold and delivered. Defendant admitted the sale and the price, but set up two counterclaims, one for damages for failure to deliver other merchandise which plaintiff contracted to sell, and the other for breach of warranty of quality of some of the merchandise delivered.

As to the first counterclaim: Plaintiff is a manufacturer of tools at Jamestown, N. Y., and defendant is a jobber of tools at Albert Lea, Minn. From time to time during the year 1916 defendant ordered from plaintiff wrenches and pliers. Plaintiff accepted these orders. The contract relation was therefore complete. A large quantity of the articles so sold plaintiff failed to deliver. The court found that the failure was without excuse. * * *

4. Plaintiff claims that it was relieved of the obligation to make the deliveries which it failed to make because defendant had failed to pay for the merchandise that plaintiff had delivered, in accordance with the contract of sale. The contract provided that defendant should pay for all goods shipped within 30 days from the date of invoice. The orders for the goods involved were given and accepted between March 7 and October 13, 1916. During the early months payments were made in a manner satisfactory to plaintiffs. On the last day of September $126.67 fell due, and on October 13th $286.73 more. On this latter date plaintiff commenced making insistent demands for payment. On November 10th it informed defendant it would ship no more unless payment was made for indebtedness past due. Defendant refused to pay.

The attitude of both parties is expressed in the following correspondence: On November 7th defendant wrote:

"We absolutely refuse to make payment on your past-due invoice until you have made us shipments that will cut down the goods that we have coming from you." "In proportion to what your shipments of goods to us from this on cut down the unfilled orders, we would cut down your past due invoices to us by making remittances to you to apply on them." "We are willing to allow you to ship us goods from now on, draft with bill of lading."

In reply to this plaintiff wrote on November 10th:

"We are not going to ship you any goods with sight draft and bill of

Dow Chemical Co. v. Detroit Chemical Works, 208 Mich. 157, 175 N. W. 269. "The defendant having breached its contract and the plaintiff having elected to treat the contract as at an end, the defendant had no right to require further deliveries. It was therefore not entitled to recover on its counterclaim for failure to deliver."

But see West v. Bechtel, 125 Mich. 144 (1900), and compare Myer v. Wheeler, 65 Ia. 390 (1884).

[111] Parts of the opinion are omitted.

lading attached or any other way until you have taken care of the accounts that are now past due."

There is much conflict in authority as to the effect, in case of contracts calling for installment deliveries and installment payments, of failure of the vendee to pay an installment when due. We need discuss the law only as it pertains to the state of facts presented in this case. This court said in one case that the vendee's failure "without excuse" to make an instalment payment when due relieves the vendor from making further instalment deliveries. Robson v. Bohn, 27 Minn. 333, 346, 7 N. W. 357. See Palmer v. Breen, 34 Minn. 39, 24 N. W. 322; Beatty v. Howe Lumber Co., 77 Minn. 272, 79 N. W. 1013. See, also, Uniform Sales Act (Laws 1917, c. 465) § 45 (Gen. St. Supp. 1917, § 6015–45).

Such language would seem to mean that, though an instalment is due, failure to pay may be based on so just an excuse that it will not relieve the vendor from further deliveries, and this we conceive to be the law. But what is a just excuse for refusal to pay an instalment that has become due?

In Union Pressed Brick Co. v. Fultonham Brick & Drain Tile Co., 112 Fed. 920, 50 C. C. A. 615, the court pointed out one excuse which was considered sufficient when it said that failure to make an installment payment absolved the plaintiff from obligation to make further deliveries "unless such failure was justified by plaintiff's failure to fill orders required by the contract."

In Freeth v. Burr, L. R. 9 C. P. 208, the buyer's refusal to pay for the first instalment, claiming a right to withhold to cover loss due to delay in delivery, was held not to be such a refusal on his part to comply with the contract as to set the seller free.

In Myer v. Wheeler, 65 Iowa, 309, 21 N. W. 692, plaintiffs sold defendant ten carloads of barley. Defendants were to pay 70 cents per bushel for each carload when delivered. On receipt of the first carload, the defendants refused to pay, upon the ground that the barley was not equal to the sample, but stated that they had given the plaintiffs credit for 65 cents per bushel, and would withhold payment until the 10 cars were delivered, and urged shipment of the remainder. It was held that plaintiffs were liable for damages resulting from nondelivery of the remainder.

In Winchester et al. v. Newton, 2 Allen (Mass.) 492, a seller agreed to deliver timber within a certain time. The price was to be paid six months after delivery. Later the time for delivery of a part was extended. The buyer refused to pay for the part first delivered, contending that he was not liable to so pay until six months after the delivery of all. The court said the buyer was wrong in his contention, but there was no prospective refusal to pay for goods to be later shipped. The refusal to pay was based on what the buyer conceived to be the legal effect of the contract, and did not discharge the seller from his promise to deliver the later instalment.

In this case the court found in substance that defendant did not owe the full amount claimed. It had been subjected to substantial damages from plaintiff's default. Unless further deliveries were made, the damage would virtually wipe out plaintiff's claim. Defendant offered to pay cash on delivery for all goods to be subsequently shipped, and so far as appears it was solvent and able to do so. But plaintiff insisted on payment of the face of its account in full. Defendant was willing to do even this, waiving all damages for past default, if at that late day its orders could be filled. But it could get no satisfactory assurance as to future deliveries. It was not willing to pay plaintiff's demand in full with the prospect of being compelled to assert its claim for damages far from home. Our opinion is that defendant was justified in its position, and that plaintiff's refusal to make further delivery was a breach of contract and rendered plaintiff liable in damages. * * *

*Order affirmed.*

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## HOARE AND OTHERS *v.* RENNIE AND ANOTHER.

**(Court of Exchequer, 1859. 5 Hurlstone & Norman, 19.)**

Declaration. First count: That, on the 21st of April, A. D. 1857, the defendants agreed to buy of the plaintiffs, and the plaintiffs then agreed to sell to the defendants, about 667 tons of hammered Swede bar iron of certain sizes, then agreed on between the plaintiffs and the defendants, the said iron to be shipped from Sweden in the months of June, July, August, and September next, and in about equal portions each month, at 15*l.* 10*s.* per ton, delivered in good condition ex ship, on arrival in the port of London; and it was thereby then further agreed, amongst other things, that no shipment should exceed 150 tons, which should be in proportionate quantities of each size; but that, if any variation therein, it should not exceed one ton, and such variation to be corrected in subsequent shipments; that sellers should have the option of commencing shipments in May, 1857, and also of completing the whole by the end of July, 1857; that ships' names should be declared as soon as known to the sellers; that if any should be lost on the voyage the quantity lost should be null and void; and that there should be discount at the rate of two and a half per cent for cash against each delivery. Averments: That plaintiffs had done all things necessary on their part to be done, &c.; and though all things had happened and all times had elapsed to entitle them to have the said iron accepted, yet the defendants have wholly refused to accept the said iron or any part thereof, or to pay for the same according to the terms of the said agreement, whereby the plaintiffs lost divers profits, &c.

Second count: That on the 21st of April, A. D. 1857, the plaintiffs agreed to sell to the defendants, and the defendants agreed to buy of

the plaintiffs, about 667 tons of hammered iron, upon the terms in the first count mentioned; and that from the time of the making the agreement continually until after the refusal, notice, and discharge hereinafter mentioned, the plaintiffs did and performed all conditions precedent, and all things were done, and all times elapsed, necessary to entitle them to the performance of the agreement on the part of the defendants; and that at and after the refusal, notice, and discharge hereinafter mentioned, they were ready and willing to perform the agreement on their part; and although the plaintiffs, in part performance of said agreement, did, in June, A. D. 1857, ship a certain portion of the said iron, and did, in further performance of such agreement, and within a reasonable time after such shipment, tender to the defendants, and offered to deliver to them the said portion of iron so shipped as aforesaid, yet the defendants refused to accept the said portion of iron so tendered and offered, and thenceforth wholly refused to accept the same or any of the residue of the said iron, and gave notice to the plaintiffs that they would not accept the residue of the said iron; and the defendants thenceforth wholly refused to observe the agreement on their part, and wholly discharged the plaintiffs from the further execution and performance of the agreement by them; and wholly waived such execution and performance, whereby, etc.

Third plea to the first count. That the plaintiffs did not avail themselves of the option given to them by the agreement of commencing shipments of the iron in the month of May; and that the plaintiffs in the month of June shipped from Sweden, on board a certain vessel, a quantity of the said iron so contracted for, to-wit, 21 tons, 6 cwt., 1 qr., being a much less quantity than was required to be shipped during the said month of June, according to the terms of the said contract, and gave notice to the defendants that the said iron was to be part of the iron so agreed to be sold as aforesaid; that the plaintiffs failed to complete the shipment for the month of June according to the terms of the contract, and were never ready and willing to deliver to the defendants such a quantity of iron, shipped from Sweden in June, as is specified in the said contract, although none of the iron was lost during the voyage; and were not ready and willing to deliver to the defendants the said small quantity of iron which had been shipped during the month of June, until after the month of June had elapsed, and until after the defendants had notice that the plaintiffs were not ready and willing, and were unable to fulfil their part of the said agreement with reference to the quantity of iron to be shipped in June; and that the defendants, having notice of all the premises in this plea mentioned, did afterward refuse to receive the said quantity of iron so shipped as aforesaid during the month of June, and did give notice to the plaintiffs that they refused to receive the residue of the said iron.

The sixth plea, to the second count, was similar to the third plea.

The plaintiffs demurred to the third and sixth pleas, and the defendants joined in demurrer.

POLLOCK, C. B.[112] We are all agreed that the defendants are entitled to judgment upon the pleas. The foundation of my opinion is shortly this, that a man has no right to say that which is a breach of an agreement is a performance of it. On that ground this case is distinguishable from almost every other which has been cited. It does not turn upon any question of condition precedent. The only question is whether, if a man who is bound to perform his part of a contract does not do so, he can enforce the contract against another party. The plaintiffs contracted with the defendants to ship a large quantity of iron in June, July, August, and September, about one-fourth part in each month; but instead of shipping about 160 tons in June, as they should have done, they shipped little more than twenty tons as a performance of the contract. * * * The only question we have to deal with is whether, on a contract like this, if the sellers at the outset send a less quantity than they are bound to send, so as to begin with a breach, they can compel the purchasers to accept and pay for that, the sending of which was a breach and not a performance of the agreement. The argument on the part of the plaintiffs is that this was not a condition precedent. I do not think that is the test. It was said that if the plaintiffs had sent the one-hundredth part instead of one-fourth part in June, the defendants' remedy would have been by a cross action. The case was put of the plaintiff's sending a short quantity after one shipment had been accepted. Possibly that might have made a difference. Where a person has derived a benefit from a contract, he cannot rescind it because the parties cannot be put in *statu quo*. Probably, therefore, in such case, the defendants could not have repudiated the contract and must have been left to their cross action. Here, however, the defendants refused to accept the first shipment, because, as they say, it was not a performance but a breach of the contract. Where parties have made an agreement for themselves, the courts ought not to make another for them. Here they say that, in the events that have happened, one fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset the plaintiffs failed to tender the quantity according to the contract: they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for. Therefore the pleas are an answer to the action.

CHANNELL, B. On the pleas the defendants are entitled to judgment. The substantial question is, whether the defendants were bound to ac-

[112] The opinion of Watson, B., and portions of the opinions of Pollock, C. B., and Channel, B., are omitted.

cept the portion which was tendered at the time at which it was tendered. That does not depend on the month in which it was tendered, but on the position of the parties at the time of the tender, by which the defendant was placed in the same situation as if, at the time of the tender, notice had been given to him that there would be no further shipment in all June. I think that there was not in the month of June such a shipment as was made necessary by the contract. * * * There are options to vary the time of performance, which gave the plaintiffs the right to accelerate but not to delay it. The plaintiffs have not performed their part of the contract, and the defendants have not accepted anything which can be construed as an imperfect execution of the contract by the plaintiffs. The defendants were thus at liberty to rescind the contract, and our judgment must therefore be for the defendants upon the demurrer to the pleas.

*Judgment for the defendants.*[113]

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## THE MERSEY STEEL AND IRON CO. (LIMITED), APPELLANT, *v.* NAYLOR, BENZON, & CO., RESPONDENTS.

**(House of Lords, 1884. 9 App. Cas. 434.)**

Appeal from an order (dated June 13, 1882) of the Court of Appeal reversing an order of Lord Coleridge, C. J.

The respondents bought from the appellant company 5,000 tons of steel of the company's make to be delivered 1,000 tons monthly commencing January, 1881, payment within three days after receipt of shipping documents. In January the company delivered part only of that month's instalment, and in the beginning of February made a further delivery. On the 2d of February, shortly before payment for these deliveries became due, a petition was presented to wind up the company. The respondents, *bonâ fide,* under the erroneous advice of their solicitor that they could not without leave of the court safely pay pending the petition, objected to make the payment then due unless the company obtained the sanction of the court, which they asked the company to obtain. On the 10th of February the company informed the respondents that they should consider the refusal to pay as a breach

[113] But in Simpson v. Crippen, L. R. 8 Q. B. 14 (1872), where under a contract by defendants to supply 6,000 to 8,000 tons of coal in equal monthly quantities for twelve months to be put in plaintiffs' wagons, and where because the plaintiffs only took 158 tons during the first month the defendants sent them notice that the contract was cancelled, a recovery by the plaintiffs was upheld. Though, as judges of a court of co-ordinate jurisdiction, they could not overrule Hoare v. Rennie, two of the judges wondered at it. Blackburn, J., said: "It is, however, difficult to understand upon what principle Hoare v. Rennie was decided," and Lush, J., said: "I cannot understand the judgments in Hoare v. Rennie."

of contract, releasing the company from any further obligations. On the 15th of February an order was made to wind up the company by the court. A correspondence ensued between the respondents and the liquidator, in which the respondents claimed damages for failure to deliver the January instalment, and a right to deduct those damages from any payments then due; and said that they always had been and still were ready to accept such deliveries and make such payments as ought to be accepted and made under the contract, subject to the right of set-off. The liquidator made no further deliveries, and brought an action in the name of the company for the price of the steel delivered. The respondents counter-claimed for damages for breaches of contract for non-delivery. The referee having found that the damages due to the defendants for non-delivery amounted to £1723, being in excess of the £1713 admitted to be due to the plaintiffs for the price of the steel delivered, the Court of Appeal, by an order dated the 13th of April, 1883, gave judgment for the defendants with costs. The plaintiffs appealed from this order also.

EARL OF SELBORNE, L. C.[114] * * * I am content to take the rule as stated by Lord Coleridge in Freeth v. Burr, L. R. 9 C. P. 208, which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part;[115] and I think that nothing more is necessary in the pres-

[114] The opinion of Lord Bramwell and parts of the opinions of the Earl of Selborne, L. C., and of Lord Blackburn are omitted.

[115] In Freeth v. Burr, L. R. 9 C. P. 208 (1874), the defendant contracted to sell to plaintiff 250 tons of pig iron at 56 s. per ton, one-half to be delivered in two weeks and the remainder in four weeks, payment to be net cash 14 days after delivery of each parcel. The market was rising and despite repeated urgings by plaintiffs the defendant did not complete delivery of the first 125 tons for about six months. The plaintiffs, under an erroneous impression that they were entitled to set off against the defendant's claim for the price any loss which they might incur in case the defendant should fail to deliver the remainder of the iron, refused to pay for the half delivered. The defendant then sued for the purchase price of the iron delivered and the plaintiffs made payment. The plaintiffs then demanded the delivery of the rest of the iron, and on defendant's refusal to comply, brought this action. After a verdict directed for the plaintiffs with leave to defendant to move to enter a non-suit, the Court of Common Pleas upheld the judgment for the plaintiffs. Lord Coleridge, C. J., said that "in cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think

ent case than to look at the conduct of the parties, and see whether anything of that kind has taken place here. Before doing so, however, I must say one or two words in order to show why * * * to me it is plain beyond the possibility of controversy, that upon the proper construction of this contract it [the payment by the respondents for the iron delivered] is not and cannot be a condition precedent. The contract is for the purchase of 5,000 tons of steel blooms of the company's manufacture; therefore it is one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract, as to the time of delivery, "Delivery 1,000 tons monthly commencing January next;" and as to the time of payment, "Payment, net cash within three days after receipt of shipping documents;" but that does not split up the contract into as many contracts as there shall be deliveries for the purpose, of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract, that it is to be one contract for the purchase of that quantity of iron, to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfilment of the unfulfilled part of the contract, by the delivery of the undelivered steel.

But quite consistently with that view, it appears to me, according to the authorities and according to sound reason and principle, that the parties might have so conducted themselves as to release each other from the contract, and that one party might have so conducted himself as to leave it at the option of the other party to relieve himself from a future performance of the contract. The question is whether the facts here justify that conclusion? Now the facts relied upon, without reading all the evidence, are these. The company at the time when the money was about to become payable for the steel actually de-

the decisions in these cases must rest. There has been some conflict among them. But I think it may be taken that the fair result of them is as I have stated—viz., that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free. That is the true principle on which Hoare v. Rennie, 5 H. & N. 19, was decided, whether rightly or not upon the facts, I will not presume to say. Where by the non-delivery of part of the thing contracted for the whole object of the contract is frustrated, the party making default renounces on his part all the obligations of the contract."

And Keating, J., said: "It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do that will justify the other in repudiating the contract; but there must be an absolute refusal to perform his part of the contract."

livered fell into difficulties, and a petition was presented against them. There was a section in the Companies Act, 1862 (§ 153), which appeared to the advisers of the purchasers to admit of the construction, that until in those circumstances the petition was disposed of by an order for the company to be wound up or otherwise, there would be no one who could receive, and could give a good discharge for, the amount due. There is not, upon the letters and documents, the slightest ground for supposing either that the purchasers could not pay, or that they were unwilling to pay, the amount due; but they acted as they did, evidently *bona fide*, because they doubted, on the advice of their solicitor, whether that section of the act, as long as the petition was pending, did not make it impossible for them to obtain the discharge to which they had an unquestionable right. And therefore the case which I put during the argument is analogous to that which according to the advice they received they supposed to exist—namely, the case of a man who has died between the delivery and the time when payment ought to be made, he being the only person to whom payment is due; and, of course, until there is a legal personal representative of that person no receipt can be given for the money. By the Act of Parliament, in the event of a winding-up order being made, it would date from the time when the petition was presented; and this clause, which no doubt, according to its true construction, only deals with alienations of the property of the company, was supposed by the solicitor of the purchasers to make it questionable whether the payment of a debt due to the company, to the persons who if there had been no petition would have had a right to receive it, might not be held, in the event of a winding-up order being made, to be a payment of the property of the company to a wrong person and therefore an alienation. I cannot ascribe to their conduct, under these circumstances, the character of a renunciation of the contract, a repudiation of the contract, a refusal to fulfil the contract. It is just the reverse; the purchasers were desirous of fulfilling the contract; they were advised that there was a difficulty in the way, and they expressed anxiety that that difficulty should be as soon as possible removed, by means which were suggested to them, and which they pointed out to the solicitors of the company. The company evidently took up the attitude, in that state of things, of treating the default as one which released them from all further obligation. On the 10th of February, which was before the winding-up order was made, and while that state of things still continued, the company by their secretary wrote to say that they thought (being so far correct and thinking rightly) that the objection was not well founded in law; and they added: "We shall therefore consider your refusal to pay for the goods already delivered as a breach of contract on your part and as releasing us from any further obligations on our part." I think that they were wrong in that conclusion, and that there is no principle deducible from any of the authorities which supports that view of such—I hardly like to call it

a refusal—of such a demur, such a delay or postponement, under those circumstances.

The company, until they were wound up, never receded from that position which they took up on February 10th, 1881; and it appears to me to be clear that the liquidator adopted it, and never departed from it, and that the repudiation of the contract on insufficient grounds on the part of the company, which had taken place while the petition was pending and before the winding-up order was made, was adhered to after the winding-up order was made, on the part of the liquidator. On the other hand, it seems to me that, fairly and reasonably considered, the conduct of the respondents was justifiable. Upon the 17th of February, 1881, after the making of the winding-up order, they state that there are instalments which ought to have been delivered, but which have not been delivered, in respect of which they would have a claim for damages, and that they apprehend that they would have a right to deduct those damages from any payment then due from them; and, according to the view which has been taken in the Court of Appeal of the effect of the 10th section of the Act of 1875, and in which view I believe your Lordships agree, that was the right way of looking at the matter. Then the respondents go on to say, that they are prepared to accept all deliveries which the liquidator may make under the contract, and to pay everything due, only requesting that those payments may be considered as made upon this understanding, in substance, that the right to the set-off which exists in law for the damages shall not be prejudiced —a perfectly reasonable, defensible, and justifiable proposal. And the solicitor who writes the letter adds, "Or I think it probable that my clients would consent to accept delivery now and waive the damages," a thing which in a later letter they express their willingness to do. In my judgment, they have not in any portion of the proceeding acted so as to show an intention to renounce or to repudiate the contract, or to fail in its performance on their part.

Therefore I think that the judgment of the court below is right, and that this appeal should be dismissed with costs, and I so move your Lordships.

LORD BLACKBURN. * * * As to the first point, I myself have no doubt that Withers v. Reynolds, 2 B. & Ad. 882, correctly lays down the law to this extent, that where there is a contract which is to be performed in future, if one of the parties has said to the other in effect, "If you go on and perform your side of the contract I will not perform mine," (in Withers v. Reynolds it was, "You may bring your straw, but I will not pay you upon delivery as under the contract I ought to do. I will always keep one bundle of straw in hand so as to have a check upon you"), that in effect amounts to saying, "I will not perform the contract." In that case the other party may say, "You have given me distinct notice that you will not perform the contract. I will

not wait until you have broken it, but I will treat you as having put an end to the contract, and if necessary I will sue you for damages, but at all events I will not go on with the contract." That was settled in Hochster v. De la Tour, 2 E. & B. 678, in the Queen's Bench, and has never been doubted since; because there is a breach of the contract although the time indicated in the contract has not arrived. That is the law as laid down in Withers v. Reynolds. That is, I will not say the only ground of defence, but a sufficient ground of defence. * * *

The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to Pordage v. Cole, 1 Wms. Saund. 548 (Ed. 1871), if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, "I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct." But Mr. Cohen [of counsel for appellants] contended that whenever there was a breach of the contract at all (I think he hardly continued to contend that after a little while, but he said whenever there was a breach of a material part of the contract) it necessarily went to the root of the matter. I cannot agree with that at all. I quite agree that when there were a certain number of tons of the article delivered, it was a material part of the contract that the man was to pay, but it was not a part of the contract that went to he root of the consideration in the matter. There was a delay in fulfilling the obligation to pay the money, it may have been with or without good reason (if that would have made any difference), but it did not go to the root or essence of the contract, nor do I think that there is any sound principle upon which it could do so. I repeatedly asked Mr. Cohen whether or not he could find any authority which justified him in saying that every breach of a contract, or even a breach which involved in it the non-payment of money which there was an obligaton to pay, must be considered to go to the root of the contract, and he produced no such authority. There are many cases in which the breach may do so; it depends upon the construction of the contract. With regard to the case of Hoare v. Rennie, 5 H. & N. 19, it has been said that the Chief Baron there went so far as to say that it was the essence and substance of the contract that the whole of the 166 tons of iron, and no less, should be delivered. If it was so, it would follow that when in the present case the January shipment had not been made, and the company could only deliver part of the quantity, it went to the essence of the contract. The question depends upon whether the whole and no less is the essence of it. * * *

The circumstances being as I have said, the contract not being such as to make this payment a condition precedent, or to make punctual payment for one lot of iron which has been delivered a matter causing the contract to deliver other iron afterwards to be a dependent contract,

being of opinion that that is not the meaning of the contract, I think that the decision of the Court of Appeal was right.

LORD WATSON. My Lords, I am of the same opinion. I think it would be impossible for your Lordships to sustain the appeal unless your Lordships are prepared to hold that any departure whatever from the terms of the contract by one of the parties must be sufficient to entitle the other to set it aside. I think the correspondence shows that the delay in making payment of that part of the contract price which ought to have been paid on the 5th of February, was due to these two causes; in the first place, a very natural desire on the part of the purchasers to see that they were safe against being called upon to make second payment of the price, and in the second place an obvious desire on the part of the sellers to get rid of the contract altogether. There was no controversy as to the terms of the contract. There was no unwillingness on the part of the respondents to pay the price due under the contract, except for the circumstance that there had been a change in the constitution of the company, because they had gone into liquidation on the 2d of February and the respondents' firm were advised by their law agent that they were not in safety to pay until the liquidator was appointed.

That brings us down to the 15th of February. At that date this had taken place, the company had given notice on the 10th of February of their resolution to repudiate the contract in consequence of the failure of the respondents to pay, and to that repudiation the liquidator, I think, consistently adhered. In these circumstances it appears to me that the judgment appealed from must be affirmed.

*Orders appealed from affirmed and appeal dismissed with costs.*[116]

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## NORRINGTON *v.* WRIGHT.

**(Supreme Court of the United States, 1885. 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366.)**

This was an action of *assumpsit,* brought by Arthur Norrington, a citizen of Great Britain, trading under the name of A. Norrington &

[116] In Cornwall v. Henson, [1900] 2 Ch. 298, 304, Collins, L. J., said that since Mersey Steel & Iron Co. v. Naylor "the law is now clear that the breach of one stipulation [in a contract] does not necessarily carry with it even an implication of an intention to repudiate the whole contract. It may do so if the circumstances lead to the inference; but the further the parties have proceeded in the performance of the contract the less likely is it that by the breach of one stipulation by one party he should intend to declare his incapacity to perform the contract, or his intention not to carry it out."

See C. B. Morison, Rescission of Executory Contracts for Partial Failure in Performance, 29 Law Quar. Rev. 61.

Co., against James A. Wright and others, citizens of Pennsylvania, trading under the name of Peter Wright & Sons, upon the following contract:

"PHILADELPHIA, January 19, 1880.

"Sold to Messrs. Peter Wright & Sons, for account of A. Norrington & Co., London, five thousand (5000) tons of old T iron rails, for shipment from a European port or ports, at the rate of about one thousand (1000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1st, 1880, at forty-five dollars ($45) per ton of 2240 pounds custom-house weight, ex ship Philadelphia. Settlement cash on presentation of bills accompanied by custom-house certificate of weight. Sellers to notify buyers of shipments with vessels' names as soon as known by them. Sellers not to be compelled to replace any parcel lost after shipment. Sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia.

"EDWARD J. ETTING, Metal Broker."

The declaration contained three counts. The first count alleged the contract to have been for the sale of about 5000 tons of T iron rails, to be shipped at the rate of about 1000 tons a month, beginning in February, and ending in July, 1880. The second count set forth the contract *verbatim*. Each of these two counts alleged that the plaintiffs in February, March, April, May, June, and July shipped the goods at the rate of about 1000 tons a month, and notified the shipments to the defendants; and further alleged the due arrival of the goods at Philadelphia, the plaintiff's readiness to deliver the goods and bills thereof, with custom-house certificates of weight, according to the contract, and the defendants' refusal to accept them. The third count differed from the second only in averring that 400 tons were shipped by the plaintiff in February and accepted by the defendants, and that the rest was shipped by the plaintiffs at the rate of about 1000 tons a month in March, April, May, June, and July. The defendants pleaded *non assumpsit*. The material facts proved at the trial were as follows:

The plaintiff shipped from various European ports 400 tons by one vessel in the last part of February, 885 tons by two vessels in March, 1571 tons by five vessels in April, 850 tons by three vessels in May, 1000 tons by two vessels in June, and 300 tons by one vessel in July, and notified to the defendants each shipment.

The defendants received and paid for the February shipment upon its arrival in March, and in April gave directions at what wharves the March shipments should be discharged on their arrival; but on May 14th, about the time of the arrival of the March shipments, and having been then for the first time informed of the amounts shipped in February, March, and April, gave Etting written notice that they should decline to accept the shipments made in March and April, because

none of them were in accordance with the contract; and, in answer to a letter from him of May 16th, wrote him on May 17th as follows: "We are advised that what has occurred does not amount to an acceptance of the iron under the circumstances and the terms of the contract. You had a right to deliver in parcels, and we had a right to expect the stipulated quantity would be delivered until the time was up in which that was possible. Both delivering and receiving were thus far conditional on there being thereafter a complete delivery in due time and of the stipulated article. On the assumption that this time had arrived, and that you had ascertained that you did not intend to, or could not, make any further deliveries for the February and March shipments, we gave you the notice that we declined accepting those deliveries. As to April, it is too plain, we suppose, to require any remark. If we are mistaken as to our obligation for the February and March shipments, of course we must abide the consequences; but if we are right, you have not performed your contract, as you certainly have not for the April shipments. There is, then, the very serious and much debated question, as we are advised, whether the failure to make the stipulated shipments in February or March has absolved us from the contract. If it does, we of course will avail ourselves of this advantage."

On May 18th Etting wrote to the defendants, insisting on their liability for both past and future shipments, and saying, among other things: "In respect to the objection that there had been a complete delivery in due time of the stipulated article, I beg to call your attention to the fact that while the contract is for 5000 tons, it expressly stipulates that deliveries may be made during six months, and that they are only to be at the rate of about 1000 tons per month." "As to April, while it seems to me 'too plain to require any remark,' I do not see how it can seem so to you, unless you intend to accept the rails. If you object to taking all three shipments made in that month, I shall feel authorized to deliver only two of the cargoes, or, for that matter, to make the delivery of precisely 1000 tons. But I think I am entitled to know definitely from you whether you intend to reject the April shipments, and, of so, upon what ground, and also whether you are decided to reject the remaining shipments under the contract. You say in your last paragraph that you shall avail yourselves of the advantage, if you are absolved from the contract; but as you seem to be in doubt whether you can set up that claim or not, I should like to know definitely what is your intention."

On May 19th the defendants replied: "We do not read the contract as you do. We read it as stipulating for monthly shipments of about 1000 tons, beginning in February, and that the six months' clause is to secure the completion of whatever had fallen short in the five months. As to the meaning of 'about,' it is settled as well as such a thing can be; and certainly neither the February, March, nor April shipments are

within the limits." "As to the proposal to vary the notices for April shipments, we do not think you can do this. The notice of the shipments, as soon as known, you were bound to give, and cannot afterward vary it if they do not conform to the contract. Our right to be notified immediately that the shipments were known is as material a provision as any other, nor can it be changed now in order to make that a performance which was no performance within the time required." "You ask us to determine whether we will or will not object to receive further shipments because of past defaults. We tell you we will if we are entitled to do so, and will not if we are not entitled to do so. We do not think you have the right to compel us to decide a disputed question of law to relieve you from the risk of deciding it yourself. You know quite as well as we do what is the rule and its uncertainty of application."

On June 10th Etting offered to the defendants the alternative of delivering to them 1000 tons strict measure on account of the shipments in April. This offer they immediately declined.

On June 15th Etting wrote to the defendants that two cargoes, amounting to 221 tons, of the April shipments, and two cargoes, amounting to 650 tons, of the May shipments (designated by the names of the vessels), had been erroneously notified to them, and that about 900 tons had been shipped by a certain other vessel on account of the May shipments. On the same day the defendants replied that the notification as to April shipments could not be corrected at this late date, and after the terms of the contract had long since been broken.

From the date of the contract to the time of its rescission by the defendants, the market price of such iron was lower than that stipulated in the contract, and was constantly falling. After the arrival of the cargoes, and their tender and refusal, they were sold by Etting, with the consent of the defendants, for the benefit of whom it might concern.

At the trial the plaintiff contended, first, that under the contract he had six months in which to ship the 5000 tons, and any deficiency in the earlier months could be made up subsequently, provided that the defendants could not be required to take more than 1000 tons in any one month. Second, that if this was not so, the contract was a divisible contract, and the remedy of the defendants for a default in any month was not by rescission of the whole contract, but only by deduction of the damages caused by the delays in the shipments on the part of the plaintiff.

But the court instructed the jury that if the defendants, at the time of accepting the delivery of the cargo paid for, had no notice of the failure of the plaintiff to ship about 1000 tons in the month of February, and immediately upon learning that fact gave notice of their intention to rescind, the verdict should be for them.

The plaintiff excepted to this instruction, and, after verdict and judgment for the defendants, sued out this writ of error.

GRAY, J.[117] In the contract of merchants time is of the essence.[118] The time of shipment is the usual and convenient means of fixing the prob-

117 Parts of the opinion are omitted.

118 In Hartley v. Hyams, [1920] 3 K. B. 475, 484, McCardie, J., said: "Now if time for delivery be of the essence of the contract, as in the present case, it follows that a vendor who has failed to deliver within the stipulated period cannot prima facie call upon the buyer to accept delivery after that period has expired. He has himself failed to fulfill the bargain and the buyer can plead the seller's default and assert that he was not ready and willing to carry out his contract. That this is so seems clear. It is, I take it, the essential juristic result when time is of the essence of the contract. This is cogently shown by the judgment in Plevins v. Downing, 1 C. P. D. 220, where the plaintiff vendors agreed to deliver iron in the month of July; as Brett, J., put it (Ibid. 226), when delivering the opinion of the court: 'The day after the end of July they could not have insisted on an acceptance of iron then offered to the defendant.'"

But the words "time is of the essence" in Justice Gray's sentence do not bear that literal meaning. As Professor Williston has pointed out, "it is evident that what is meant is that, the element of time is material, not that a day's delay will be fatal." 2 Williston on Contracts, p. 1624, note 72.

In Beck & Pauli Lithographing Co. v. Colorado Milling & Elevator Co., 52 Fed. 700, 702-703 (1892), Sanborn, J., said: "It is a general principle governing the construction of contracts that stipulations as to the time of their performance are not necessarily of their essence, unless it clearly appears in the given case from the express stipulations of the contract or the nature of its subject-matter that the parties intended performance within the time fixed in the contract to be a condition precedent to its enforcement, and, where the intention of the parties does not so appear, performance shortly after the time limited on the part of either party will not justify a refusal to perform by the party aggrieved, but his only remedy will be an action or counterclaim for the damages he has sustained from the breach of the stipulations. In the application of this principle to the cases as they have arisen, in the promulgation of the rules naturally deduced from it, and in the assignment of the various cases to the respective classes in which the stipulation as to time of performance is, or is not, deemed of the essence of the contract, the controlling consideration has been, and ought to be, to so decide and classify the cases that unjust penalties may not be inflicted, nor unreasonable damages recovered. Thus, in the ordinary contract of merchants for the sale and delivery, or the manufacture and sale, of marketable commodities within a time certain, it has been held that performance within the time is a condition precedent to the enforcement of the contract, and that a failure in this regard would justify the aggrieved party in refusing performance at a later day. Norrington v. Wright, 115 U. S. 188-203, 6 Sup. Ct. 12. This application of the general principle commends itself as just and reasonable, on account of the frequent and rapid interchange and use of such commodities made necessary by the demands of commerce, and because such goods, if not received in time by the vendee, may usually be sold to others by the vendor at small loss, and thus he may himself measure the damages he ought to suffer from his delay by the difference in the market value of his goods. On the other hand, it has been held that an express stipulation in a contract for the construction of a house, that it should be completed on a day certain, and that, in case of failure to complete it within the time limited, the builder would forfeit $1,000, would not justify the owner of the land on which the house was constructed in refusing to accept it for a breach of this stipulation when the house was completed

able time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law —that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract; Behn v. Burness, 3 B. & S. 751; Bowes v. Shand, 2 App. Cas. 455; Lowber v. Bangs, 2 Wall. 728; Davison v. Von Lingen, 113 U. S. 40.

The contract sued on is a single contract for the sale and purchase of 5000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities of iron. Mersey Co. v. Naylor, 9 App. Cas. 434, 439. The further provision, that the sellers shall not be compelled to replace any parcel lost after shipment, simply reduces, in the event of such a loss, the quantity to be delivered and paid for.

The times of shipment, as designated in the contract, are "at the rate of about 1000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1st, 1880." These words are not satisfied by shipping one-sixth part of the 5000 tons, or about 833 tons,

shortly after the time fixed, nor even in retaining the penalty stipulated in the contract, but that he must perform his part of the contract, and that he could retain from or recover of the builder the damages he sustained by the delay and those only. Tayloe v. Sandiford, 7 Wheat. 13, 17. This application of the general rule is equally just and reasonable. The lumber and material bestowed on a house by a builder become of little comparative value to him, while they are ordinarily of much greater value to the owner of the land on which it stands, and to permit the latter to escape payment because his house is completed a few days later than the contract requires would result in great injustice to the contractor, while the rule adopted fully protects the owner, and does no injustice to any one. The cases just referred to illustrate two well-settled rules of law which have been deduced from this general principle, and in accordance with which this case must be determined. They are:

"In contracts of merchants for the sale and delivery or for the manufacture and sale of marketable commodities a statement descriptive of the subject-matter, or some material incident, such as the time of shipment, is a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. Norrington v. Wright, 115 U. S. 188, 203, 6 Sup. Ct. 12; Rolling Mill v. Rhodes, 121 U. S. 255, 261, 7 Sup. Ct. 882. But in contracts for work or skill, and the materials upon which it is to be bestowed, a statement fixing the time of performance of the contract is not ordinarily of its essence, and a failure to perform within the time stipulated, followed by substantial performance after a short delay, will not justify the aggrieved party in repudiating the entire contract, but will simply give him his action for damages for the breach of the stipulation. Tayloe v. Sandiford, 7 Wheat. 13, 17; Hambly v. Railroad Co., 21 Fed. 541, 544, 554, 557."

in each of the six months which begin with February and end with July. But they require about 1000 tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in the month of July. The contract is not one for the sale of a specific lot of goods, identified by independent circumstances, such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer, in a certain mill, in which case the mention of the quantity, accompanied by the qualification of "about," or "more or less," is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. But the contract before us comes within the general rule: "When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations, arising from slight and unimportant excesses or deficiencies in number, measure, or weight." Brawley v. United States, 96 U. S. 168, 171-172.[119]

[119] "It will be noticed that defendant did not agree to deliver 3,000 tons of coal, but only '3,000 tons more or less.' This is an indefinite quantity, and especially subjects the contract to the rule that—

" 'Every agreement should be interpreted with reference to the circumstances under which the parties contract and in the light of the objects to be accomplished.' McKeesport Machine Co. v. Ben Franklin Insurance Co., 173 Pa. 53, 34 Atl. 16; Myers' Estate, 238 Pa. 195, 211, 86 Atl. 89.

"It is true the words '3,000 tons more or less' ordinarily would be construed to mean that the amount should be approximately that stated, because usually that is the intention of the parties; but in ascertaining the intention this is not always so. If those words follow an alleged quantity of land which is also described by metes and bounds, or an estimated quantity of personal property in bulk, the vendor is obliged to give and the purchaser to take whatever there is, even if it is considerably more or less than that stated; or if the real purpose of the provision is to enable the vendee to get the article desired for a particular use, as for instance to operate a plant during a specified period, it can require enough for that use and need take no more, though it is considerably more or less than the amount named. Glen v. Glen, 4 Serg. & R. 488; Ashcom v. Smith, 2 Pen. & W. 211, 21 Am. Dec. 437; Petts v. Gaw, 15 Pa. 218; Coughenour's Adm'rs v. Stauft, 77 Pa. 191; McCullough v. Manning, 132 Pa. 43, 18 Atl. 1080; Lobenstein v. United States, 91 U. S. 324, 23 L. Ed. 410; Brawley v. United States, 96 U. S. 168, 24 L. Ed. 622; 35 Cyc. 206-7; Williston on Sales, § 464. The latter point is well illustrated in Brawley v. United States, supra, where it is said:

" 'If it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract is not governed by the quantity named, nor by that quantity with slight and unimportant variations, but by what the receiving party shall require for the use of his mill; and the variation from the quantity named will

The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once.

The plaintiff, instead of shipping about 1000 tons in February and about 1000 tons in March, as stipulated in the contract, shipped only 400 tons in February, and 885 tons in March. His failure to fulfil the contract on his part in respect to these first two instalments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission.

The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice, or means of knowledge, that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties.

The case wholly differs from that of Lyon v. Bertram, 20 How. 149, in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract.

The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action.

For these reasons, we are of opinion that the judgment below should be affirmed. But as much of the argument at the bar was devoted to a discussion of the recent English cases, and as a diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to

depend upon his discretion and requirements, so long as he acts in good faith.'

"In the present case the evidence shows, and appellee says in its paper book, 'It is admitted the appellee was contracting for the year's supply of coal for this factory;' and its manager testified that the reason why the language '3,000 tons more or less' was used was 'to note the fact that if we wanted more coal we could get it,' and of course, if they did not require so much, that they need not take beyond their needs. It follows that herein plaintiff was entitled to receive only sufficient coal to run its plant." Simpson, J., in Ruth-Hastings Glass Tube Co. v. Slattery, 266 Pa. 288, 109 Atl. 695, 696 (1920).

be deprecated, it is proper to add that upon a careful examination of the cases referred to they do not appear to us to establish any rule inconsistent with our conclusion. * * *

The plaintiff in the case at bar greatly relied on the very recent decision of the House of Lords in Mersey Co. v. Naylor, 9 App. Cas. 434, affirming the judgment of the Court of Appeal, in 9 Q. B. D. 648, and following the decision of the Court of Common Pleas in Freeth v. Burr, L. R. 9 C. P. 208.

But the point there decided was that the failure of the buyer to pay for the first instalment of the goods upon delivery does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract and to decline to make further deliveries under it. And the grounds of the decision, as stated by Lord Chancellor Selborne in moving judgment in the House of Lords, are applicable only to the case of a failure of the buyer to pay for, and not to that of a failure of the seller to deliver, the first instalment. * * *

Being of opinion that the plaintiff's failure to make such shipments in February and March as the contract required prevents his maintaining this action, it is needless to dwell upon the further objection that the shipments in April did not comply with the contract, because the defendants could not be compelled to take about 1000 tons out of the larger quantity shipped in that month, and the plaintiff, after once designating the names of vessels, as the contract bound him to do, could not substitute other vessels. See Busk v. Spence, 4 Camp 329; Graves v. Legg, 9 Exch. 709; Reuter v. Sala, [4 C. P. D. 239], above cited.

*Judgment affirmed.*[120]

[120] Most American decisions are in accord with Norrington v. Wright. But see Quarton v. American Law Book Co., 143 Ia. 517 (1909). Even the New Jersey cases have been brought into line by the Uniform Sales Act. E. I. Dupont etc. Co. v. United Zinc Co., 85 N. J. L. 416 (1914). By § 45 (2) of that act it is provided that "Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken." By the English Sale of Goods Act, on the other hand, the English repudiation test is enacted.

"The American authorities are in irreconcilable conflict upon the question as to whether or not the seller may terminate the contract on account of a default in the payment of an installment, when the contract provides for the sale and delivery of a given commodity in stated installments, which are to be separately paid for. In this country it is probably accurate to say that the weight of judicial opinion is now to the effect that, if the buyer defaults in the payment of a given installment, the seller may treat the default as a

## AUGUSTA FACTORY *v.* MENTE & CO.

(Supreme Court of Georgia, 1909. 132 Ga. 503, 64 S. E. 553.)

Action by Mente & Co. against the Augusta Factory. Judgment for plaintiffs, and defendant brings error. Affirmed.

ATKINSON, J.[121] * * * In the present case the defendants wrote

breach and terminate the contract, without incurring any liability for damages for the failure to make delivery of subsequent installments. Ross-Meehan Foundry Co. v. Royer Wheel Co., 113 Tenn. 370, 83 S. W. 167, 68 L. R. A. 829, 3 Ann. Cas. 898; Ohio Valley Buggy Co. v. Anderson Forging Co., 168 Ind. 593, 81 N. E. 574, 11 Ann. Cas. 1045; Alpha Portland Cement Co. v. Oliver, 125 Tenn. 135, 140 S. W. 595, 38 L. R. A. (N. S.) 416, Ann. Cas. 1913 C 120; 24 R. C. L. 280.

"According to what is probably the minority view, the failure of the buyer to pay an installment does not give the seller an absolute right to terminate the contract, unless, in addition to the naked act of failure or refusal to pay, the conduct of the buyer shows an intention on his part to abandon or no longer be bound by the terms of the contract, as, for example, where the default is accompanied with a deliberate demand insisting upon new terms different from the original agreement. Johnson Forge Co. v. Leonard, 3 Pennewill (Del.) 342, 51 Atl. 305, 57 L. R. A. 225, 94 Am. St. Rep. 86. Prior adjudications are our warrant for declaring that Oregon may be included among the jurisdictions where the minority view prevails. Barnes v. Leidigh, 46 Or. 43, 45, 79 Pac. 51; Longfellow v. Huffman, 55 Or. 481, 486, 104 Pac. 961; Krebs Hop Co. v. Livesley, 59 Or. 574, 114 Pac. 944, 118 Pac. 165, Ann. Cas. 1913 C 758; Armsby v. Grays Harbor Commercial Co., 62 Or. 173, 183, 123 Pac. 32; Walker v. Warring, 65 Or. 149, 156, 130 Pac. 629.

"According to the rule which governs in this jurisdiction, the failure of the buyer to pay an installment does not alone and of itself enable the seller to terminate the contract, so as to avoid liability for failure to make subsequent deliveries called for by the contract; but, in addition to the bare fact of failure to pay, the conduct of the buyer must indicate an intention on his part to abandon the contract, or a design no longer to be bound by the terms agreed upon. In some of the states, including Oregon, legislation has been enacted governing the subject. However, the instant case is not controlled by chapter 91, Laws 1919, for the reason that it is expressly provided in section 76a of the statute that the act shall not apply to any sale or contract to sell 'made prior to the taking effect of this act.'

"Of course, the parties may expressly stipulate that payment for one delivery shall be a condition precedent; and, consequently, if a contract for the continuing delivery of wares contains such a stipulation, the failure of the buyer to pay a given installment enables the seller to rescind, regardless of what the rule might be in the absence of such a stipulation. West v. Bechtel, 125 Mich. 144, 163, 84 N. W. 69, 51 L. R. A. 791; Johnson Forge Co. v. Leonard, 3 Pennewill (Del.) 342, 51 Atl. 305, 57 L. R. A. 225, 94 Am. St. Rep. 86, 91. If, therefore, the payment of each invoice was by agreement made a condition precedent as to subsequent orders, then the plaintiff had the absolute right to terminate the contract, if the defendant refused to pay any installment within the time fixed for payment." Harris, J., in H. R. Wyllie China Co. v. Vinton, 97 Ore. 350, 364-366 (1920).

See Frederic C. Woodward, The Doctrine of Divisible Contracts, 39 Amer. L. Reg. (N. S.) 1.

[121] The statement of facts and parts of the opinion are omitted.

to their broker in New Orleans, authorizing him to sell 200,000 yards of sheeting, of two kinds described, to be delivered "25,000 yards weekly of each, commencing February 1st, delivery in New Orleans." He was instructed to give defendant's letter to the plaintiffs, and say to them that they might write an acknowledgment, and that would be all the contract defendant required. It was alleged by the plaintiffs and admitted by the defendant that the former did duly acknowledge the letter, and thus complete the contract for the goods at the prices named. This closed a distinct and unambiguous contract. It fixed the time and place of delivery. * * * In this case the judge acted both as judge and jury. Did he err in deciding that time was of the essence of this contract? The contract was for the sale of 200,000 yards of cotton goods by a factory to purchasers in a distant city. It was specified that 50,000 yards should be delivered each week, commencing February 1st, at stated prices, with payment at thirty days, or five per cent discount for cash. It might well be inferred that it was important to a purchaser of such a quantity of cloth to have it arrive as specified, both in order to prepare for its reception and storage or use and to provide for payments in the time and manner stated, and that this was in contemplation of the parties. It might make a very material difference whether a merchant should receive and be prepared to handle 50,000 yards of cloth, ordered, perhaps, for some special purpose, each week, and commencing at a specified date, or whether he should have 200,000 yards of the cloth delivered to him in one bulk a month or more thereafter, or in instalments commencing some six weeks after the proper time and delivered according as the vendor found himself able to meet the contract. It may also be that a merchant desires, during the season when certain goods are salable, to have them ready for delivery to his customers, or that he may have contracts to make delivery. If such were the case, it would ill suit his purpose to have goods suitable to or salable during a certain season only, and ordered to be delivered in instalments at fixed times during that season, delivered to him in a single lump or shipment at a much later period or after the entire season was over.

If recourse is had in the case before us to the correspondence between the parties, the possible injury from extended delay which has thus been hypothetically stated would apparently have resulted to the plaintiffs. In one of their letters to the defendant it was said that these goods were not bought from the defendant to be sold in cloth, as dry goods people do, but were sold manufactured into bags for a sugar refinery, and that, as the refinery operated night and day, it was compelled to have the goods; and in another letter they stated to the defendant that the latter had not complied with their request to make the shipments, although the plaintiffs had tried to make it clear to the defendant that these goods were sold to the refinery at the place of delivery, and that the latter were obliged to have them for bags for shipment of their product, and that it was not material to be put on the shelf and sold in lots.

See, in this connection, Savannah Ice Co. v. American Refrigerator Co., 110 Ga. 142, 35 S. E. 280; Branch v. Palmer, 65 Ga. 210; Henderson Elevator Co. v. North Ga. Milling Co., 126 Ga. 279, 55 S. E. 50; Gude & Walker v. Bailey Co., 4 Ga. App. 226, 61 S. E. 135; Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; Cleveland Rolling Mill Co. v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; McGrath v. Gegner, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415. The cases in which contracts for purchases of real estate have been held not to be forfeited because of failure to pay the purchase price at the date named therefor, in the absence of anything in the contract making time of the essence thereof, and where the payment of interest has been held, under the circumstances of different cases, to be a sufficient compensation for the failure to pay on the exact date when due, are in no way in conflict with what is here ruled. "Time is not generally of the essence of a contract; but, by express stipulation or reasonable construction, it may become so." Civ. Code, § 3675 (8). But under the facts in this case the judge did not err in finding that time was of the essence of the contract involved. The statement in the opinion of Mr. Justice Gray in Norrington v. Wright, *supra*, that "in the contracts of merchants time is of the essence," was not laid down as an absolute rule, regardless of what the contract itself might show the intention of the parties to be. This clearly appears from the headnote, in which it is stated that: "In a mercantile contract, a statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, or condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract."

If it were not clear that time was originally of the essence of the contract, nevertheless the judge was authorized to find that the vendee from time to time urged compliance, and finally fixed a time, after that specified in the contract, within which they insisted that delivery of the goods should be made, stating the necessity therefor, and that, if delivery should not be made within that time, they would be compelled to buy material in lieu of that which the vendor had contracted to deliver. If time was not of the essence originally, still the vendor did not have the right indefinitely to postpone compliance, and when the vendees, after a considerable delay, fixed a definite time in advance within which delivery would have to be made, and notified the vendor of that fact, if the time set was reasonable, it was incumbent on the vendor to meet such reasonable demand; and, if it failed to do so, the vendees were authorized to treat such failure as a breach of the contract. In Parker v. Tharold, 16 Beav. 59, Sir John Romilly, Master of the Rolls, said (on page 71): "It is, I consider, the undoubted law of this court that, although time was not originally an essential part of the contract, still that either party may, by a proper notice, bind the other to complete within a reasonable time to be specified in such notice; and if the party

receiving such notice do not complete within the time so specified, equity will not enforce a specific performance of the contract, but leave the parties to their remedies and their liabilities at law." See, also, Ellis v. Bryant, 120 Ga. 890, 894, 48 S. E. 352, and authorities cited in note to Johnson v. Evans, (Md.) 50 Am. Dec. 678, 679, and in note to Jones v. Robbins, 50 Am. Dec. 600.

The judge, in passing on both law and facts, could well have found that the time so fixed was reasonable, and that the failure of the vendor to make delivery was a breach. * * *

*Judgment affirmed.*[122]

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## NATIONAL MACHINE AND TOOL COMPANY *v.* STANDARD SHOE MACHINERY COMPANY.

(Supreme Judicial Court of Massachusetts, 1901-1902. 181 Mass. 275, 63 N. E. 900.)

HOLMES, C. J. This is an action of contract upon one or two small claims and for the breach of a contract made in March, 1900, by certain letters, in which the plaintiff undertook to manufacture certain portions of a patented machine, according to a schedule attached to the defendant's order. This last is the main source of trouble. With regard to payment the plaintiff wrote: "If you should favor us with an order for a considerable number of these parts, we would bill them up to you as they were finished, and would merely ask that the bills be settled promptly as they came to you." At a later stage of the negotiation the plaintiff wrote that it should expect the defendant "to ar-

[122] It is all a question of fact. "It may be said that ordinarily stipulations as to time in commercial contracts are of the essence, and the reason for this is manifest. Merchants carry on business largely through credit. The capital invested is often small compared to the volume of business transacted in a given period, and this results from the constant movement of the merchandise in which they deal; the capital invested continually 'turning over.' As one lot of merchandise goes out to supply the merchant's trade, another comes in to take its place. Where the commodity is such that because of the margin of profit possible on its resale, and the demand for it, it is held for a very short time by the merchant, and is placed in receptacles for convenience in distribution rather than storage, it becomes essential to the existence of his business that the merchant be assured of a steady, constant, and regular supply. And if, as often happens, his storage capacity is limited, the time of the arrivals of the invoices of the commodity in which he deals is of the utmost importance. It is for such reasons that time ordinarily is an essential element where it is stipulated in commercial contracts. Bowes v. Shand, 2 App. Cases, 455; Brantly on Contracts, 180; Barker v. Borzone, 48 Md. 474. And where time is of the essence of the contract, then the parties to it are entitled to require a strict compliance with its terms in that regard." Offcut, J., in Penn. Oil Co. v. Triangle Petroleum & Gasoline Co., 136 Md. 559, 111 Atl. 482, 488 (1920).

range it so that the bills would be approved promptly, and payment made on same at once, so that we may expect payments coming in rapidly after we have got well started on the contract, thus preventing us from having too large an amount of money tied up in the work." In this letter the plaintiff also wrote that it expected the defendant "to fully protect us from any suits that might be brought against us while we are on this work, on account of patents." It is denied that this letter was a part of the contract. We see no sufficient reason for the denial.

About May 1, 1900, the plaintiff was sued and demanded a bond with surety, as protection under its agreement. The defendant agreed to give a bond, but on May 21 declined to furnish a surety, and this is relied on by the plaintiff as one breach of the defendant's undertaking. We think it so plain that the defendant was not bound to give a surety that we dismiss this part of the case without further mention.

On May 17, 1900, the plaintiff having finished one item on the defendant's order, of sixty adjusting screws, sent a bill for the price, $90. The bill bore a stamped notice that "all claims for corrections in this bill must be made within ten days from date." It was understood by the plaintiff that if the bill was approved by the proper man it would be sent on to New York to be paid. Three or four days later there was a conversation in the defendant's Boston office, it was suggested that this bill ought to be paid immediately on presentation, and complaint was made with regard to another overdue account of nearly seven hundred dollars ($697.23). There were apologies and further delays, complaints, and explanations, the defendant's representative always explaining the delay as accidental, and finally, on May 28, stating that the check was ready but had been retained for entry as the bookkeeper was away. This last seems to have been true. On May 29 the plaintiff, hearing that a check had not come on, notified the defendant that "as you have not lived up to your agreement with us in relation to the work we are doing for you, we shall stop all of your work to-day," and stopped. Later efforts to come to an understanding failed.

The plaintiff when it stopped work had finished another small item of $24, and on May 31 offered to deliver these goods as well as those for which the bill for $90 had been sent, but the defendant declined to receive them. May 31 was the date of the writ, and the plaintiff very candidly says that the offer was made after suit was brought. The plaintiff seeks to recover as damages for the defendant's alleged breach the cost of the finished parts, and also the value of stock and castings and a large amount of work upon parts never delivered or completed.

The case was sent to an auditor. He found that the defendant did not repudiate the contract, and that the delay in payment did not justify the plaintiff in stopping work. The judge of the Superior Court adopted his rulings and findings, although finding in addition that the provision for prompt payment of bills for finished work was material,

and that payment was not made promptly, and expressing a doubt whether the plaintiff was not justified in refusing to proceed.

Although the contract was not repudiated by the defendant, we are of opinion, notwithstanding Winchester v. Newton, 2 Allen, 492, which perhaps was not intended to establish a different general rule (see also Newton v. Winchester, 16 Gray, 208), that there might have been such a breach by failure to pay, as, however honest and however little it expressed a repudiation, would warrant a refusal to go on with the work. Bloomer v. Bernstein, L. R. 9 C. P. 588. See Stephenson v. Cady, 117 Mass. 6. There is nothing to the contrary in Daley v. People's Building, Loan & Saving Association, 178 Mass. 13, 18. What is said there refers to an attempt to avoid a contract *ab initio* for a refusal to pay money due upon an executed consideration, when to make that payment is all that remains to be done on that side.

We may say further that for the purposes of this decision it is not necessary to consider Lord Selborne's somewhat sweeping suggestion in Mersey Steel & Iron Co. v. Naylor, 9 App. Cas. 434, 439, that when delivery of an instalment of goods under an entire contract is to precede payment for the goods delivered, as payment cannot be a condition precedent of the entire contract, it cannot be a condition precedent to the deliveries remaining to be made, at least without express words. See Norrington v. Wright, 115 U. S. 188, 210. In this case both parties have assumed that the plaintiff could put the defendant in default without delivery merely by sending a bill for an item when it was finished, so that Lord Selborne's logical difficulty, if there is anything in it, does not apply.

The question before us therefore is whether the defendant's failure to pay $90 promptly was a breach going to the root of the contract,— a breach so important as to warrant the plaintiff in refusing to go on without defeating his own right to recover upon it or rescinding the contract. My Brother Loring and I have not been able to reach a clear conviction that it was such a breach, in view of the smallness of the sum, the indefiniteness of the terms of the contract as to the time for payment (see Harnden v. Milwaukee Mechanics' Ins. Co., 164 Mass. 382; Parker v. Middlesex Mut. Ass. Co., 179 Mass. 528, 531), the shortness of the delay, and some other circumstances. Of course not every trifling breach of contract excuses the other side from further performance. Honck v. Muller, 7 Q. B. D. 92, 100; Mersey Steel & Iron Co. v. Naylor, 9 App. Cas. 434, 444; Dubois v. Delaware & Hudson Canal Co., 4 Wend. 285, 289; Wright v. Haskell, 45 Maine, 489, 492; Weintz v. Hafner, 78 Ill. 27, 29; Worthington v. Gwin, 119 Ala. 44, 54.

But my brethren are of opinion, and I dare say wisely, upon the findings, that the plaintiff was warranted in its course. The plaintiff's contract necessitated a considerable preliminary outlay, and would necessitate further expenditures in carrying out its part. At the time it was paying nearly seventy dollars a day. Prompt payment for goods

as finished took the place of payments on account. The plaintiff was sensitive, and had a right to be so, at any appearance of uncertainty as to the stipulated payments being made. It had a further ground of anxiety in the suits brought against it for infringement of patents, when it had only the defendant's personal guaranty to protect it. Under such circumstances, the failure to pay the other bill for nearly seven hundred dollars, gave a character to the failure to pay the smaller sum which was due, and imparted a significance to the delay that otherwise it might not have had. A failure to pay a small sum promptly because of difficulty in raising the money is not the same thing as, and may have a greater effect than, a similar failure simply because of the absence of a bookkeeper or of some misunderstanding between the defendant's Boston and New York houses.

The first count was upon a claim for $209.38 outside the contract thus far discussed. The auditor finds for the plaintiff, but for $129.15 only. The plaintiff demands the larger sum, notwithstanding the finding, on the ground that when seeking to reduce the plaintiff's attachment the defendant expressed a willingness to pay for all work that had been completed, that the plaintiff's counsel stated what that work amounted to so far as he knew, that thereupon the judge made an order dissolving the attachment upon the payment of that amount to the sheriff and the giving of a bond for $5,000 more, and that the defendant paid the sum, which included the item of $209.38. This transaction was not a tender, and did not fall within the rule laid down in Currier v. Jordan, 117 Mass. 260, and Bouvé v. Cottle, 143 Mass. 310, 315. It would seem to have been only a substitution of securities in the sheriff's hands, and to have left the correctness of the figures open to trial with the rest of the case.

The second count also was for items outside the contract, and only one of them was disputed. This was for some articles not finished because the defendant, after the plaintiff refused to go on with its contract, took away jigs and tools which it had furnished the plaintiff under the contract, and also the unfinished articles. There is nothing in the report which necessarily implies that the failure to finish the articles was due to the plaintiff's fault, or indeed to any other cause than the defendant's removal of them. Therefore we cannot say that the auditor's finding was wrong.

A part of the damages to be recovered by the plaintiff on the larger contract will be for work done under it. Goodman v. Pocock, 15 Q. B. 576, 580. Therefore one other question requires a few words. The defendant made a tender on May 31 of the amount then due, including the $90 claimed under the contract, which was refused. But this tender has not been pleaded or kept good, even if, as does not appear very clearly, it embraced the sums not recovered. Therefore it does not prevent the recovery of interest and costs. The answer was a general denial. Brickett v. Wallace, 98 Mass. 528, 529; Grover v. Smith, 165

Mass. 132. See Noble v. Fagnant, 162 Mass. 275, 286. The payment to the sheriff was not a payment into court or an admission that the sum paid was due, as we have said and as the plaintiff contends. In Suffolk Bank v. Worcester Bank, 5 Pick. 106, the amount tendered was deposited in a bank to the order of the plaintiff, and in Goff v. Rehoboth, 2 Cush. 475, the defendant was a town, and the treasurer might be presumed to have kept the money on hand in obedience to the order of the selectmen. In both the tender was set up and the money brought into court. See Pub. Sts. c. 168, § 23; Town v. Trow, 24 Pick. 168, 169; Sanders v. Bryer, 152 Mass. 141. There was another tender after suit brought, but that did not comply with Pub. Sts. c. 168, § 24, and is not relied upon.

*Case to stand for assessment of damages.*[123]

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HANSON & PARKER, LIMITED, *v.* WITTENBERG ET AL. (two cases).

WITTENBERG ET AL. *v.* HANSON & PARKER, LIMITED.

(Supreme Judicial Court of Massachusetts, 1910. 205 Mass. 319, 91 N. E. 383.)

Three consolidated actions, two by Hanson & Parker, Limited, against C. J. Wittenberg and others, and a third by C. J. Wittenberg and others

[123] "There is a great difference in the authorities in the application of the doctrine of implied conditions precedent in a contract, especially where there has been part performance. This difference appears particularly upon the question as to the measure of performance by one party which is to be regarded as such substantial performance as will protect him from having his defaults considered as breaches of such a condition, and also upon the corresponding question as to the kind of default which so far goes to the essence of the consideration as to justify the other party in refusing to go on with the contract." Hammond, J., in Eastern Forge Co. of Mass. v. Corbin, 182 Mass. 590, 592 (1903).

"While in instalment contracts stipulations of times of delivery are ordinarily material obligations, breaches of which go to the essence of the contract, stipulations of times of payment, in the absence of an express or necessarily implied condition that times of payment shall be of the essence, are not so vital that delay in payment would justify the seller's refusal to deliver the succeeding instalments, unless the delay was of such importance as to work material injury to the seller or fairly expressed the buyer's intention no longer to be bound by his remaining executory agreements. * * * Without an agreement to the contrary, delay in payment may ordinarily be compensated for with interest; but without an agreement to the contrary, delay of delivery of goods beyond the stipulated time violates the fundamental purpose of the buyer in entering into the contract at all." Baker, J., in Vulcan Trading Corporation v. Kokomo Steel & Wire Co., 268 Fed. 913, 916 (1920).

On "rescission" of contract for successive deliveries of goods on account of non-payment of instalments, see 3 Ann. Cas. 901, note; 11 Ann. Cas. 1049, note. Compare right of building contractor to "rescind" contract for failure of owner to make payment. Ann. Cas. 1916 C, 54, note.

against Hanson & Parker, Limited. From a verdict for Hanson & Parker, Limited, in all the actions, Wittenberg and others excepted. Exceptions overruled.

BRALEY, J.[124] * * * During the period covered by the transactions the plaintiff corporation was engaged as a jobber in selling coal at wholesale, with its principal office in Boston. If occasional sales were made elsewhere, the bulk of its trade was supplying customers within the territory of which the city is described in the report as the usual commercial center of distribution. After verbal negotiations, it entered into two contracts in writing with the defendant Wittenberg, who resided and did business in another state, for the delivery of 10,000 tons of "steam coal" under each contract. The coal was to be delivered at Newport News, Va., by the railroad as directed by the seller, free on board vessels sent by the buyer, by whom the expenses of transportation were to be paid. By the first contract, an option as to the kinds of coal was given, and although the second contract omits this clause, the auditor reports that the plaintiff contracted only for "New River coal," which the defendant engaged to furnish. In the performance of the first contract, the defendant concedes that the shipments were not of the kind selected, but the cargoes were composed of a mixture of New River coal and Kanawha coal, in which the latter largely predominated. Upon arrival of the first cargo, a part was discharged before the plaintiff ascertained its inferior quality. Interviews followed between the parties, but no adjustment of their differences was reached, and the defendants' agent having stated that the remaining cargoes in transit were similar, the plaintiff notified the defendant it would not accept them. Because of the failure to comply with the terms of the first contract, the corporation recalled the vessel it had sent for the small balance remaining of the first purchase, and for the coal to be shipped under the second contract, and claimed as a defense, in the suit against it by Wittenberg for damages, for the refusal to perform, that this contract had been canceled.

The contracts, as the judge ruled, no doubt were distinct, and not dependent. Turner v. Rogers, 121 Mass. 12. If the first had been broken by the seller, it did not follow he would commit a breach of the second contract, although a refusal to perform would have justified an immediate rescission by the plaintiff. Daniels v. Newton, 114 Mass. 530, 533, 19 Am. Rep. 384; Menage v. Rosenthal, 187 Mass. 470, 73 N. E. 537. But while his conduct tended strongly to weaken confidence in his intention to keep a similar agreement in the future, the plaintiff's anticipation of nonperformance, however reasonable under the circumstances, would not have been a justification for its rescinding or repudiating the second contract. Porter v. American Legion of Honor, 183 Mass. 326, 67 N. E. 238.

An executory bilateral contract, however, may be rescinded or can-

[124] The statement of facts and parts of the opinion are omitted.

celed by mutual consent of the parties. They may discharge it in part by a new agreement, modifying its terms, or agree to abrogate it, so that both will be discharged from performance. The original consideration supports the modification, while the agreement of each to annul is a sufficient consideration of an abandonment. Earnshaw v. Whittemore, 194 Mass. 187, 191, 80 N. E. 520, and cases cited; Cutter v. Cochrane, 116 Mass. 408, 410. But where, as in the present case, the parties are not in accord as to what was done, whether they have reached such an understanding is a question of fact. Johnson v. Reed, 9 Mass. 78-84, 6 Am. Dec. 36; Cutter v. Cochrane, 116 Mass. 408, 410; Hobbs v. Columbia Falls Brick Co., 157 Mass. 109, 31 N. E. 756. * * * The auditor, who saw the witnesses and heard the evidence, * * * finds the * * * second contract was cancelled by mutual consent. The judge, having been warranted in finding accordingly, rightly refused to give the plaintiff Wittenberg's thirty-first and thirty-second requests,[125] and having found for the defendant, the fourth and fifth requests became immaterial. * * *

We find no error of law at the trial, and the exceptions must be overruled.

*So ordered.*[126]

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## GEORGE CAHEN, RESPONDENT, *v.* JOHN R. PLATT ET AL., APPELLANTS.

**(Court of Appeals of New York, 1877. 69 N. Y. 348, 25 Am. Rep. 203.)**

Appeal from judgment of the General Term of the Superior Court of the City of New York, affirming a judgment in favor of plaintiff entered upon a verdict. (Reported below, 8 J. & S. 483.)

[125] The thirty-second request was: "The contract of April 13th [the second contract], has never been cancelled."

[126] "It is argued on behalf of the defendant that as the two contracts were for the successive deliveries of the same article, and covered approximately the same periods of time, it was not necessary for defendant to go through the form of receiving and paying for shipments under the second contract, when plaintiff's failure to comply with the first contract had made it certain that it was engaged in shipping rubber that did not meet the requirements of the contract. Such, however, is not the prevailing rule. On the contrary, the authorities are agreed that, where the contracts are separate and distinct, the breach of one by the seller will not justify the buyer's failure to perform the other. Elliott on Contracts, § 5053; Williston on Sales, § 467; Lestershire Lumber, etc., Co. v. W. M. Ritter Lumber Co. (C. C.) 144 Fed. 568; Ritter Lumber Co. v. Lestershire, 153 Fed. 575, 82 C. C. A. 529; Sleepy Eye Milling Co. v. Hartmann, 184 Ill. App. 308; Hanson v. Wittenberg, 205 Mass. 319, 91 N. E. 383; Stephenson v. Cady, 117 Mass. 6; Hutchens v. Sutherland, 22 Nev. 363, 40 Pac. 409; Bowers Granite Co. v. Farrell, 66 Vt. 314, 29 Atl. 491; Collins v. Swan-Day Lumber Co., 158 Ky. 231, 164 S. W. 813. It is therefore clear that defendant breached the second contract." Clay, C., in Ten Broeck Tyre Co. v. Rubber Trading Co., 186 Ky. 526, 529-530 (1919).

This action was brought to recover damages for the alleged breach of a contract of purchase and sale.

EARL, J.[127] In September, 1872, at the city of New York, the plaintiff sold to the defendants 10,000 boxes of glass, at seven and one-half per cent discount from the tariff price of July, 1872, to be paid for in gold, at New York upon delivery of invoice and bill of lading, by bills of exchange on Antwerp. The glass was to be of approved standard qualities, and was to be shipped on board of sailing vessels at Antwerp, and to be at the risk of the defendants as soon as shipped, and they were to insure and pay the freight and custom duties. The glass was to be delivered during the months of October, November, and December, 1872, and January, 1873. In pursuance of this contract, the plaintiff delivered to the defendants 4,924 boxes of glass, for which they paid. They refused to receive any more, and this action was brought to recover damages consequent upon such refusal.

The defendants claimed, and gave evidence tending to prove, that the glass delivered was not of approved standard quality, and hence that they had the right to refuse to take the balance.

While some months after the glass was delivered the defendants complained of its quality, they at no time offered to return it, or gave plaintiff notice to retake it. They received it under the contract, and it is not important in this action to determine, as no counterclaim is set up, whether or not a right of action for damages on account of the inferior quality of the glass survived the acceptance. The fact that the glass delivered and received upon the contract was inferior did not give them the right to repudiate the contract altogether. They could demand better glass, and when the plaintiff offered to deliver the balance, if it was inferior, they could refuse to accept it. But if plaintiff was ready and willing to deliver for the balance such glass as the contract called for, they were bound to receive it. Here the plaintiff requested them to take the balance of the glass, and they refused to take any more, and thus repudiated and put an end to the contract. There was no proof that the plaintiff insisted upon delivering inferior glass, or that he was not ready and willing to deliver glass of the proper quality. They did not take the position that they were willing to receive glass of approved standard quality, but refused to take any more glass under the contract. There was, therefore, such a breach of contract as entitled the plaintiff to recover such legal damages as he sustained by the breach. * * *

*Judgment reversed,* [*however, for error in instruction as to damages*].[128]

[127] Part of the opinion is omitted.

[128] But see Fullam v. Wright & Colton Wire Cloth Co., 196 Mass. 474 (1907). On the right of a purchaser of goods deliverable in instalments to rescind the contract, or refuse further deliveries, for breach as to quality, see 38 L. R. A. (N. S.) 539, note. Some courts are inclined to deal with defect in quality in

## CASTLEBERRY *v.* TYLER COMMERCIAL COLLEGE.

(Court of Civil Appeals of Texas, 1919. 217 S. W. 1112.)

Action by Grace Castleberry against the Tyler Commercial College. From a judgment for defendant, plaintiff appeals. Affirmed.

August 20, 1918, appellant entered into a contract with appellee, by the terms of which she became entitled, by complying with appellee's regulations, to a "complete course of shorthand" in its school. The contract was in writing and contained stipulations as follows:

"If a student * * * disregards the regulations of the school, * * * this scholarship will be limited to the average time of 3½ months.

"The school reserves the right at all times to require its students to board in homes approved by the college, and to cancel this scholarship and require the withdrawal of any one deemed by the management injurious to the best interest of the school."

Having secured rooms at Mrs. Alford's, on South College street, and board at Mrs. Christians' on South Broadway, in compliance with appellee's instructions to her, appellant on said August 20, 1918, began to attend appellee's school in the city of Tyler. She continued to room at Mrs. Alford's, and to attend said school until November 21, 1918, when, she alleged, she was expelled from the school by appellee. Afterwards she brought this suit to recover damages she alleged she had suffered as a result of appellee's act, which, she charged, was a breach of the contract. * * *

The trial court * * * instructed the jury to return a verdict in favor of appellee. The appeal is from a judgment in accordance with such a verdict.

WILLSON, C. J.[129] It will be noted that appellee in its contract with appellant reserved "the right at all times to require" her "to board in homes" it approved. As commonly used, the word "board" means lodging as well as food. Century Dictionary; Heron v. Webber, 103 Me. 178, 68 Atl. 744. That it was used in that sense in the contract will not be doubted, when the obvious reason why the reservation was made is kept in mind. The plain meaning of the stipulation was that appellee was to have the right while appellant attended its school to require her to room, as well as to take her meals, at homes it approved. It was not against either the law or public policy for the parties to so contract. Therefore the stipulation was a valid one, and appellee was acting within its lawful right under the contract when it insisted that ap-

the same way as defect in quantity and other courts are inclined to make persistence in sending inferior quality the test; but, after all, though there may be a difference in emphasis, the question of whether the breach goes to the essence is the fundamental one, whether quantity or quality is considered.

[129] The statement of facts is abbreviated.

pellant should move from Mrs. Alford's to another rooming house. But appellant insists that, if appellee had such a right, the penalty provided by the contract for a refusal by her to comply with the requirement was only to limit her scholarship to 3½ months, and that appellee had no right to expel her from the school because of such refusal. The answer to that is, we think, that it did not appear from the testimony that appellee expelled appellant from the school. All it did was to insist that she cease her attendance at its school until she complied with the demand it made on her to move to another rooming house. So far as the testimony in the record shows to the contrary, there has never been a time since she was requested to move from Mrs. Alford's when appellant has not been at liberty to resume her attendance at the school on her compliance with the demand she agreed by her contract appellee might make of her.

*The judgment is affirmed.*[180]

[180] In National Contracting Co. v. Vulcanite Portland Cement Co., 192 Mass. 247 (1906), the defendant being much behind in its shipment of cement under the contract and the plaintiff being much behind in payments for cement delivered, the plaintiff wrote demanding prompt shipments, the defendant replied demanding payment of items due and stating that no more shipments would be made until the items were paid, and the plaintiff declined to pay, claiming to hold the money as security for damages already suffered and that might hereafter be suffered from the defendant's breach of contract. In affirming a judgment for the defendant, Knowlton, C. J., for the court, said that while the plaintiff might well be found to have waived any claim for damages up to the time it demanded prompt shipments, nevertheless "It had a right to insist upon perfect performance in the future; but the plaintiff's failure to pay for the cement when the bills were due, left the defendant with a right to insist at any time that these payments should be made. Such payments might be demanded as a condition precedent to the delivery of any more cement. Eastern Forge Company v. Corbin, 182 Mass. 590-593, 66 N. E. 419; National Machine Company v. Standard Company, 181 Mass. 275-279, 63 N. E. 900; Stephenson v. Cady, 117 Mass. 6; Wilkinson v. Blount Manufacturing Company, 169 Mass. 374, 47 N. E. 1020. The defendant made its demand, and stood on its right to have pay before making any more deliveries. The plaintiff sought to hold the money as security for damages from possible breaches of the contract by the defendant in the future.

"We think it quite plain that the plaintiff could not lawfully do this. It could not be known that there would be any breach of the contract of the defendant in the future if the plaintiff made the payments then due and afterwards paid promptly. One who contracts for the purchase of goods by installments cannot lawfully demand performance of the contract, and at the same time withhold payments due for installments already received in order to protect himself from anticipated breaches of the contract by the seller. Stephenson v. Cady, 117 Mass. 6-9, 10; Spaulding v. Backus, 122 Mass. 553, 23 Am. Rep. 391. Wiley v. Bunker Hill National Bank, 183 Mass. 495, 67 N. E. 655."

## PAYZU, LIMITED *v.* SAUNDERS.

**(High Court of Justice, King's Bench Division and Court of Appeal. [1919] 2 K. B. 581.)**

Action tried by McCardie, J., without a jury.

By a contract in writing dated November 9, 1917, the defendant, who was a dealer in silk, agreed to sell to the plaintiffs 200 pieces of crepe de chine at 4*s.* 6*d.* a yard and 200 pieces at 5*s.* 11*d.* a yard, "delivery as required January to September, 1918; conditions, 2½ per cent 1 month," which meant that payment for goods delivered up to the twentieth day of the month should be made on the twentieth day of the following month, subject to 2½ per cent discount. At the request of the plaintiffs, the defendants delivered, in November, 1917, a certain quantity of the goods under the contract, the price of which amounted to 76*l.* less 2½ per cent discount. On December 21st the plaintiffs drew a cheque in favor of the defendant in payment of these goods, but the cheque was never received by the defendant. Early in January, 1918, the defendant telephoned to the plaintiffs asking why she had not received a cheque. The plaintiffs then drew another cheque, but owing to a delay in obtaining the signature of one of the plaintiffs' directors, this cheque was not sent to the defendant until January 16th. On that day the plaintiffs gave an order by telephone for further deliveries under the contract. The defendant in the belief, which was in fact erroneous, that the plaintiffs' financial position was such that they could not have met the cheque which they alleged had been drawn in December, wrote to the plaintiffs on January 16, refusing to make any further deliveries under the contract, unless the plaintiffs paid cash with each order. The plaintiffs refused to do this, and after some further correspondence brought this action claiming damages for breach of contract. The damages claimed were the difference between the market price in the middle of February 1918, and the contract price of the two classes of goods, the difference alleged being respectively 1*s.* 3*d.* and 1*s.* 4*d.* a yard.

McCARDIE, J.[131] * * * It is to be observed that in the present case the contract did not provide for delivery in any particular number of instalments. The deliveries were to be extended over the period from January to September, and it was contemplated that there would be an unspecified number of deliveries and a corresponding number of payments. I may, with diffidence, refer to my own judgment in In re Rubel Bronze and Metal Co. and Vos, [1918] 1 K. B. 315, where I referred to the leading authorities. I recognized that in certain circumstances a single breach of a contract may amount to a repudiation of the whole contract. I adhere to what I said in that case, but in the pres-

[131] Parts of the opinion of McCardie, J., in the Divisional Court and part of the opinion of Bankes, L. J., in the Court of Appeal are omitted.

ent case I entertain no doubt whatever that the plaintiffs' failure to make punctual payment for the November delivery did not amount to a repudiation of the contract, nor did it go to the root of the contract; on the other hand, in my opinion, the defendant's letter of January 16 did in fact and in law amount to an unjustifiable refusal by her to carry out her contractual obligations, for she announced in clear terms that she would thenceforth deliver no further goods to the plaintiffs under the contract unless the plaintiffs paid cash to cover each invoice. The market price of these goods was rising from the beginning of January and continued to rise up to the middle of February. The plaintiffs claim to be entitled to damages based on the market price at that date. I find as a fact that the market prices in February were respectively 6*d.* and 7*d.* per yard in excess of the contract prices. The plaintiffs did not in fact purchase goods as against their contract with the defendant. They asserted that the market was so bare of goods as to render purchases impracticable.

Now a serious question of law arises on the question of damages. I find as a fact that the defendant was ready and willing to supply the goods to the plaintiffs at the times and places specified in the contract, provided the plaintiffs paid cash on delivery. Mr. Matthews [of counsel for the plaintiffs] argued with characteristic vigour and ability that the plaintiffs were entitled to ignore that offer on the ground that a person who has repudiated a contract cannot place the other party to the contract under an obligation to diminish his loss by accepting a new offer made by the party in default.

The question is one of juristic importance. What is the rule of law as to the duty to mitigate damages? I will first refer to the judgment of Cockburn, C. J., in Frost v. Knight, (1872) L. R. 7 Ex. 111, 115, where he said: "In assessing the damages for breach of the performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished." * * *

The question, therefore, is what a prudent person ought reasonably to do in order to mitigate his loss arising from a breach of contract. I feel no inclination to allow in a mercantile dispute an unhappy indulgence in far-fetched resentment or an undue sensitiveness to slights or unfortunately worded letters. Business often gives rise to certain asperities. But I agree that the plaintiffs in deciding whether to accept the defendant's offer were fully entitled to consider the terms in which the offer was made, its bona fides or otherwise, its relation to their own business methods and financial position, and all the circumstances of the case; and it must be remembered that an acceptance of the offer would not preclude an action for damages for the actual loss sustained. Many illustrations might be given of the extraordinary results which would follow if the plaintiffs were entitled to reject the defendant's

offer and incur a substantial measure of loss which would have been avoided by their acceptance of the offer. The plaintiffs were in fact in a position to pay cash for the goods but instead of accepting the defendant's offer, which was made perfectly bona fide, the plaintiffs permitted themselves to sustain a large measure of loss which as prudent and reasonable people, they ought to have avoided. But the fact that the plaintiffs have claimed damages on an erroneous principle does not preclude me from awarding to them such damages as they have in fact suffered, calculated upon the correct bases. See Cory v. Thomas Ironworks and Shipbuilding Co., (1868) L. R. 3 Q. B. 181. They have suffered serious and substantial business inconvenience, and I conceive that I am entitled to award them damages for that. The authorities are conveniently collected in Arnold on Damages, at p. 13. Moreover, even if the plaintiffs had accepted the defendant's offer, they would nevertheless have lost the very useful period of credit which the contract gave them. Taking into consideration all the circumstances of the case I have come to the conclusion that the right sum to award as damages is 50*l*. I give judgment for the plaintiffs for that amount, and in view of the important points involved, I give costs on the High Court scale.

*Judgment for plaintiffs.*

The plaintiffs appealed to the Court of Appeal on the question of damages.

BANKES, L. J. At the trial of this case the defendant, the present respondent, raised two points: first, that she had committed no breach of the contract of sale, and secondly that, if there was a breach, yet she had offered and was always ready and willing to supply the pieces of silk, the subject of the contract, at the contract price for cash; that it was unreasonable on the part of the appellants not to accept that offer, and that therefore they cannot claim damages beyond what they would have lost by paying cash with each order instead of having a month's credit and a discount of 2½ per cent. We must take it that this was the offer made by the respondent. The case was fought and the learned judge has given judgment on that footing. It is true that the correspondence suggests that the respondent was at one time claiming an increased price. But in this court it must be taken that the offer was to supply the contract goods at the contract price except that payment was to be by cash instead of being on credit.

In these circumstances the only question is whether the appellants can establish that as matter of law they were not bound to consider any offer made by the respondent because of the attitude she had taken up. * * *

It is plain that the question what is reasonable for a person to do in mitigation of his damages cannot be a question of law but must be one of fact in the circumstances of each particular case. There may be cases where as matter of fact it would be unreasonable to expect a plaintiff to

consider any offer made in view of the treatment he had received from the defendant. If he had been rendering personal services and had been dismissed after being accused in presence of others of being a thief, and if after that his employer had offered to take him back into his service, most persons would think he was justified in refusing the offer and that it would be unreasonable to ask him in this way to mitigate the damages in action for wrongful dismissal. But that is not to state a principle of law, but a conclusion of fact to be arrived at on a consideration of all the circumstances of the case. Mr. Matthews complained that the respondents had treated his clients so badly that it would be unreasonable to expect them to listen to any proposition she might make. I do not agree. In my view each party was ready to accuse the other of conduct unworthy of a high commercial reputation, and there was nothing to justify the appellants in refusing to consider the respondent's offer. I think the learned judge came to a proper conclusion on the facts, and that the appeal must be dismissed.

SCRUTTON, L. J. I am of the same opinion. Whether it be more correct to say that a plaintiff must minimize his damages, or to say that he can recover no more than he would have suffered if he had acted reasonably, because any further damages do not reasonably follow from the defendant's breach, the result is the same. The plaintiff must take "all reasonable steps to mitigate the loss consequent on the breach," and this principle "debars him from claiming any part of the damage which is due to his neglect to take such steps": British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Co. of London, per Lord Haldane L. C. [1912] A. C. 673, 689. Mr. Matthews [of counsel for the appellants] has contended that in considering what steps should be taken to mitigate the damage all contractual relations with the party in default must be excluded. That is contrary to my experience. In certain cases of personal service it may be unreasonable to expect a plaintiff to consider an offer from the other party who has grossly injured him; but in commercial contracts it is generally reasonable to accept an offer from the party in default. However, it is always a question of fact. About the law there is no difficulty.

EVE, J. I agree. But for the difficulty introduced by the respondent's demand for a higher price than that named in the contract, I think this is a plain case. That difficulty is more apparent than real. It was not raised in the court below, and there is not enough evidence to enable us to give effect to it, assuming it to be a matter of substance.

*Appeal dismissed.*[182]

[182] In the United States the general rule is that where the contract calls for credit to the buyer and the seller demands cash, the buyer is under no obligation to pay cash unless he is financially able to do so, unless the seller offers the appropriate discount for cash and unless the demand for cash is made under circumstances which will not prejudice any other contract right or dam-

## HERBERT S. GILBERT & CO. *v.* PATRICK McGINNIS ET AL.

**(Supreme Court of Illinois, 1885. 114 Ill. 28, 28 N. E. 382.)**

MULKEY, J. On the 16th of February, 1881, Patrick McGinnis, the appellee, sold to appellants, Herbert S. Gilbert & Co., seven thousand bushels of corn at thirty-nine cents per bushel, to be delivered in the months of August and September following. As a part of the same agreement the appellants promised to make advances on the contract to appellee of what money he might, from time to time, require. A short time after the making of this agreement, appellee called on the appellants, at their business house in Ottawa, and requested an advance on the contract, as per agreement. The clerk in charge of their business told him he could have the money, and commenced writing a note for the amount, whereupon appellee stated to the clerk he would not sign a note remarking, in effect, that if he wanted to obtain money in that way he could get it from the bank. Appellants refused to make the required advance unless appellee would give his note for the amount. This he declined to do, and informed the clerk at the time he would not let appellants have the corn. The corn not having been delivered within the time specified in the agreement, the appellants, on the 3d day of October, 1881, commenced an action of assumpsit, against appellee, in the circuit court of LaSalle county, to recover damages for the non-delivery of the corn, which resulted in a judgment in favor of the defendant, for costs. This judgment having been affirmed by the Appellate Court for the second district, the plaintiffs appealed to this court.

On the trial the plaintiffs offered to show there was a general custom among grain merchants to take notes from the seller for the amount of advances made under contracts for the sale of grain, like the one in question. They also proposed to prove that on previous occasions there had been contracts and dealings similar in character to the one sued upon, and that the manner of dealing between the parties was, when an advance was made, memoranda or notes should be taken for the money advanced. The court declined to admit evidence to the jury in support of either of these positions, and the ruling of the court in this

ages right of the buyer. Coppola v. The Marden, Orth & Hastings Co., 282 Ill. 281 (1918); Plesofsky v. Kaufman, 140 Tenn. 208 (1918); Hirsch v. Georgia Iron & Coal Co., 169 Fed. 578 (1909); Campfield v. Sauer, 189 Fed. 576 (1911). But if those conditions are met, even where the ability to pay cash is because of credit which could be used to get it, the buyer must pay cash or have his damages reduced accordingly. Lawrence v. Porter, 63 Fed. 62 (1894); Deere v. Lewis, 51 Ill. 254 (1869); Plesofsky v. Kaufman, 140 Tenn. 208 (1918). In Campfield v. Sauer, *supra*, and Plesofsky v. Kaufman, *supra*, the burden is put on the seller to show the buyer's ability to pay cash.

On duty of purchaser on credit to accept seller's offer to deliver for cash, see 1 A. L. R. 436, note.

See, generally, Joseph H. Beale, Jr., Damages upon Repudiation of a Contract, 17 Yale L. J. 443 and comment on that article in 17 Yale L. J. 611.

respect presents the only question for determination. The same question is raised by certain refused instructions asked on behalf of the appellants.

The rule is well recognized that where a commercial contract is in any respect ambiguous, a particular custom or usage of trade known to the parties, or which, under the circumstances, they are presumed to know, or any previous course of dealing between them that will have a tendency to disclose the real intentions of the parties, and to aid the court in arriving at its true construction, will be admissible in evidence. Such evidence is not only admissible for the purpose of explaining the terms of a contract, but also for the purpose of ingrafting, as it were, new terms into it, subject, however, to the qualification that such new terms are not expressly or impliedly excluded by the express agreement. (1 Smith's Leading Cases, 307, *et seq.*) To have this effect, however, the usage must be reasonable, and not in conflict with any general rule of law. (Macy et al. v. Wheeling Ins. Co., 9 Met. (Mass.) 354.) The proof offered in this case was clearly not for the purpose of explaining any ambiguity in the contract, or for the purpose of showing that some particular word or phrase in it is used out of its ordinary signification. No claim of this kind is made. It is conceded by both parties that appellants were to make advances—that is, let appellee have money, from time to time, as he might need it, under the contract. So far there is no controversy. But appellants contend that a custom or usage prevailed, not adverted to in the express agreement, which required the appellee to give to them this note upon receiving any such advances. The usage here sought to be shown, it is clear, was for the purpose of aiding a stipulation on the part of appellee which, it is conceded, is not found in the express agreement. This, as we have already seen, may sometimes be done; but whether it could be done in this particular case depends upon whether the stipulation thus to be added is inconsistent or in conflict with that part of the agreement which is expressed, and about which there is no controversy. We are clearly of opinion that it is, and that the trial court therefore ruled properly in excluding the evidence and in refusing the instructions complained of.

An advance or payment of money on a contract of sale, without doubt, is altogether a different thing from that of obtaining money from the purchaser on the seller's own note. The legal effect of the transaction in the first case is to extinguish, *pro tanto*, the seller's claim and the purchaser's corresponding liability. In the second, no part of either is extinguished. Instead of collecting something on his corn, as provided by the agreement, the seller is offered a loan of money on his individual note, which would be a complete change of the legal relations of the parties. Whereas the seller was, before, a mere creditor of the purchaser, he at once, upon giving such a note, becomes the debtor of the purchaser, and no part of the debt due him on account of the sale is thereby discharged. Thus it is seen the legal effect in the one case is practically the very opposite of what it is in the other, and might

in many cases result in the grossest injustice. For instance, had appellee given his note for the required advance, the appellants might, the next hour thereafter, have transferred it to another for value, and appellee would have been compelled to pay it, whether he ever got a cent for his corn or not. This is apparent. That one will not be permitted to prove a custom or usage the effect of which will be to add to an express agreement a condition or limitation which is repugnant to or inconsistent with the agreement itself, will hardly be questioned. This is not only the universally received doctrine on the subject, but it has been often fully recognized by this court. Caldwell v. Meek, 17 Ill. 220; Bissell v. Ryan, 34 *id.* 566; Deshler v. Beers, 32 *id.* 368; Wilson v. Bauman, 80 *id.* 493. In the editor's note to Wigglesworth v. Dalleson, Smith's Leading Cases 309, it is said: "Evidence of usage, though sometimes admissible to add to or explain, is never to vary or to contradict, either expressly or by implication, the terms of a written instrument,"—citing in support of the proposition, Magie v. Atkinson, 2 M. & W. 442; Adams v. Worldley, 1 *id.* 374; Freeman v. Loeder, 11 A. & E. 589, and Gates v. Pym, 6 Taunt. 445. The rule here stated is equally applicable to a verbal contract, where the terms of it are definitely fixed, as they are in the present case.

It follows from what we have said, and the authorities cited, the judgment of the appellate court must be affirmed.

*Judgment affirmed.*

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## CRESSWELL RANCH & CATTLE CO., LIMITED, *v.* MARTINDALE ET AL.

**(United States Circuit Court of Appeals, Eighth Circuit, 1894. 63 Fed. 84, 11 C. C. A. 33.)**

SANBORN, J.[133] If the vendee of personal property, to be delivered and paid for in instalments, refuses, upon the demand of the vendor, to accept and pay for a substantial part of an instalment according to the contract, will the fact that he does so in good faith, and in the belief that he is not required by the contract to receive any of the property so rejected, deprive the vendor of his right to refuse to further perform the contract on his part? This is the principal question presented by this case.

September 19, 1892, the Cresswell Ranch & Cattle Company, Limited, a corporation, the plaintiff in error, sold to William Martindale and Thomas J. Price, the defendants in error, 5,021 steers, 1,321 of which were to be delivered not later than October 20, 1892, and the remaining 3,700 at the rate of 1,000 each week, commencing October 24, 1892. The

[133] Parts of the opinion are omitted.

vendees agreed to pay $28 per head for the cattle, and at the date of the contract paid $5,000, which was to be applied to the payment for the cattle as they were delivered at the rate of $1 per head. The 3,700 cattle were part of a herd of cattle owned by the vendor that was on a range in Texas, 40 miles square and the contract provided that when any instalment of these cattle was ready to load upon the cars the vendees should be notified, and might cut out any of the steers gathered that did not weigh 900 pounds. After the 1,321 cattle and two instalments of the 3,700 had been delivered and paid for, making in all 2,289 steers, the parties met on November 14, 1892, for the fourth delivery, and the vendor tendered, and demanded that the vendees should receive, 980 steers that weighed over 900 pounds each, and that complied with the other requirements of the contract. The vendees cut out and refused to accept or pay for 282 of these cattle, on the ground that they did not weigh 900 pounds each, but accepted and paid for the remaining 698. Before the time for another delivery arrived, the vendor notified the vendees that they had violated the contract on their part by rejecting the 282 steers, and that the cattle company would deliver no more cattle to them thereunder. The vendees then brought this suit for damages for the failure of the vendor to deliver the remainder of the cattle specified in the contract, and for the balance of the $5,000 not yet applied to the payment for the cattle already delivered. The vendor answered that the vendees had committed the first breach by failing to receive and pay for the 282 cattle tendered November 14, 1892. At the close of the trial the court instructed the jury, in effect, that the mere fact that the vendees refused to accept the steers that complied with the contract on November 14, 1892, did not relieve the vendor of its obligation to make tender of the remainder of the 5,021 steers due under the contract, if the jury further found that the vendees made the rejection in good faith, in the belief that the rejected steers did not come up to the requirements of the contract. The court also refused to charge, as requested by the vendor, that the rejection of these steers entitled it to treat this action as a breach of the contract, and that, if the vendor notified the vendees that it so elected in a reasonable time after the rejection, the latter could not recover. The court also instructed the jury that, although they found that the vendor tendered and the vendees refused to accept cattle that fulfilled the requirements of the contract, yet, if the vendor had subsequently waived that breach of the contract, the vendees could recover damages for the failure of the vendor to make the subsequent deliveries. There was a verdict and judgment for the vendees for damages for the failure of the vendor to deliver the steers due subsequent to November 14, 1892. But the jury found that the 282 steers tendered and rejected on that day fulfilled the requirements of the contract, and gave the vendees no damages on account of those steers. The verdict does not disclose whether the jury found that the vendees' breach of the contract on November

14, 1892, was excused because they made it in good faith or because the vendor had waived it.

The contract on which this action was based was an entire contract. It was a contract for the sale of 5,021 cattle for $140,588, and the $5,000 earnest money paid at the time the contract was made was paid on account of the entire purchase. The subsidiary provisions of the contract, that the price was $28 for each steer, and that there were to be five deliveries of the cattle, no more made as many contracts of this one as there were to be instalments of cattle delivered than it made as many as there were cattle to be delivered. Norrington v. Wright, 115 U. S. 188, 203, 6 Sup. Ct. 12; Iron Co. v. Naylor, 9 App. Cas. 434, 439. Nor was the vendees' breach of this contract slight or in an immaterial part. It was substantial, and went to the very root of the contract. It consisted in their refusal to accept 282 cattle, and to pay $7,896 for them, at the time and place they agreed to accept and pay for them under the contract. These cattle had been gathered by the vendor from a range 40 miles square by the labor of many men for many days and driven near to the railroad station to be delivered to the vendees. Their refusal to take them imposed upon the vendor the necessity of gathering other cattle from this extended range in the same manner to carry out its contract in the face of the fact that the vendees had refused to accept nearly three hundred cattle that complied with its provisions. A plaintiff cannot maintain his action for the breach of a contract made with him by a defendant unless he can establish such performance on his part as will entitle him to demand performance of the defendant. A prior substantial breach of the contract on the plaintiff's part is ordinarily a conclusive answer to an action for a subsequent breach on the defendant's part. In their complaint the vendees recognized this principle, and alleged that they "have in all things kept and performed the said contract upon their part," but that the cattle company, on November 19, 1892, refused to perform on its part.

The verdict does not rest, however, upon proof of this prior performance on the part of the vendees, but upon the facts that, before they charge any breach upon the cattle company, they had themselves failed to perform a substantial part of the contract, but that they then in good faith believed that they were not so failing. Nor was this exercise of good faith and belief by mistake, or without notice of the fact. It was a willful and determined exercise of faith. The vendor insisted, at the time, that these cattle weighed over 900 pounds each, weighed some of them in the presence of one of the vendees on some defective scales that indicated that its claim was well founded, and demanded that the vendees should accept them. All this may not have demonstrated the weight of the cattle, though it seems to have proved it to the satisfaction of the jury, but, although the judgment of the vendor's agent was liable to be at fault, and although the scales were defective, this was ample warning to the vendees to determine the weight of these

cattle in some way correctly before they rejected them. They had, by the express terms, reserved to themselves the exclusive privilege of rejecting cattle that did not in fact weigh 900 pounds, and by that very provision they had imposed upon themselves the duty of determining the fact, and of rejecting, at their peril, those whose weight exceeded that amount. The provision of the contract which presents this question is that the vendees may cut out "any objectionable steer that may not weigh 900 pounds." It was perfectly competent for these parties to this contract to have provided in it that the vendees might cut out and reject any steer that in their judgment weighed less than 900 pounds, or any steer that they in good faith believed weighed less than 900 pounds. This they did not do. They provided that the vendees might cut out those steers that in fact weighed less than 900 pounds each. There is a well-known and accurate standard and method for measuring the weight of cattle and most mercantile commodities, and contracting parties know when they make their contracts what the standard is, and what the method is, and that neither of them will probably change. But there is no accurate test, standard, or method by which the belief of vendees as to the weight of the articles they purchase can be measured, and no one can know in advance what such a belief may be. The belief of the defendants in error in this case was, according to the verdict of the jury, too far from the fact to authorize its substitution in this contract for the actual weight, for out of 980 cattle that weighed over 900 pounds each they believed that more than 28 per cent. of them weighed less. To substitute in this contract, for the actual weight, the judgment or belief in good faith of the vendees on that subject as the standard by which to determine what steers were heavy enough to comply with the terms of the contract, would be to make a new contract for these parties,—a contract they neither made nor intended to make, and one which the verdict shows would have been far more beneficial to the vendees than was the actual contract. It is not claimed that this can be done.

But it is insisted that, although the good faith and belief of the vendees cannot be made the standard to determine the existence of the breach of this contract, yet they may be interposed to deprive that breach some of its ordinary legal effects. But that as effectually makes a new contract for the parties as to substitute the vendees' belief as to the weight for the actual weight. The established rights and remedies for the breach of an agreement are as effectually contracted for as the performance of the acts stipulated. One of the rights of the vendor under this contract was to refuse to perform subsequent acts stipulated after the vendees had refused to perform a substantial part of the contract on their part. This right is given by the law for his protection to the party to a contract against whom the first breach has been committed. No sound reason occurs to us why its existence should be made depend-

ent on the good faith or belief of him who first breaks the contract. On the other hand, there are cogent reasons to the contrary.

First. It is the breach itself, and not the good faith or belief of the party who commits it, that causes and measures the damage of the injured party. The injury to the vendor in the case before us was not less because the vendees broke the contract in good faith, in the belief that they were not breaking it. Nor did the fact that they broke it in good faith, in the belief that they were complying with it, raise any presumption that they would not continue to do so. On the other hand, this fact presented the guaranty of word and of act that they would continue to break it.

Second. The rights and remedies of parties for breaches of civil contracts ought not to depend on the good faith and belief of those who violate them, because these are so difficult to ascertain. The proof of the existence or absence of such good faith and belief is peculiarly within the knowledge and control of the violators themselves. Frequently they alone know what they believe, and whether or not they are acting in good faith. It would always be difficult, and often impossible, to establish their bad faith or their belief that they were violating their contracts, without their testimony, and generally impossible to do so with it. The rights and remedies of parties for the breach of civil contracts ought not to be so placed at the mercy of those who break them. It would be intolerable that parties to continuing contracts should be compelled to perform them on their part until they could prove that the other contracting parties, who were constantly breaking them, were doing so in bad faith, and in the belief that they had no right to do so.

Our conclusion is that the right of a party to a continuing contract to refuse to make subsequent performance on his part, after the other contracting party has refused, upon full notice and demand, to perform a substantial part of the contract on his part, is not dependent on the good faith of the latter, nor on his belief that he is not violating the contract, but rests solely upon the fact whether or not he has violated or failed to perform a substantial part of the contract that the agreement required him to perform. Norrington v. Wright, 115 U. S. 188, 204, 205, 6 Sup. Ct. 12; Filley v. Pope, 115 U. S. 213, 6 Sup. Ct. 19; Rolling-Mill v. Rhodes, 121 U. S. 255, 261, 264, 7 Sup. Ct. 882; Beck & Pauli Lithographing Co. v. Colorado Milling & Elevator Co., 3 C. C. A. 248, 52 Fed. 700, 703, 10 U. S. App. 465, 470; Philip Mills v. Slater, 12 R. I. 82; Smith v. Lewis, 40 Ind. 98; Hoare v. Rennie, 5 Hurl. & N. 19; Pope v. Porter, 102 N. Y. 366, 371, 7 N. E. 304; Dwinel v. Howard, 30 Me. 258; Robson v. Bohn, 27 Minn. 333, 344, 7 N. W. 357; Reybold v. Voorhees, 30 Pa. St. 116, 121; Stephenson v. Cady, 117 Mass. 6, 9; Branch v. Palmer, 65 Ga. 210; Fletcher v. Cole, 23 Vt. 114, 119. * * *

The reason why the vendor could not recover in Norrington v. Wright was that he had committed the first breach of the contract, and that relieved the vendee from subsequent performance on his part. For the

same reason the breach committed November 14, 1898, relieved the cattle company from any subsequent performance on its part. If a default on the first instalment by one party relieves the other contracting party from the performance of all the stipulations of the contract, by so much the more will a default on a later instalment relieve him from all subsequent performance. It is the first breach which he commits, and not the number of the particular instalment to which it relates, that defeats the plaintiff, in these actions. Thus in Robson v. Bohn, *supra*, a contract was made May 19, 1873, for the sale of 425,000 feet of lumber, to be delivered at the rate of 20,000 feet per week from the date of the contract, and the defendant agreed to give his promissory note for $3,000 at that time, to pay $2,000 in cash August 1, 1873, and to pay the balance on the full delivery of the lumber. He gave his note for $3,000. The vendor delivered the lumber weekly until August 1, 1873. The vendee then failed to pay the $2,000 in cash, and the court held that the refusal of the vendee to pay the $2,000 excused the vendor from the delivery of any lumber subsequent to August 1st. To the same effect are Dwinel v. Howard and Reybold v. Voorhees, *supra*. The rule is general that he who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure to perform, and it rules this case.

Finally, it is contended that the cattle company waived the breach committed by the vendees, and, that, even if there was error in the instruction we have been considering, it was error without prejudice, and the judgment should be affirmed. * * * But it is unnecessary to determine that question here, * * * because it may be that the jury founded their verdict upon the very issue to which the erroneous ruling related, and that they were controlled in their finding by that ruling. Coal Co. v. Johnson, 6 C. C. A. 148, 56 Fed. 810; State of Maryland v. Baldwin, 112 U. S. 490, 492, 5 Sup. Ct. 278. * * *

The judgment is accordingly reversed, with costs, and the cause remanded, with directions to grant a new trial.[184]

[184] See Stanfield v. Arnwine (Ore.), 185 Pac. 759 (1919), where lambs rejected under a contract of sale really were according to contract, but the buyer honestly thought they were not.

One who refuses to perform on the ground that the other party cannot or will not perform does so, of course, at the peril of proving the inability or uncertainty. "The case comes down to this, as far as the rule of law governing it is concerned: Plaintiff believed and perhaps had reasonable cause to believe the city would be unable to carry out its part of the contract; that is to say, would be unable promptly to furnish a right of way for the sewer system, and in consequence he might sustain loss; but this was by no means certain, and the law does not relieve a man from a contractual obligation because he believes with good cause the person with whom he has contracted will be unable to perform." Goode, J., in Coonan v. City of Cape Girardeau, 149 Mo. App. 609, 129 S. W. 745, 748 (1910).

On right to repudiate because of anticipated inability of the other party to perform within the time limit, see 41 L. R. A. (N. S.) 60, note.

## TIPTON *v.* FEITNER.

(Court of Appeals of New York, 1859. 20 N. Y. 423.)

Appeal from the Supreme Court. Action to recover the price of certain slaughtered hogs, sold by the plaintiffs to the defendants. It was defended on the ground that they were purchased under a special contract with the plaintiffs, which had been violated on their part. The case, according to the finding of the referee, before whom it was tried, was as follows: On the 3rd day of February, 1855, at the city of New York, the plaintiffs agreed with the defendant, by parol, by one and the same contract, to sell the defendant eighty-eight dressed hogs, then at the slaughter house of a third person, in the city, at 7 cents per pound; and also certain live hogs of the plaintiffs, which were being driven and were then on their way from the state of Ohio to New York at 5¼ cents per pound live weight, the defendant agreeing on his part to buy dressed and live hogs at these prices. The dressed hogs were to be delivered immediately after the sale, and the live ones on their arrival in the city, where they were expected, and did arrive some days afterwards. The dressed hogs were delivered on the same day, but were not paid for by the defendant. The live hogs arrived five days afterwards; they were not delivered to the defendant, but were slaughtered by the plaintiffs, and by them sold to other parties. The defendant insisted that the plaintiffs could not recover for the dressed hogs, on the ground that they had failed to perform their agreement as to the live ones. The referee, however, held that the plaintiffs were entitled to recover the price of the dressed hogs, deducting the damages which the defendant had sustained for the breach of the other branch of the contract; and he reported accordingly. The dressed hogs came to $1,182.57; deducted for defendant's damages, $401, leaving $780.38, for which judgment was given, which was affirmed at a general term. The defendant appealed.

DENIO, J.[135] It is not universally true that a party to a contract who has himself failed to perform some of its provisions is thereby precluded from recovering damages for a breach committed by the other party. The question in such cases is, whether the stipulation which the plaintiff has failed to observe was a condition precedent to the performance by the defendant; and whether it is of that character or not depends upon the general scope and intention of the agreement, to be gathered from its several provisions. If the parties have in terms stipulated that the defendant's performance shall be dependent or conditional upon something to be done by the plaintiff, the case is a plain one. It is equally so where the act to be done by the plaintiff must naturally precede, in the order of time what the defendant is

[135] Parts of the opinion of Denio, J., and all of the opinion of Selden, J., are omitted.

same reason the breach committed November 14, 1898, relieved the cattle company from any subsequent performance on its part. If a default on the first instalment by one party relieves the other contracting party from the performance of all the stipulations of the contract, by so much the more will a default on a later instalment relieve him from all subsequent performance. It is the first breach which he commits, and not the number of the particular instalment to which it relates, that defeats the plaintiff, in these actions. Thus in Robson v. Bohn, *supra*, a contract was made May 19, 1873, for the sale of 425,000 feet of lumber, to be delivered at the rate of 20,000 feet per week from the date of the contract, and the defendant agreed to give his promissory note for $3,000 at that time, to pay $2,000 in cash August 1, 1873, and to pay the balance on the full delivery of the lumber. He gave his note for $3,000. The vendor delivered the lumber weekly until August 1, 1873. The vendee then failed to pay the $2,000 in cash, and the court held that the refusal of the vendee to pay the $2,000 excused the vendor from the delivery of any lumber subsequent to August 1st. To the same effect are Dwinel v. Howard and Reybold v. Voorhees, *supra*. The rule is general that he who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure to perform, and it rules this case.

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## TIPTON *v.* FEITNER.

(Court of Appeals of New York, 1859. 20 N. Y. 423.)

Appeal from the Supreme Court. Action to recover the price of certain slaughtered hogs, sold by the plaintiffs to the defendants. It was defended on the ground that they were purchased under a special contract with the plaintiffs, which had been violated on their part. The case, according to the finding of the referee, before whom it was tried, was as follows: On the 3rd day of February, 1855, at the city of New York, the plaintiffs agreed with the defendant, by parol, by one and the same contract, to sell the defendant eighty-eight dressed hogs, then at the slaughter house of a third person, in the city, at 7 cents per pound; and also certain live hogs of the plaintiffs, which were being driven and were then on their way from the state of Ohio to New York at 5¼ cents per pound live weight, the defendant agreeing on his part to buy dressed and live hogs at these prices. The dressed hogs were to be delivered immediately after the sale, and the live ones on their arrival in the city, where they were expected, and did arrive some days afterwards. The dressed hogs were delivered on the same day, but were not paid for by the defendant. The live hogs arrived five days afterwards; they were not delivered to the defendant, but were slaughtered by the plaintiffs, and by them sold to other parties. The defendant insisted that the plaintiffs could not recover for the dressed hogs, on the ground that they had failed to perform their agreement as to the live ones. The referee, however, held that the plaintiffs were entitled to recover the price of the dressed hogs, deducting the damages which the defendant had sustained for the breach of the other branch of the contract; and he reported accordingly. The dressed hogs came to $1,182.57; deducted for defendant's damages, $401, leaving $780.38, for which judgment was given, which was affirmed at a general term. The defendant appealed.

DENIO, J.[135] It is not universally true that a party to a contract who has himself failed to perform some of its provisions is thereby precluded from recovering damages for a breach committed by the other party. The question in such cases is, whether the stipulation which the plaintiff has failed to observe was a condition precedent to the performance by the defendant; and whether it is of that character or not depends upon the general scope and intention of the agreement, to be gathered from its several provisions. If the parties have in terms stipulated that the defendant's performance shall be dependent or conditional upon something to be done by the plaintiff, the case is a plain one. It is equally so where the act to be done by the plaintiff must naturally precede, in the order of time what the defendant is

[135] Parts of the opinion of Denio, J., and all of the opinion of Selden, J., are omitted.

called upon to do, and where the former is necessary to be done to enable the defendant to perform; and also where the defendant's performance is the payment or equivalent for something which he is to receive from the plaintiff, unless, in the latter case, it is provided that such equivalent is to be rendered in advance of what is to be received on account of it, credit being given for the latter.

In contracts for the purchase of property, real or personal, where there is no stipulation for credit or delay on either side, the delivery of the property (or its conveyance where it is of a nature to pass by grant), and the payment of the price are each conditions of the other, and neither party can sue for a breach without having offered performance on his part. Such was the nature of the contract in this case. The plaintiff had slaughtered hogs and also live hogs to dispose of, and the defendant agreed to purchase the whole of both kinds, and to pay a certain price per pound, discriminating, however, as to price between the two species of property. There was no agreement for credit for any part of the property for any time; and in the absence of such a stipulation, we must consider that it was to be paid for on delivery, and that the delivery of the property and the payment of the price were to be concurrent acts. But a question then arises, whether the contract was entire in the sense that a delivery of the whole—the live hogs as well as the dressed meat—was to precede, the payment of the latter; and it is upon the answer to that inquiry, as I think, that this case depends. And I am of the opinion that the bargain respecting the several kinds of property, in regard to the payment for each, is to be taken distributively. The dressed hogs were to be delivered immediately while those which were alive, and were on their way from Ohio, were to be delivered when they should arrive. It would not be unreasonable for the parties to have agreed that payment for those first delivered should be postponed until the others came to hand, so that there should be one settlement for the whole; but it would be a more probable mode of adjustment for the purchaser to agree to pay for the parcel which he was to receive at once, and for the other when he should receive it. In that way neither of the parties would be called upon to trust the other—and there being nothing in the contract which looked to credit, we cannot, I think, reasonably hold that any was contemplated. The difference in the kind of property, in the price, and in the time of delivery showed such a diversity in the two operations as to preclude any necessary or probable inference that the one first to be consummated by delivery was to be suspended, as to its liquidation for the period, more or less uncertain, which might elapse before the other would be ready for adjustment. Upon the construction of so peculiar an agreement a precise precedent is not to be expected. But there is a modern case in the Court of King's Bench, which somewhat confirms the opinion to which I have arrived. [Stating Withers v. Reynolds, 2 Barn. & Adol. 882.] * * *

Assuming that I am right in the construction of the contract, I am

of the opinion that the defendant cannot refuse to pay for the dressed hogs delivered, on the ground that the plaintiff has broken his contract relative to the live ones. The only condition upon which the payment for the former depended was their delivery. The payment might have been required to be made concurrently with the delivery; but that being waived, the plaintiff might have sued immediately afterwards, and before the time for the delivery of the other property had arrived. It is true, that before this action was commenced the plaintiff was in default for not delivering the other parcel of the property; but for that wrong the defendant had his remedy, either by separate action or by a recoupment in the plaintiff's action; and the referee has allowed him the benefit of it in the latter form. The law no doubt intends to discourage men from breaking their engagements, but this is not generally accomplished by visiting them with a penalty beyond the damages sustained by the party injured. If I am right in my construction of the agreement, there can be no pretence that the delivery of the hogs coming from Ohio was a precedent condition to the payment for the others; and if this were not so, when the agreement was made, it did not become so by the facts which afterwards took place. * * *

The position that one who has violated a contract on his own part cannot recover for the breach of any of its stipulations by the other party, however disconnected with the one he has broken, cannot be sustained. There are many cases the other way; and the rule would be one of needless severity. (Boon v. Eyre, 1 H. Black. 273, note; Campbel v. Jones, 6 Term R. 570; Carpenter v. Cresswell, 4 Bing. 409; Havelock v. Geddes, 10 East 555; Davidson v. Gwynne, 12 Id., 381;) The cases in our own courts, in which covenants have been adjudged to be independent, show that there may be provisions in contracts available to the party in whose favor they are made, though he is unable to aver performance of other provisions of the same contract binding on him. (Bobb v. Montgomery, 20 Johns. 15; Slocum v. Despart, 8 Wend. 615; Morris v. Sliter, 1 Denio, 59.)

I am in favor of affirming the judgment appealed from.

*Judgment affirmed.*[186]

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## SHINN ET AL. *v.* BODINE ET AL.

**(Supreme Court of Pennsylvania, 1869. 60 Pa. St. 182, 100 Am. Dec. 560.)**

Action of assumpsit, brought by Frank L. Bodine and J. Minor Bodine, trading as F. & J. Bodine, against Charles H. Shinn and William C.

[186] It has been suggested that Tipton v. Feitner, *supra*, is an instance of severing performance so as to make a party accept other than performance according to the contract's terms "in a state where, if a contract is entire, the rule that all must be tendered before anything is due has been very stoutly

Shinn, trading as Charles H. Shinn & Son. The cause of action alleged in the plaintiff's declaration was that the defendants had refused to deliver 800 tons of coal, as they had contracted to do. The contract was contained in the following letter:

"128 S. Front St., July 31st, 1865.

"Messrs. C. H. Shinn & Co.:

"Gentlemen—We accept your offer for eight hundred (800) tons Greenwood Co.'s coal, broken size, at six (12½-100ths) dollars per ton, 2,240 lbs. Coal to be delivered on board vessels as sent for during months of August and September; to be of as good quality as we have heretofore received. Should we be unable to get all away by close of September, it is understood you can keep over on wharf or bring down later, as you prefer, as much as 300 tons of above quality.

"Yours truly, F. & J. Bodine."

Under this contract the defendants delivered one cargo of coal. The plaintiffs refused to pay for that till the whole was delivered, and the defendants refused to complete the contract. Verdict and judgment for the plaintiffs and defendants removed the case to the court *in banc*.

AGNEW, J.[137] The entirety of a contract depends upon the intention of the parties and not on the divisibility of the subject. The severable nature of the latter may often assist in determining the intention, but will not overcome the intent to make an entire contract, when that is shown. Nor will the mode of measuring the price, as by the bushel, ton or pound, change the effect of the agreement, when it is entire. If a party should agree to deliver one bullock, at a certain price per pound, and on a certain day, no one would doubt the entirety of the contract, notwithstanding the mode of measuring the price. But the indivisibility of the contract was not to be less, if he had contracted in the same terms to deliver two. Precisely the same rule would apply to an agreement to deliver 100 bushels of wheat by a certain day for a certain price per bushel, and the entirety of the contract would not be disproved if the agreement required it to be delivered by the wagon-load.

Just so, here, the contract for the delivery of 800 tons of coal at a stated price per ton, is in language clearly denoting an entire contract for that much coal, the price measured by the ton not indicating an intent to sever in payment. Nor does the provision for delivery on board vessels sent for the coal during August and September, indicate an intent to sever the payment, for delivery by the vessel-load was a necessity grow-

applied. Catlin v. Tobias, 26 N. Y. 217." Francis H. Bohlen, Breach of One Installment of a Divisible Contract, 39 Am. L. Reg. (N. S.) at p. 483, n.

The principal case should be considered in the light of the test laid down by Window, C. J., in National Knitting Co. v. Bouton & Germain Co., reported *post*, p. 940.

137 The statement of facts is abbreviated.

ing out of the quantity to be delivered and the distance of transportation. And the last clause was but a provision against inability to send for all the coal in the prescribed time, and fails to indicate any intent to sever the payment. No part of the agreement disclosing an intent to sever in the payment, the legal presumption drawn from the entire contract to deliver 800 tons of coal remains, that it was to be paid for on delivery.

On authority the case is not less clear: Shaw v. Badger, 12 S. & R. 275; Shaw v. Turnpike Co. 2 Penna. R. 454; Harris v. Ligget, 1 W. & S. 301; Davis v. Maxwell, 12 Metc. 286. The authorities cited by the plaintiff in error are all distinguishable. Lester v. McDowell, 6 Harris 92, was a question in replevin, of title dependent on delivery. The same question arose in Welsh v. Bull, 8 Casey 13, the action there being trespass. In Reybold v. Vorhees, 6 Casey 116, the contract clearly indicated a severance in the payments. Mayor v. Pyne, 2 Car. & P. 91, was put on the ground of the refusal of the purchaser to take the undelivered numbers of the work subscribed for. The idea thrown out by Best, C. J., that though the contract was entire for the whole work in numbers, yet there was a subordinate contract to pay for each number on delivery, is plainly founded on what he understood to be a custom of the trade. The contract in Withers v. Reynolds, 2 Barn. & Adol. 882, was for no specific quantity of straw, but a running agreement for the delivery of wheat straw for the use of the stables, until a certain day, at a specified price per load, with an agreement to pay the price for each load. The intention to sever the payment was clear. The other English cases cited need no notice more than to say they are clearly distinguishable from this. We are of the opinion that the contract here for the delivery of 800 tons of coal was entire, and payment of the price waited on the fulfilment.[138] It was, therefore, not in the

[138] "It has often been held that a contract is not entire and indivisible because embraced in one instrument (Straus v. Yeager, 48 Ind. App. 448, 93 N. E. 877; Edgerton v. Power, 18 Mont. 350, 45 Pac. 204), and that it is not necessarily severable because embraced in more than one instrument (Spriggs v. R. Ry. Co., 77 Vt. 347, 60 Atl. 143; Waldron v. Can. Pac. Ry. Co., 22 Wash. 253, 60 Pac. 653). Referring to this question, the court in Timber Co., v. Windmill & Pump Co., 135 Iowa, 308, 112 N. W. 771, said:

"'As a general rule, it may be said that a contract is entire when by its terms, nature, and purpose it contemplates and intends that each and all of its parts and the consideration shall be common each to the other and "interdependent." On the other hand, it is the general rule that a severable contract is one in its nature and purpose susceptible of division and apportionment. The question whether a given contract is entire or separable is very largely one of intention, which intention is to be determined from the language the parties have used and the subject-matter of the agreement. The divisibility of the subject-matter or the consideration is not necessarily conclusive, though of aid, in arriving at the intention.'" Stevens, J., in B. F. Sturtevant Co. v. Le Mars Gas Co. (Ia.), 176 N. W. 338, 341 (1920).

power of the defendants below to demand payment on each vessel-load, and to rescind on a refusal to pay in this mode.

*Judgment affirmed.*

In Munsey et al. v. Tadella Pen Co., 38 N. Y. Supp. 159 (1895), the action was on the following accepted offer: "Please insert our one-quarter page advertisement in Munsey's Magazine for one year. This advertisement is to appear in every issue (not less than twelve) of Munsey's Magazine during the year following its first insertion hereunder, beginning with August, 1894. To appear always on back cover page. Matter is to be changed as often as we direct, and proof is always to be submitted to and approved by us before publication. Every term of this offer is material, and a condition upon the strict performance whereof we are to pay you one hundred and eighty dollars per quarter page at our office in New York. This price you warrant to be the lowest at which you sell advertising space on back cover in said publication, and if hereafter, during the continuance of this contract, you sell space on back cover page for a lower price, then the price to us shall be reduced to equal such lowest price. On business which you place through advertising agents, the term 'price' includes the commission which you pay or allow such agent." The action was for $540 for insertion of the advertisement for three months. The defendant Pen Company claimed that the contract was an entire one, to publish the advertisement for one year, and that, if the plaintiff failed to publish the advertisement for the full year, it would not be entitled to recover anything. Lawrence, J., said: "After examining the contract, I am of the opinion that the contention of the defendant is correct. The contract does not say that $180 becomes due every month, but requires a one-fourth page advertisement for one year, to appear in every issue, 'not less than twelve,' during the year beginning August, 1894. It also provides that 'every term of this offer is material, and a condition upon the strict performance whereof we are to pay you one hundred and eighty dollars for one-quarter page.' The term of publication for one year is certainly a material matter. It was a condition which the parties agreed upon, and the court ought not, by construction, to substitute a different condition. The authorities cited by the defendant seem to me fully to sustain its contention. In Davis v. Maxwell, 12 Metc. (Mass.) 286, Davis contracted to work on Maxwell's farm 'seven months at $12 per month.' It was held that the contract was entire, and required merely payment of $84 at the end of seven months, not $12 at the end of each month, and that Davis, by voluntarily quitting before seven months elapsed, lost the right to recover anything for the time he worked. In Baker v. Higgins, 21 N. Y. 397, the contract was, 'I will deliver 25,000 pale brick for $3 per M., and 50,000 hard brick at $4 per M., cash.' The offer was accepted, but after delivering 10,000 pale and 10,500 hard brick, in one delivery, payment therefor was demanded and refused. In the action for the price it was held that the delivery of the entire quantity was a condition precedent to any payment. In Casten v. Decker, 3 N. Y. St. Rep. 429, the plaintiff made an agreement with the defendant that he and his wife would work for him for a stated term at a fixed compensation per month. Before the end of the term agreed upon the plaintiff ceased work under the contract, alleging as a reason the sickness of his wife. It was held that the agreement was an entire and indivisible one, for services, and that the plaintiff was not entitled to recover without complete performance, unless such performance was in some manner excused, but that the sickness of his wife was an adequate excuse. To the same effect is the case of Fahy v. North, 19 Barb. 341. * * * Upon these authorities, I am of the opinion that the contract was entire, and that the plaintiff could not legally demand payment for any portion

## VIGERS *v.* COOK.

(High Court of Justice, King's Bench Division. [1919] 2 K. B. 475.)

A. T. LAWRENCE, J.[139] This is an unpleasant case and not a simple one. The plaintiff, an undertaker, sued the defendant for services rendered in connection with the funeral of his son. The claim was for 57*l.* 15*s.* Of that sum 8*l.* 15*s.* for the hire of carriages, which was the subject of a separate contract, was admitted to be recoverable. The balance of 49*l.* was disputed. The county court judge disallowed certain of the items claimed, but gave judgment for the plaintiff for 42*l.* The question is whether he was right in holding that the plaintiff was entitled to recover any of the items claimed. The plaintiff, through his manager, took an order for the funeral. He admitted that it was his duty in the contract of that funeral to take the body into the church in order that the funeral services might be read over it, and that duty he admittedly did not perform. It appears that a lead coffin was provided, and the body was placed in it and removed to a mortuary, where it remained for three days. It seems to be the universal practice in the case of the lead coffins to make a pinhole in the lid to allow of the escape of the gas resulting from decomposition. That was done in this case, but the plaintiff, having received a complaint from the mortuary officials of a smell from the coffin, caused the pinhole to be closed, and he proceeded to conduct the funeral with the coffin sealed up. He knew quite well that it was not unlikely that the coffin might burst, but he was content to take the risk. The natural consequence happened, and by the time the funeral procession reached the church the coffin had burst and was leaking, so that it became impossible to take it into the church and the service inside the church had to be read without the body being present. Under those circumstances, is the plaintiff entitled to recover for the services which he in fact rendered? I think he is not. The contract was to conduct the funeral in a reverent manner such as to conform with the sentiments of the family. It was an essential part of the funeral that the body should be taken into the church so that the service might be read in its presence. The various items of which the plaintiff's bill is made up are mere accidentals, and if he fails to carry out the essential part of his contract he fails to carry it out altogether. * * * In my opinion the plaintiff's case fails, and there must be judgment for the defendant.[140]

of the advertisements until the expiration of the year, and that the mere fact of the defendant's having made one payment to the plaintiff is not such a practical construction of the contract by the parties as to take the case out of the general rule."

[139] The statement of facts, the concurring opinion of Lush, J., in the Divisional Court, and also the opinion of Bankes, L. J., in and for the Court of Appeal are omitted. Part of the opinion of A. T. Lawrence, J., is omitted.

[140] The Court of Appeal dismissed the appeal from the Divisional Court, holding, as stated in the head-note of the case, "that the contract was one

## BARRIE *v.* EARLE.

(Supreme Judicial Court of Massachusetts, 1886. 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 126.)

This was an action of contract brought to recover a balance of $120 upon a special contract, the substance of which was as follows:

MAY 24, 1883.

"I hereby subscribe for one copy of the Art Treasures of America, in ten portfolios, at $15 each, as published, on the following terms of subscription, which terms cannot be altered or modified: (1) The Art Treasures of America, to be completed in ten portfolios, at $15 each. (2) Each portfolio to contain sixteen impressions of photogravure plates, and fifty pages of text or full-page wood engravings. (3) The portfolios to be issued at intervals of about two months. (4) This edition is limited to 1,200 copies; but no more copies shall be issued than are subscribed for, and the publisher reserves the right, at any time, to advance the price to new subscribers. (5) Each copy of the work to contain a special title, bearing name and address of its subscriber; and the publisher guaranties to furnish impressions and paper equal in all respects to the specimens shown. (6) Portfolios to be delivered, carriage prepaid; payment only to be made for each portfolio after such delivery. (7) No terms, conditions, or representations other than here printed will be binding on subscriber or publisher, and the subscriber hereby acknowledges receipt of a copy of these terms.

[Signed] "ENOCH EARLE."

The plaintiff introduced evidence tending to show that he delivered the first portfolio, under said contract, by the Adams Express Company, at the house of the defendant, some time in July, 1883, and received, some time afterwards, the defendant's check for $15; that, some time in August or September following, the plaintiff, by said express company, delivered a second portfolio, under said contract, at the defendant's house, for which he afterwards received the defendant's check for $15; that, some time in October following, the plaintiff sent, in the same way, another portfolio, which the defendant refused to take; that the remaining seven portfolios were never delivered to the defendant, but that the plaintiff had been ready to deliver the same, but the defendant refused to accept them, and notified the plaintiff of his refusal.

The defendant offered evidence to show that the defendant's signature to said contract was obtained by certain false and fraudulent

entire contract; that it was an essential term thereof that the coffin should be taken into the church for a part of the service, subject to the condition that the body was in such a state as to permit of that being done; that the onus lay on the plaintiff to prove that it was not owing to his default that this term of the contract could not be carried out, and he had not discharged that onus; and that he was not entitled to recover."

representations made by the plaintiff's duly-authorized agent to the defendant, upon which representations the defendant relied; but, it being admitted by the defendant that he had neither returned nor offered to return the portfolios received as above stated by him, the court excluded the evidence, and the defendant excepted.

FIELD, J.[141] The first exception is to the exclusion of evidence that the defendant's signature to the contract was obtained by the false and fraudulent representations. This evidence was excluded upon the ground that the contract was entire, and the defendant could not avoid it except by returning the two portfolios which he had received and paid for. The same question of law is involved in the last exception. A majority of the court think that this is such a contract as is described in Badger v. Titcomb, 15 Pick. 409, 413, where, "although the agreement is entire, the performance is several;" or, as is said in Denny v. Williams, 5 Allen, 1, 4, a contract "one and entire in its origin, and yet, looking to the performance of different things at different times, it may be divisible in its operation;" that an action under it could be maintained for the price of each portfolio when each was delivered, but that the contract is one entire agreement to take one copy of a publication made up of ten parts or portfolios, which together should constitute the Art Treasures of America, and that it is not a contract containing ten distinct and independent agreements to take ten different portfolios, one under each agreement. See Vinton v. King, 4 Allen, 562.

The defendant's evidence went to the whole contract, and was offered for the purpose of avoiding the whole contract, and he could only avoid the contract, for fraud in its inception, by rescinding it *in toto*, and by restoring to the plaintiff the portfolios which he already received. If the defendant had a right to avoid the contract, and exercised that right, he had a defense to this action, and could recover, in an action brought by him, the $30 he had paid, and the portfolios would all belong to the plaintiff; but the defendant could not retain part of the portfolios under the contract, and avoid the contract as to the rest. Clark v. Baker, 5 Metc. 452; Morse v. Brackett, 98 Mass. 205; Mansfield v. Trigg, 113 Mass. 350; Young v. Wakefield, 121 Mass. 91. It does not follow from this that the defendant is required to receive any portfolios that are not such as the contract calls for, or that if plaintiff did not from time to time offer to the defendant ten portfolios, each of which satisfied the description contained in the contract, the defendant might not recover damages for a breach of the contract by the plaintiff. * * *

*Exceptions overruled.*

[141] The statement of facts is abbreviated and part of the opinion is omitted.

## NATIONAL KNITTING CO. *v.* BOUTON & GERMAIN CO.

(Supreme Court of Wisconsin, 1909. 141 Wis. 63, 123 N. W. 624.)

Action by the National Knitting Company against the Bouton & Germain Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The plaintiff corporation is a manufacturer and dealer in knitted goods at Milwaukee, and the defendant corporation is a jobber in the same line of goods at Ripon. In November, 1905, the defendant ordered of the plaintiff, in writing, a quantity of gloves of different kinds at fixed prices, aggregating $322.86, delivery to be made in the following May, bill to be dated as of November 1, 1906, payable in thirty days. The order was accepted, and in April the plaintiff delivered the greater part of the goods ordered, but never delivered one item of eighteen dozen gloves, and another item of six dozen gloves. The plaintiff sues to recover for the goods actually delivered at contract prices. The defendant contends that the contract is entire, and hence that nothing is due, because the contract has never been fully performed. The defendant also sets up a counterclaim for damages because of nondelivery of said two items, in case the court should hold the contract to be severable. The trial court held the contract to be severable, and awarded judgment for the plaintiff for the contract price of the items delivered, less damages, consisting of the loss of profits, on the items not delivered. From this judgment, defendant appeals.

WINSLOW, C. J. (after stating the facts as above). We think that the business world would be astonished to learn that whenever an order for a bill of merchandise is accepted the contract thus made is entire, and requires delivery of every article before there can be recovery of any part of the purchase price. Such would be the practical effect of the defendant's contention here, if it should be upheld. We cannot so hold. The question of entirety is a question of intention. Severability of the subject-matter and measurement of consideration by units may assist in determining, but do not of themselves necessarily determine, the question. In case of a contract naturally and accurately severable (such as a contract for the sale of a bill of goods at certain prices for each article), courts incline to hold the contract severable, and to grant a recovery for that portion of the goods actually delivered, less damages for the nondelivery of any portion not delivered. Under all ordinary circumstances, this course will result in exact justice. The vendor will receive pay for his goods, which the vendee has retained, and the vendee will receive compensation for any damage which he has actually suffered.

If, however, it appears by express terms or by necessary implication from the terms of a contract that the intention of the parties was to make payment of the consideration depend upon delivery of all the

articles, the contract will be held entire, though the consideration may be measured in units and be actually severable. Goodwin v. Merrill, 13 Wis. 658; Shinn v. Bodine, 60 Pa. 182, 80 Am. Dec. 560. Thus, when a contract required the delivery of 2,000 yards of crushed stone for the purpose of building a bridge, it was held to be entire, notwithstanding the payment was to be at a certain rate per yard. Prautsch v. Rasmussen, 133 Wis. 181, 113 N. W. 416. So contracts to tow a given quantity of logs at so much per 1,000 feet, and to carry 5,000 barrels of salt at so much per barrel, have been held entire, upon the idea that the terms of the contract, in the light of the surrounding facts, showed that the parties evidently intended to contract for one entire job, and only used the unit of measurement of the consideration for convenience, and not as indicating any contemplation of severability. Boutin v. Lindsley, 84 Wis. 644, 54 N. W. 1017; W. & B. S. Co. v. Galvin, 96 Wis. 523, 71 N. W. 804, 65 Am. St. Rep. 57. See, also, Widman v. Gay, 104 Wis. 277, 80 N. W. 450.

The principle here decided is that contracts for the sale of goods like the present, which are naturally severable, will not be held entire contracts, in the absence of express or implied provision to that effect in the contract, or persuasive circumstances showing the intention of the parties to make it entire.

*Judgment affirmed.*[142]

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## GRAY *v.* HINTON AND OTHERS.

(United States Circuit Court, D. Nebraska, 1881. 7 Fed. 81.)

Demurrer to Petition. The facts, as they appear by the allegations of the petition, are as follows:

The Nebraska Railway Company was a corporation organized for the purpose of constructing a road from Brownsville to Lake City. The precincts of Ohio and Falls City, in the county of Richardson, had voted

142 "Primarily the question whether a contract is entire or separable is one of intention. But the general rule is that where the part to be performed by one party consists of several distinct and separate items and the price to be paid is apportioned to each item according to the value thereof, and not as one unit in the whole or a part of a round sum, the contract may and will be regarded as severable. And this rule holds true, even though the contract may be in a sense entire, if what is to be paid is clearly and distinctly apportioned to the different items as such, and not to them as parts of one whole." Morton, J., in Barlow Manufacturing Co. v. Stone, 200 Mass. 158, 160 (1908). See also, Regent Waist Co. v. O. J. Morrison Department Store Co. (W. Va.), 106 S. E. 712 (1921).

On a contract for the sale of goods as entire or divisible, see 2 A. L. R. 643, note. On the divisibility of a contract for the sale of an outfit, plant of machinery, see 4 A. L. R. 442, note.

to subscribe for a certain amount of the capital stock of said railway company, for the purpose of aiding the construction of said railroad. The railway company contracted for the construction of the road through the said precincts of Ohio and Falls City. Litigation being threatened by parties adverse to the policy of granting aid by the precincts above mentioned, the defendants in this suit, 150 in number, signed the contract upon which this suit is brought.

The contract, in so far as it is material to be considered, is as follows:

The consideration for its execution on the part of the defendant is stated to be "the sum of one dollar, to us in hand paid by the Nebraska Railway Company, and the advantages thereafter to accrue by the construction of said railway through the precincts of Ohio and Falls City."

And the defendants agree as follows:

To pay jointly and severally to the Nebraska Railway, or its order, the sum of $65,000, in lawful money of the United States of America, to be paid in instalments as follows, to-wit: $10,500 thereof when said railway company shall have graded its road-bed and built its culverts through the precinct of Ohio according to the terms of the foregoing proposition; $35,000 thereof when the said Nebraska Railway Company shall have graded its road-bed and built its culverts through the precinct of Falls City according to the terms of the foregoing proposition; $19,500 when said Nebraska Railway Company shall have graded, tied, and ironed its roadway through the precincts of Ohio and Falls City, according to the foregoing propositions,—each instalment of which shall be truly and promptly paid.

The "foregoing proposition" referred to in this agreement, among other things, provided that the railroad should be constructed before December 1, 1876. The petition alleges that the grading was completed in accordance with the contract, but there is no allegation that the road has ever been completed. The time for the completion of the road, according to the terms of the agreement, had elapsed before the commencement of this suit. The defendant files a general demurrer to the petition, under which he insists—First, that the contract is not binding on the defendants for want of mutuality; second, that the contract is an entirety, and as the plaintiff has commenced this action after expiration of the time within which the railroad company was to have completed the railroad, he cannot recover without alleging and proving a full performance of the contract on the part of the company, or, in other words, that it has finished the road; third, that the plaintiff cannot recover without alleging performance of all the stipulations of the contract to be performed upon the part of the railroad company.

MCCRARY, C. J. The demurrer raises the question whether suit can be maintained on the contract upon the facts disclosed by the petition. The plaintiff sues after the expiration of the time within which,

by the terms of the contract, the road was to have been finished. It is alleged that the grading was completed according to the contract, but it is not alleged that the road was finished. The question is whether, under the contract, plaintiff can recover for the grading without alleging that he has finished the road, or offering some sufficient excuse for his failure to do so; or, in other words, we are to consider whether the agreement to do the grading was a contract separate and distinct from and independent of the agreement to finish the road, so that the plaintiff can sue upon the contract and recover for the grading without alleging compliance, or readiness to comply, with the other part of the agreement. Speaking of the "entirety of contracts," Mr. Parsons says:

"The question whether a contract is entire or separable is often of great importance. Any contract may consist of many parts, and these may be considered as parts of one whole, or as so many distinct contracts entered into at one time and expressed in the same instrument, but not thereby made one contract. No precise rule can be given by which this question in a given case may be settled. Like most other questions of construction, it depends upon the intention of the parties, and this must be discovered in each case by considering the language employed and the subject-matter of the contract." 2 Pars. Con. 517.

From what appears upon the face of this contract we are to determine whether it was the intention of the parties to make one contract for the construction of a railroad, or two separate contracts,—one for the grading, and the other for the bridging, tying, and ironing of the roadway through the precincts of Ohio and Falls City. It seems pretty clear that the subject-matter of the contract was an entirety, to-wit, a completed railroad. The case is not like many we find cited in the books, in which two or more separate and distinct articles of property are sold and conveyed by a single instrument, for separate and distinct prices, at one and the same time. In such cases it often appears that the purchase of each article was a separate and distinct transaction, and intended to be so regarded by the parties to the contract. There is in such cases no necessary connection between the several articles sold and conveyed. There is nothing from which it can be inferred that it was not the intention of the purchaser to secure one without also securing the others. The case before us, however, is quite different. It cannot be supposed that the defendants would have employed the railroad company to do the grading alone, without it had at the same time agreed to go on and complete the road. The contract itself declares that the consideration for the contract, on the part of the defendants, was the benefits they were to receive by the construction of the road through the two precincts named. Suppose the railroad company, or its contractors, after completing the grading, had failed or refused to go on and complete the road upon the demand of the defendants. Would it be contended that the plaintiff, under such circumstances, could maintain an action upon the contract? This is probably the test. See Robinson v.

Green, 3 Met. 159. If it were alleged in the petition that the railroad company, or the contractors, completed the grading, and were ready, able, and willing to go on and finish the road; that they offered to do so, and were prevented by the act or fault of defendants,—a very different question would arise. But an allegation that the grading was completed, without more, is insufficient, because it is manifest that the defendants did not intend to bind themselves to pay for grading, and leave the contractors at liberty to finish the road or not, at their option. The parties must have understood that the defendants were binding themselves to pay a large sum of money to secure the construction of the railroad through the precincts in which they resided and held property. If the proposition upon which this action is based, to-wit, that the defendants were to pay the price named for the grading whether the road was completed or not, had been suggested at the time of the execution of the contract, no one of the defendants would have assented to it. They undoubtedly regarded the contract as an entirety. Such was the intention; and the construction of the contract, as to its being several or entire, depends upon the intention of the parties to it.

But, independently of this consideration, there can, I think, be no doubt upon another question which is presented by this record. The contract itself shows no mutuality. The defendants bound themselves to pay a certain sum of money, provided plaintiff's assignor, the railroad company, would complete a certain railroad; but there is nothing in the contract to bind the company to complete the road. The performance of the contract by the railroad company would avoid this objection. The rule is that where one party agrees to pay a certain sum of money if another party will do certain acts, the latter is not bound; but the agreement of the former may be considered as a request to the latter to do the acts named, and the doing of the acts is an assent, and the promise thereby becomes mutual and obligatory. But this case presents the question whether a performance of a part of the acts specified, and a failure to perform another part, will answer the objection that there is no mutuality. The rule is that performance is an assent to the terms proposed; but I know of no authority for the proposition that part performance will amount to an assent. See 13 Ohio St. 94, where it is distinctly held that "this rule does not appear to be applicable where the act done only constitutes a part of the consideration, and shows no assent to the terms of the contract." The performance by the party to whom the offer is made takes the place of a formal acceptance of a proposition to contract; but a part performance, without an offer to make full performance, is not an acceptance, no more than an acceptance in writing of a part of a proposition could be regarded as an acceptance of the whole. In such a case, whatever the rights of the plaintiff might be in a suit upon the *quantum meruit*, he has no right of action upon the contract itself.

The demurrer to the petition is sustained.

## STOCKSTILL *v.* BYRD.

(Supreme Court of Louisiana, 1913. 132 La. 404, 61 So. 446.)

Action by W. A. Stockstill against J. R. Byrd. From a judgment dismissing the suit, plaintiff appeals. Affirmed.

SOMMERVILLE, J. Plaintiff sues for damages *ex contractu;* and defendant filed an exception of no cause of action to the petition. The exception was sustained; the suit was dismissed; and plaintiff appeals.

Plaintiff attaches to, and makes part of, his petition the contract sued upon. It therein appears that plaintiff agreed to go upon the land of the defendant and there erect and locate a sawmill for the purpose of manufacturing into lumber certain described timber located on defendant's land. Plaintiff further agreed to operate said mill continuously, and as regularly as practicable, until the timber on said land was manufactured into lumber. He further agreed that defendant was to be the sole logger of the mill. He agreed to use the property of defendant for no other purpose than was necessary and proper for operating said sawmill. He further agreed to give orders and bills for logs in such manner as to make it practicable for defendant to deliver with the exercise of due diligence, and to purchase said timber and pay to defendant $5 per 1,000 feet thereof.

Defendant, on his part, agreed to sell all of the timber described in contract to plaintiff and deliver it at the ramps of the sawmill of plaintiff, according to orders and bills furnished by the latter.

The parties to the contract mutually agreed that:

"This contract is not to be assignable by either party hereto without the consent of both."

Plaintiff alleges in his petition that he had sold his sawmill to Eddins & Stockstill, and that, upon the consummation of said sale, defendant wrongfully and without cause refused to haul or deliver any more of said timber to petitioner, although requested so to do; that, in thus refusing, defendant has breached the contract, and this to the extent of $17,150, for which amount plaintiff asks judgment.

No precise rule can be laid down for the solution of the question whether a contract is divisible or indivisible, separable or entire. The question is one of construction.

Article 2108 of the Civil Code provides that:

"An obligation is divisible or indivisible, according as it has for its object either the thing which, in its delivery, or a fact which, in its execution, is or is not susceptible of division, either material or intellectual."

And article 2109 is as follows:

"The obligation is indivisible, though the thing or the fact which is the object of it be by its nature divisible, if the light in which it is considered in the obligation does not admit of its being partially executed."

The courts at the present day incline strongly against the construction of promises as independent; and, in the absence of clear language to the contrary, promises which form the consideration for each other will be held to be concurrent or dependent, and not independent, so that a failure of one party to perform will discharge the other, and so that one cannot maintain an action against the other without showing the performance or tender of performance on his part. Where acts are to be performed by each party at the same time, neither party can maintain an action against the other without performance, or tender of performance, on his part. So where a party sues on a certain contract to recover compensation due on its performance, he must show performance on his part, or a legal excuse.

"The contract may be entire or separable, according to the circumstances in each particular case; and the criterion is to be found in the question whether the whole quantity—all of the things as a whole—is of the essence of the contract. If it appear that the purpose was to take the whole or none, then the contract would be entire; otherwise it would be separable." 9 Cyc. 643, 649; Lowber v. Bangs, 2 Wall. 728, 736 (17 L. Ed. 768).

In construing the contract under consideration, we must determine which of the numerous provisions are conditions precedent, and which are mutual and independent stipulations.

"It seems to be well settled that, when there is a stipulation amounting to a condition precedent, the failure of one party to perform such condition will excuse the other party from all further performance of stipulations depending upon such prior performance. But a failure to perform an independent stipulation, not amounting to a condition precedent, though it subjects the party failing to damages, does not excuse the party on the other side from the performance of all stipulations on his part." Mill Dam Foundery v. Hovey, 21 Pick. (Mass.) 417, 437.

This is a contract of sale by defendant to plaintiff of the timber standing on defendant's premises to be manufactured into lumber by plaintiff on defendant's premises; the real property and the material belonging to defendant. The plaintiff was to enter upon the property of defendant, under a contract in the nature of a lease, for the express purpose of erecting a sawmill thereon to do the work of converting defendant's timber into lumber, and to use defendant's premises for the purposes of the contract. The condition precedent in this contract is that plaintiff was to enter upon the land of defendant, and to thereon erect a sawmill, ramps, and appurtenances for the purpose already indicated; and he agreed to operate the sawmill continuously and as regularly as practicable until the timber on the land referred to was manufactured into lumber; plaintiff agreeing not to use the property of defendant for any other purpose than was necessary and proper for operating the said sawmill, together with the necessary right of way and passage over and across the land for hauling purposes. It was further agreed that

defendant should be the sole logger of the sawmill, and that the contract was not assignable without the consent of both parties.

Plaintiff has made these obligations on his part impossible of performance. He erected the sawmill as agreed to by him, but sold the same to some third persons, so that he had no mill to operate continuously until all the timber belonging to defendant on the land in question had been converted into lumber. The sale of the mill to third persons is equivalent to not having erected the mill at all, under the circumstances of this contract. Further, he has avoided and set at naught the stipulation that defendant was to be the sole logger of his sawmill; the management of the mill was exclusively in the control of the purchasers of the mill; and he has permitted the land of defendant to be used by these purchasers, after stipulating that defendant's land was not to be used for any other purpose than of operating his sawmill.

These various stipulations all go to show that the contract sued upon cannot be partially executed, and it is therefore indivisible or entire.

Plaintiff argues that he has not violated the contract by selling his sawmill to third persons; that his agreement was not to assign the contract; that he has not assigned the contract to the purchasers of the sawmill; that he is willing to receive and pay for the logs purchased by him from the defendant; that, because of the failure and refusal of defendant to sell the logs to him (plaintiff), he (plaintiff) "was unable to sell and deliver said logs to the said Eddins & Stockstill;" and that said action on the part of defendant caused the purchasers of the sawmill to purchase other logs, and that they have refused to pay plaintiff for the mill, and that he has taken the sawmill back.

We think that it is quite clear, from the actions of the purchasers of the mill, that the contract between plaintiff and defendant was assigned to them at the same time that the mill was, although plaintiff alleges to the contrary.

Be this as it may be, plaintiff has put himself into a different position altogether from that contemplated by the terms of the contract. He is a nonresident, residing in Hancock county, Miss.; and defendant might well be unwilling to sell his timber on credit to a nonresident who owned no property in this state, and who was to immediately transfer the timber of defendant to third persons, who were operating a sawmill located on land not belonging to them, or leased by them, and who might, at any time, be treated as trespassers, and who could exercise the right to saw timber belonging to third persons, and thus bring about a confusion of goods belonging to defendant, and thus deprive defendant of a vendor's lien. The purchasers were not obligated in any way to defendant; he had not dealt with them; they had not promised to take all of his timber, or to manufacture it into lumber within a specified time; he may not have known them to be prompt in the fulfillment of engagements, which is said to be the life of commercial success; he may have known nothing of their solvency, or of the various other cir-

cumstances which go to control the issues of profit or loss—all of which are important in trade. Lowber v. Bangs, 2 Wall. 728, 737 (17 L. Ed. 768).

We do not deem it needful to review the numerous authorities, because we hold the general principle to be clear that covenants are to be considered divisible or indivisible, dependent or independent, separable or entire, according to the intention of the parties, which is to be deduced from the whole instrument; and in this case we find no difficulty in arriving at the conclusion that the covenants are dependent throughout. The intention of the parties was that the contract was not to be assignable, in whole or in part, and that when plaintiff sold his sawmill to third persons, and brought them onto the land of defendant and established them there, without the consent of defendant, and thus rendered the contract impossible of performance by himself, he violated the contract in its entirety; that he is in default and cannot claim damages for nonperformance by defendant. C. C. art. 2109.

*The judgment appealed from is affirmed.*

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## BARNETT *v.* ROSEN ET AL.

**(Supreme Judicial Court of Massachusetts, 1920. 126 N. E. 386.)**

Suit in equity by Nathan Barnett against Sarah Rosen and others, resulting in order dismissing the bill, and plaintiff excepts. Exceptions overruled.

BRADLEY, J. The plaintiff, a judgment creditor, brings suit under R. L. c. 159, § 3, cl. 7, to reach and apply in satisfaction of a judgment recovered against the defendant Rosen the amount coming to her under a policy of fire insurance issued by the co-defendant. The defendant having paid into court a certain sum to abide the final decree, the bill by stipulation of parties has been dismissed against the company; and the trial court having ordered a decree dismissing the bill the case is before us on the plaintiff's exceptions to the admission of evidence, to the refusal to rule as requested, and to the order of dismissal. We perceive no error in the admission of evidence. The answer avers that by an accord and satisfaction the judgment has been satisfied and she was properly allowed to introduce evidence of the negotiations and of the settlement which included the obtainment of the necessary funds to make payment as well as the form in which payment was made. Way v. Greer, 196 Mass. 237, 81 N. E. 1002. The remaining question is whether as matter of law the defendant under the agreement had been discharged from all further liability. The evidence not being reported, the findings of fact of the presiding judge are conclusive. It appears that, before judgment against her was obtained, the plaintiff recovered

judgment against the defendant's husband on which execution issued and he was cited for examination as a poor debtor. The proceedings, however, were terminated by the failure of the judgment creditor to appear at the time and place to which the proceedings had been continued for his further examination. The plaintiff previously had cited the defendant for examination as a poor debtor and after she had defaulted and a *capias* issued the plaintiff in person and the defendant by counsel orally agreed that if the defendant would pay "thirty-five dollars" he would receive that amount in full satisfaction of both executions. The defendant borrowed $20, which was paid to the plaintiff, who thereupon signed and delivered the following receipt:

"Received of Mrs. Sarah Rosen twenty and no/100 dollars and upon payment to me within one month of a balance of fifteen dollars I will indorse a statement of satisfaction in full upon an execution which I have against Sarah Rosen and a similar indorsement upon an execution against Harry Rosen and I will execute general release of all demands against said Harry and Sarah Rosen."

It further appears that "the balance of fifteen dollars" was paid to the plaintiff, who thereupon indorsed upon each execution that full satisfaction had been received and delivered them to the defendant.

A further finding, in justice to the plaintiff, should be referred to, namely:

That "at the time of making said oral contract and the execution of said written instrument the plaintiff told the defendant's attorney that the receipt of said sum and his agreement referred to in said receipt was a *nudum pactum* and that he was not bound by his oral agreement or his signed receipt and that the defendant would still be liable for the balance of her judgment, notwithstanding he had agreed to accept a smaller sum in satisfaction thereof."

The judge, however, was satisfied and expressly finds that the defendant's attorney, acting in her behalf and knowing the plaintiff to be a member of the bar, did not understand or believe that the plaintiff proposed to collect the balance due upon the execution against her "notwithstanding his agreement and his written promise and did not expect him to do so."

The requests all rest upon the single proposition that the promise of the plaintiff is unenforceable because it is unsupported by any valuable consideration. We are of opinion that the judge properly refused to give any of the requests and correctly ruled that the bill should be dismissed. The borrowing by the defendant from her counsel of a part of the amount agreed upon, who gave his check therefor to the plaintiff, does not bring the case within the rule that, where the creditor receives in full satisfaction of his debt the promissory note of a third person for a smaller sum than the amount of the debt, it is a good accord and satisfaction. Brooks v. White, 2 Metc. 283, 37 Am. Dec. 95; Guild v. Butler, 127 Mass. 386; Bidder v. Bridges, 37 Ch. D. 406. The money, fur-

thermore, was not borrowed at the plaintiff's request; nor did he know from what source it was to be obtained. Harriman v. Harriman, 12 Gray, 341; Specialty Glass Co. v Daley, 172 Mass. 460, 52 N. E. 633. Compare Bunge v. Koop, 48 N. Y. 225, 229, 8 Am. Rep. 546. It also is settled in this commonwealth that neither the payment of a part of the debt by the debtor when the entire indebtedness is due and payable, nor a partial payment by him of the debt in consideration that such payment shall operate as a discharge of the debt of a third person to the creditor, is sufficient to support a promise not made under seal to release the promisee from all further liability on the remainder of the principal obligation. Weber v. Couch, 134 Mass. 26, 45 Am. Rep. 274; Slade v. Mutrie, 156 Mass. 19, 20, 30 N. E. 168, and cases cited; Specialty Glass Co. v. Daley, 172 Mass. 460, 52 N. E. 633; Gilman v. Cary, 198 Mass. 318, 320, 84 N. E. 312; Smith v. Johnson, 224 Mass. 50, 112 N. E. 644; Lait v. Sears, 226 Mass. 119, 125, 115 N. E. 247. But the judge further found that—

"Thereafter, on March 21, 1916, the plaintiff personally, and the attorney representing the defendant, conferred in regard to the adjustment of the claim of the plaintiff against the defendant, and on or about that date it was orally agreed between plaintiff and said attorney that if the defendant would pay to the plaintiff $35, the plaintiff would receive the same in full satisfaction of his execution against the defendant and against Harry Rosen; and the defendant then and there, acting through her said attorney, agreed to pay said amount in full satisfaction of both executions."

The plaintiff in return for the payment to him of any sum on her husband's debt could make a binding and enforceable agreement, and the agreement found cannot as matter of law be differentiated. It was not to pay the plaintiff a less sum in full satisfaction of her own liquidated and overdue debt of a larger amount, but it is an agreement also to pay this amount in satisfaction of the execution against Harry Rosen, her husband, to whom she was a stranger and on which she was not liable, as well as the execution against herself. The plaintiff, as we have said, having indorsed on both executions satisfaction in full, the indorsement was of itself an application by him not merely in satisfaction of the defendant's debt, but of the debt of her husband. It follows that, the contract being entire and not severable at the option of the plaintiff, her agreement to pay any sum whatever on the execution against her husband was a sufficient consideration for a valid agreement by the plaintiff to discharge her own debt. Brooks v. White, 2 Metc. 283, 286, 37 Am. Dec. 95; Bowker v. Childs, 3 Allen, 434; Hastings v. Lovejoy, 140 Mass. 267, 2 N. E. 776, 54 Am. Rep. 462; Marshall v. Bullard, 114 Iowa, 462, 87 N. W. 427, 54 L. R. A. 862; Melroy v. Kemmerer, 218 Pa. 381, 384, 67 Atl. 699, 11 L. R. A. (N. S.) 1018, 120 Am. St. Rep. 888; 1 R. C. L. p. 182, § 11; 1 C. J. 537, § 37, note 31, and page 545, § 51, note 27, where many authorities are collected. It is enough

that the consideration is valuable; it need not be adequate. Train v. Gold, 5 Pick. 380; Perkins v. Lockwood, 100 Mass. 249, 250, 1 Am. Rep. 103; Hastings v. Lovejoy, 140 Mass. 261, 264, 2 N. E. 776, 54 Am. Rep. 462.

*Exceptions overruled.*

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## BRADFORD *v.* WILLIAMS.

(Court of Exchequer, 1872. L. R., 7 Exch., 259.)

Declaration alleging breach of a charter-party dated May 26th, 1871, under which the defendant's ship should carry coals for the plaintiff between certain ports for specified freight, "Vessel to load with Gollop & Co., or Gould & Co., till end of September, with captain's option; after September, at Gould & Co."

Fourth plea, that after the commencement, and long before the end of September, and before breach, the vessel was ready to load, according to the terms of the charter-party, and the captain exercised his option by electing to load from Gollop & Co., of all which premises the plaintiffs had notice, and although all things happened, etc., necessary to entitle the defendant to have the vessel loaded in the month of September by the plaintiffs from Gollop & Co., yet the plaintiffs were not ready and willing to cause the said vessel to be loaded in the said month or at any subsequent time from or with Gollop & Co., according to the terms of the agreement, but, on the contrary, absolutely refused so to do in violation of the terms of the charter-party, and gave notice to the defendant thereof, wherefore the defendant, as he lawfully might, refused further to perform the said charter-party, which are the alleged breaches.

Demurrer and joinder.

BRAMWELL, B.[143] * * * The contract was for a continuous employment from May, 1871, to March, 1872. But in September, 1871, the plaintiffs in effect said, "We do not mean to go on loading you, the defendant, for a month;" whereupon the defendant said, "Then I shall not go on under the charter-party at all;" and I think he had a right to say so. Suppose the plaintiffs had said they would not load till some distant date—December, for example; but that afterward they would again proceed with loading, what ought the defendant to do in such a case? He would clearly be bound to find some occupation for his ship; otherwise when he brought his action for damages the plaintiffs would have good cause to complain. Then is he entitled only to do the best he can with the ship until the time named for load-

[143] The statement of the declaration is abbreviated and the opinions of Martin, B., and Pigott, B., are omitted.

ing by the plaintiffs, or is he not entitled to do the best he can once for all? In other words, is he not entitled to treat the charter-party at an end? In my opinion he may take the latter course, and thus do what is best for himself, and, at the same time, mitigate as far as possible the damages which the plaintiffs would otherwise be liable to pay for their breach of contract.

Take another illustration. A ship is chartered out and home, say from London to New York, the charterer to load a cargo at both places. Then he declines to load in London; but still insists that the shipowner is to go to New York for the home cargo. Surely this would not be reasonable. Yet the case seems almost exactly analogous to the present. I think, therefore, the plea is good.

*Judgment for the defendant.*

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## RIPLEY *v.* M'CLURE.

(Court of Exchequer, 1849. 4 Exch., 345.)

Assumpsit on an agreement by defendant to purchase of plaintiff a third interest in a cargo of tea.

At the trial before Coleridge, J., the following facts appeared in evidence: The plaintiff was a merchant carrying on business at Liverpool in his own name, and also with another person in Ghanghæ, in China, as commission agents, under the firm of Thomas Ripley & Co. The defendant carried on business as a merchant and general commission agent at Belfast, under the firm of William M'Clure & Son. On the 20th of June, 1846, the plaintiff and defendant entered into a joint adventure for importing a cargo of tea from China, in which the defendant was to have one-third interest. An investment in goods was to be made to purchase the tea, which was to be brought by the ship Mary Ann Webb; and consigned to the defendant at Belfast for sale at the customary commission. On the 7th of October, 1846, the plaintiff wrote to the defendant, inclosing invoice of shipment to China, and stating "the proceeds to be invested in tea for the Belfast market, in which you are to take one-third interest." The plaintiff subsequently wrote to the defendant, representing that the adventure was likely to prove a loss, and offering to release him from his engagement. Some correspondence then took place, and ultimately this contract was annulled by mutual consent, and on the 16th of March, 1847, the agreement set out in the declaration was substituted. The defendant became dissatisfied with this agreement, and proposed to the plaintiff to cancel it, and set up the first contract. A long correspondence ensued, in which the defendant alleged, that he had been induced to abandon the first contract and enter into the subsequent agreement by reason of the misrepresentations of the plaintiff. On the 1st of July, 1847, the plaintiff sent to the defendant copies of the invoices of the tea, in a letter containing the following passage: "I have had it from yourself, that you do not intend to comply

with the conditions of the contract for the purchase of one-third of this cargo, a threat which I am inclined to believe you do not intend to act upon. On this subject you will please give me your opinion in writing, and I shall be glad if you will assign your reasons for choosing such a course, when the contract on my part will be fulfilled to the letter." No answer having been returned to this letter, the plaintiff, on the 26th of August again wrote to the defendant thus: "As regards the Mary Ann Webb, there is nothing left for me to do but to send her to some other port than Belfast, since you have declined to fulfill your contract." On the 30th, the defendant wrote in reply: "As to the cargo of the Mary Ann Webb, to one-third of which we still think we are entitled under our first contract, we observe you now intend to send it to a different port, I am willing, and, such being the case, I am glad this unpleasant matter should be thus ended; and I am willing to waive any claim I may have under either the first or second contract." In reply, the plaintiff wrote that it was not his intention to release the defendant from his contract of purchase. On the 1st of September, the defendant wrote to the plaintiff as follows: "I give you notice, that I am entitled to have these teas delivered at Belfast, either under the first or second contract, and that, if you fail to deliver them accordingly, I shall hold myself released from all contracts respecting them." On the 21st of September, the Mary Ann Webb arrived in Belfast Lough with the cargo of tea on board; and the defendant, having been informed of it, wrote to the plaintiff, stating that he was "willing to dispose of the cargo and appropriate the proceeds according to the interests of both parties therein." The defendant also on the same day served the captain of the vessel with a copy of this letter. In consequence, however, of directions from the plaintiff, the vessel sailed from Belfast on the 24th of September for London, without delivering any portion of her cargo to the defendant. The copy of the invoice sent to the defendant was headed thus: "Invoice of congou tea shipped on board the 'Mary Ann Webb,' Silk, master, for Belfast, and consigned to Thomas Ripley, Esq., Liverpool." It afterwards appeared that, in the heading of the original invoice, the words "on account and risk of Messrs. M'Clure & Son and Thomas Ripley" were inserted after the word "Belfast." The bills of lading stated that the goods were bound for Belfast market, and consigned unto Thomas Ripley or his assignee.

It was submitted, on the part of the plaintiff, that the above correspondence proved that the defendant had refused to perform the contract declared on, and had discharged the plaintiff from delivering the tea at Belfast. On behalf of the defendant it was contended, that he had not refused to perform the contract in question, and that, so far from discharging the plaintiff from delivering the tea at Belfast, he had insisted on the plaintiff delivering it there.

With respect to the second issue. the learned judge told the jury that the fact of the teas being stated to be shipped on the joint account did

not preclude them for finding that they were consigned to the plaintiff, the invoicing them on the joint account having been done by mistake by the correspondent in China, who was ignorant of the fact of the first contract having been rescinded, and of the goods being consigned to the plaintiff, and coming home on the plaintiff's sole account.

The following questions were put by the learned judge, in writing, to the jury, who returned the accompanying answers:—

First, Was the plaintiff guilty of any misrepresentation as to the circumstances connected with the former contract, by which the defendant was induced to enter into the second? No.

Second, Did the defendant at any time refuse to perform the second contract? Yes, by implication.

Third, Did the defendant ever withdraw that refusal before the ship arrived at Belfast? No.

Fourth, Was the plaintiff willing to deliver, according to the second contract, down to the time of the defendant's refusal to perform the contract? Yes, but not after the arrival of the vessel at Belfast, the defendant having repudiated the contract.

Fifth, To and on whose account were the teas consigned? Thomas Ripley.

On these findings, the learned judge directed a verdict for the defendant on the issue raised by the fifth plea, and for the plaintiff on the other issues.

*Knowles,* in Easter Term last, obtained a rule on the part of the defendant for a new trial, on the ground of the verdict being against evidence, and also upon the following alleged grounds of misdirection: First, that the learned judge had told the jury, with reference to the letter of the first of July, in which the plaintiff demanded that the defendant should state in writing whether he intended to comply with the contract, that the plaintiff had a right to an answer from the defendant. Secondly, that the learned judge was wrong in putting the question to the jury whether the defendant at any time refused to perform his contract; but the question ought to have been, whether he did so refuse, after the arrival of the vessel at Belfast, and that the learned judge was not correct in directing a verdict to be entered for the plaintiff on the third issue, upon the answers which had been returned by the jury. Thirdly, that the mode in which the question was put to the jury, as to the consignment of the teas to the plaintiff, was improper. A rule was also obtained to arrest the judgment, on the ground that the fifth plea was found for the defendant, and was a complete answer to the action.

PARKE, B.[144] * * * It was contended, for the defendant, that to constitute a breach of the contract, a refusal at any time was insufficient; that it

[144] The pleadings and a part of the opinion are omitted.

must be a refusal after the arrival of the cargo; and that the supposed refusal in July, to which the attention of the jury was said to have been directed, and which was long before the contract to buy became absolute, was no breach, and nothing more than an expression of an intention to break the contract, not final, and capable of being retracted. And we think, that if the jury had been told that a refusal before the arrival of the cargo was a breach, that would have been incorrect. We think that point rightly decided in Phillpotts v. Evans.

But we cannot collect that the learned judge ever told the jury that a refusal at any time was a breach. He left the question in writing, whether there was a refusal at any time, and whether that refusal had been subsequently retracted; and the jury having found, as we think they were warranted by the evidence to do, that it had not, there was certainly evidence of a continued refusal down to and inclusive of the time when the defendant was bound to receive, which would render the defendant liable, if all the conditions precedent had been performed or waived. But then it was said, and rightly, that the delivery of the cargo being a condition precedent, the plaintiff was bound to perform it, unless the defendant waived or discharged him from so doing. In the declaration there is an allegation, though informal, of such waiver or discharge, coupled with the allegation of refusal, and an issue upon it in the third plea, and the plaintiff no doubt was bound to prove that waiver or discharge: we do not feel any difficulty in saying that there was ample evidence of such waiver in the conversation referred to in the plaintiff's letter of the 1st of July, coupled with the whole tenor of the defendant's letters.

By an express refusal to comply with the conditions of the contract of purchase, the defendant must be understood to have said to the plaintiff, "You need not take the trouble to deliver the cargo to me when it arrives at Belfast, as purchaser, for I never will become such;" and this would be a waiver at that time of the delivery; and, if unretracted, would dispense with the actual delivery after arrival.

And if we look to the correspondence, it is to be inferred from it that the defendant never did mean to perform the contract of purchase at all; and, consequently, never retracted the waiver of the delivery by the plaintiff as a vendor. It is true that the defendant insists that the cargo shall be delivered at Belfast; and even the alleged parol refusal was probably not intended to be, as Mr. Mellish [of counsel for the defendant] in his able and ingenious argument with truth contended, any waiver of the delivery at Belfast; it may be taken that the defendant always meant that; but the true question is not whether the delivery at Belfast was waived, but whether the delivery under the second contract, that is, the contract of purchase and sale, was waived; and we feel no doubt that the defendant, after he had formed the opinion that he had been deluded into a contract of purchase by false representations of the prospects of the original adventure in the first instance, wholly

refused to be bound by the contract of sale, and thereby intended to waive the delivery under that contract, and never afterwards retracted the waiver.

This was a question for the jury; and we do not see any reason to think, from the report and the statements of the learned counsel on both sides, that the jury were not in substance properly directed as to the question for their decision; and we are all quite satisfied with their verdict. As to the issue with respect to the consignment to the plaintiff, we think that the learned judge's direction was quite right.

With respect to the motion in arrest of judgment, we think that the verdict on the issue as to the residue is immaterial. If this residue is that part of the breach which is not answered either by the third plea or the fourth, it is in effect no part of the breach at all, for the third plea answers all; there is nothing to plead to, and the plea is idle and irrelevant. If it means the residue not answered by the fourth plea, it is only the readiness and the willingness to deliver after the time that the delivery was excused, and the defendant refused to receive; and readiness and willingness after that time is wholly immaterial. The verdict for the defendant is, therefore, upon an immaterial averment in the declaration.[145]

*Rule discharged.*

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## CORT & GEE *v.* AMBERGATE, &c. RAILWAY CO.

(Court of Queen's Bench, 1851. 17 Q. B. 127.)

Assumpsit for breach of contract by defendant to take and pay for railway chairs to be manufactured by plaintiffs. The defendant company was found by the jury to have notified plaintiffs that the company did not wish to have any more chairs and would not accept any more. The plaintiffs accordingly did not make and tender the rest of the chairs called for by the contract, but sued for loss of profits, etc. Verdict for plaintiffs and rule *nisi* for a new trial.

LORD CAMPBELL, C. J.† We are of opinion that the verdict found for the plaintiffs ought not to be disturbed. * * *

Next we have to consider whether the plaintiffs were entitled to a verdict on the issue whether they were ready and willing to execute and perform the said contract according to the said conditions and

[145] In M'Clure v. Ripley, 5 Ex. 140 (1850) the judgment in Ripley v. M'Clure, *supra*, was affirmed by the Court of Exchequer Chamber upon this last ground.

† The foregoing brief statement is substituted for the elaborate statement of pleadings and facts in the original report, and portions of the opinion are omitted.

stipulations, in manner and form, etc.; and on the issue whether the defendants did refuse to accept or receive the residue of the chairs, or prevent or discharge the plaintiffs from supplying the said residue, and from the further execution and performance of the said contract. It is not denied that if the defendants would have regularly accepted and paid for the chairs, the plaintiffs would have gone on regularly making and delivering them according to the contract; the objection is that, although the plaintiffs were desirous that the contract should be fully performed, yet, after receiving the notice that the company did not wish to have any more chairs, and would not accept any more, they ceased to make any more, insomuch that the residue which the company are alleged to have refused to accept never were made. The defendants contend that, as the plaintiffs did not make and tender the residue of the chairs, they cannot be said to have been ready and willing to perform the contract; that the defendants cannot be charged with a breach of it; that, after the notice from the defendants, which in truth amounted to a declaration that they had broken and thenceforward renounced the contract, the plaintiffs, if they wished to have any redress, were bound to buy the requisite quantity of the peculiar sort of iron suited for these railway chairs, to make the whole of them according to the pattern, with the name of the company upon them, and to bring them to the appointed places of delivery and tender them to the defendants, who, from insolvency, had abandoned the completion of the line for which the chairs were intended, desiring that no more chairs might be made, and declaring, in effect, that no more should be accepted or paid for. We are of opinion, however, that the jury were fully justified upon the evidence in finding that the plaintiffs were ready and willing to perform the contract, although they never made and tendered the residue of the chairs. In common sense the meaning of such an averment of readiness and willingness must be that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it if it had not been renounced by the defendants. What more can reasonably be required by the parties for whom the goods are to be manufactured? If, having accepted a part, they are unable to pay for the residue, and have resolved not to accept them, no benefit can accrue to them from a useless waste of materials and labor, which might possibly enhance the amount of damages to be awarded against them.

Upon the last issue, was there not evidence that the defendants refused to accept the residue of the chairs? If they had said, "Make no more for us, for we will have nothing to do with them," was not that refusing to accept or receive them according to the contract? But the learned counsel for the defendants laid peculiar stress upon the words "nor did they prevent or discharge the plaintiffs from supplying the said residue" of chairs "and from the further execution and performance of the said contract." We consider the material part of the

allegation which the last plea traverses to be, that the defendants refused to receive the residue of the chairs. But, assuming that the whole must be proved, we think there is evidence to show that the defendants did prevent and discharge the plaintiffs from supplying the residue of the chairs, and from the further execution of the contract. It is contended that "prevent" here must mean an obstruction by physical force; and, in answer to a question from the court, we were told it would not be a preventing of the delivery of goods if the purchaser were to write, in a letter to the person who ought to supply them, "Should you come to my house to deliver them, I will blow your brains out." But may I not reasonably say that I was prevented from completing a contract by being desired not to complete it? Are there no means of preventing an act from being done, except physical force or brute violence? Again, we are told there can be no "discharge" by a corporation unless by deed under the corporate seal. Of a discharge in one sense of the word this is true. A discharge is sometimes used as equivalent to a release, which must be under seal; Brymer v. Thames Haven Dock & Railway Company, 2 Exch. 549. But we conceive that, in the allegation traversed by the last plea, discharge only means, like prevent, that the act of the defendants was the cause of the residue of the chairs not being delivered, and of the contract not being further executed or performed. Taking the language employed in its natural and reasonable sense, there was abundant evidence to support the finding of the last issue for the plaintiffs.

It is averred, however, that there are express authorities to show that there could be no readiness and willingness to perform the contract unless all the chairs were finished and tendered; that to prevent must be by positive physical obstruction, and that there can be no discharging unless by instrument under seal. * * * In Roll. Abr. 453, and in 5 Vin. Abr. 242, 3, tit. Condition (M. c.) will be found various instances of a covenant being discharged without deed by the act of the covenantee. * * *

The most recent case cited by the defendants' counsel was Ripley v. McClure, 4 Exch. 345. This case is very complicated in its circumstances; but the second point decided in it is the only one applicable to the question which we have to consider. There being an executory contract, whereby the plaintiff agreed to sell and the defendant to buy, on arrival, certain goods, to be delivered at Belfast at a certain price, payable on delivery, it was held that a refusal by the defendant before the arrival of the cargo to perform the contract was not of itself necessarily a breach of it, but that such refusal, unretracted down to and inclusive of the time when the defendant was bound to receive the cargo, was evidence of a continuing refusal and a waiver of the condition precedent of delivery, so as to render the defendant liable for the breach of contract. But, in the case at bar, the refusal never

was retracted; and therefore there was a continuing breach down to the time when this action was commenced.

Upon the whole, we think we are justified, on principle and without trenching on any former decision, in holding that, when there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more as he has no occasion for them and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract; and that he is entitled to a verdict on pleas traversing allegations that he was ready and willing to perform the contract, that the defendant refused to accept the residue of the goods, and that he prevented and discharged the plaintiff from manufacturing and delivering them.

We are likewise of opinion that in this case, the damages are not excessive, as the jury were justified in taking into their calculation all the chairs which remained to be delivered, and which the defendant refused to accept. They were all included in the declaration and in the issues joined; the time mentioned in the proposal for the delivery of some of them had arrived before the notice was given; but the time of delivery was not of the essence of the contract; and the obligation was still incumbent upon the defendants to accept the whole of the residue.

The rule must therefore be discharged.

*Rule discharged.*[146]

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## HOCHSTER *v.* DE LA TOUR.

(Court of Queen's Bench, 1853. 2 Ellis & Blackburn, 678.)

Assumpsit. On the trial, before Erle, J., at the London sittings in last Easter Term, it appeared that plaintiff was a courier, who, in April,

[146] "While the pleading omits the averment that the plaintiff was ready, able, and willing to perform its part of the contract, which consisted in receiving and paying for the corn after its delivery at Whittman's Landing, it repeatedly charges that the defendant Royster announced to the agent of the plaintiff that he would not comply with his contract by delivering the corn, and this is borne out by the evidence. In such cases, which of themselves amount to a breach of the contract which entitles the plaintiff to maintain an action for damages, it is unnecessary for the plaintiff to allege in bringing his action that he was ready, able, and willing to perform his part of the contract, and this is one of the exceptions often enlarged upon by text-writers. It was therefore not necessary for the plaintiff to have alleged that it was ready, able, and willing to perform its part of the contract in order to maintain its action." Sampson, J., in Royster v. A. Waller & Co., 186 Ky. 476, 478 (1920).

"As the contract had been finally repudiated by the defendant both by letter

1852, was engaged by defendant to accompany him on a tour to commence on June 1st, 1852, on the terms mentioned in the declaration. On May 11th, 1852, defendant wrote to plaintiff that he had changed his mind, and declined his services. He refused to make him any compensation. The action was commenced on May 22d. The plaintiff, between the commencement of the action and June 1st, obtained an engagement with Lord Ashburton, on equally good terms, but not commencing till July 4th. The defendant's counsel objected that there could be no breach of the contract before June 1st. The learned judge was of a contrary opinion, but reserved leave to enter a non-suit on this objection. The other questions were left to the jury, who found for plaintiff.

Rule *nisi* to enter a non-suit or arrest the judgment.

LORD CAMPBELL, C. J.[147] On this motion in arrest of judgment, the question arises, Whether, if there be an agreement between A and B, whereby B engages to employ A on and from a future day for a given period of time, to travel with him into a foreign country as a courier, and to start with him in that capacity on that day, A being to receive a monthly salary during the continuance of such service, B may, before the day, refuse to perform the agreement and break and renounce it, so as to entitle A before the day to commence an action against B to recover damages for breach of the agreement; A having been ready and willing to perform it, till it was broken and renounced by B. The defendant's counsel very powerfully contended that, if the plaintiff was not contented to dissolve the contract and to abandon all remedy upon it, he was bound to remain ready and willing to perform it till the day when the actual employment as courier in the service of the defendant was to begin; and that there could be no breach of the agreement before that day to give a right of action. But it cannot be laid down as a universal rule that, where by agreement an act is to be done on a future day, no action can be brought for a breach of the agreement till the day for doing the act has arrived. If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage. Short v. Stone, 8 Q. B. 358. If a man contracts to execute a lease on and from a future day for a certain term, and before that day executes a lease to another for the same term, he may be immediately sued for breaking the contract. Ford v. Tiley, 6 B. & C. 325. So, if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to

and conduct before payment was due, it could not be found that the failure of the plaintiff to pay excused the defendant from performing the contract. See Ballou v. Billings, 136 Mass. 307; Randall v. Peerless Motor Car Co., 212 Mass. 352, 377, 99 N. E. 221." Carroll, J., in Wellington Piano Case Co. v. Garfield & Proctor Coal Co. (Mass.), 129 N. E. 285, 287 (1920).

147 The pleadings and part of the opinion are omitted.

an action at the suit of the person with whom he first contracted to sell and deliver them. Bowdell v. Parsons, 10 East, 359. One reason alleged in support of such an action is, that the defendant has, before the day, rendered it impossible for him to perform the contract at the day, but this does not necessarily follow; for prior to the day fixed for doing the act, the first wife may have died, a surrender of the lease executed might be obtained, and the defendant might have repurchased the goods so as to be in a situation to sell and deliver them to the plaintiff. Another reason may be that, where there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and that they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation. As for example, a man and woman engaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage. In this very case of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other; and it seems to be a breach of an implied contract if either of them renounces the engagement. This reasoning seems in accordance with the unanimous decision of the Exchequer Chamber in Elderton v. Emmens, 6 Com. B. 160, which we have followed in subsequent cases in this court. The declaration in the present case, in alleging a breach, states a great deal more than a passing intention on the part of the defendant which he may repent of, and could only be proved by evidence that he had utterly renounced the contract, or done some act which rendered it impossible for him to perform it. If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to June 1st, 1852, it follows that, till then, he must enter into no employment which will interfere with his promise "to start with the defendant on such travels on the day and year," and that he must then be properly equipped in all respects as a courier for a three months' tour on the Continent of Europe. But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on June 1st,

he is prejudiced by putting faith in the defendant's assertion, and it would be more consonant with principle, if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it. Suppose that the defendant, at the time of his renunciation, had embarked on a voyage for Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the Continent of Europe in the months of June, July, and August, 1852, according to decided cases, the action might have been brought before June 1st; but the renunciation may have been founded on other facts, to be given in evidence, which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer. An argument against the action before June 1st is urged from the difficulty of calculating the damages, but this argument is equally strong against an action before September 1st, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial. We do not find any decision contrary to the view we are taking of this case. * * * If it should be held that, upon a contract to do an act on a future day, a renunciation of the contract by one party dispenses with a condition to be performed in the meantime by the other, there seems no reason for requiring that other to wait till the day arrives before seeking his remedy by action; and the only ground on which the condition can be dispensed with seems to be, that the renunciation may be treated as a breach of the contract.

Upon the whole, we think that the declaration in this case is sufficient. It gives us great satisfaction to reflect that, the question being on the record, our opinion may be reviewed in a Court of Error. In the meantime we must give judgment for the plaintiff.

*Judgment for plaintiff.*

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## FROST *v.* KNIGHT.

(Court of Exchequer Chamber, 1872. L. R., 7 Exch., 111.)

COCKBURN, C. J.[148] This case comes before us on error, brought on

[148] The opinion of Byles, J., and parts of the opinion of Cockburn, C. J., are omitted.

a judgment of the Court of Exchequer arresting the judgment in the action on a verdict given for the plaintiff.

The action was for breach of promise of marriage. The promise, as proved, was to marry the plaintiff on the death of the defendant's father. The father still living, the defendant announced his intention of not fulfilling his promise on his father's death, and broke off the engagement, whereupon the plaintiff, without waiting for the father's death, at once brought the present action. The plaintiff having obtained a verdict, a rule *nisi* was applied for to arrest the judgment, on the ground that a breach of the contract could only arise on the father's death, till which event, no claim for performance could be made, and, consequently, till its occurrence, no action for breach of the contract be maintained. A rule *nisi* having been granted, a majority of the Court of Exchequer concurred in making it absolute, Martin, B., dissenting; and the question for us is, whether the judgment of the majority was right. * * *

The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, * * * may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.

Considering this to be now settled law, notwithstanding anything that may have been held or said in the cases of Phillpotts v. Evans, 5 E. & B. 714 and Ripley v. McClure, 4 Ex. at p. 359, we should have had no difficulty in applying the principle of the decision in Hochster v. De la Tour to the present case, were it not for the difference which undoubtedly exists between that case and the present—namely, that, whereas there the performance of the contract was to take place at a fixed time, here no time is fixed, but the performance is made to depend on a contingency—namely, the death of the defendant's father during the lifetime of the contracting parties. It is true that in every case of a personal obligation to be fulfilled at a future time, there is involved the pos-

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Upon the whole, we think that the declaration in this case is sufficient. It gives us great satisfaction to reflect that, the question being on the record, our opinion may be reviewed in a Court of Error. In the meantime we must give judgment for the plaintiff.

*Judgment for plaintiff.*

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On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.

Considering this to be now settled law, notwithstanding anything that may have been held or said in the cases of Phillpotts v. Evans, 5 E. & B. 714 and Ripley v. McClure, 4 Ex. at p. 359, we should have had no difficulty in applying the principle of the decision in Hochster v. De la Tour to the present case, were it not for the difference which undoubtedly exists between that case and the present—namely, that, whereas there the performance of the contract was to take place at a fixed time, here no time is fixed, but the performance is made to depend on a contingency—namely, the death of the defendant's father during the lifetime of the contracting parties. It is true that in every case of a personal obligation to be fulfilled at a future time, there is involved the pos-

sible contingency of the death of the party binding himself, before the time of performance arrives; but here we have a further contingency depending on the life of a third person, during which neither party can claim performance of the promise. This being so, we thought it right to take time to consider whether an action would lie before the death of the defendant's father had placed the plaintiff in a position to claim the fulfilment of the defendant's promise.

After full consideration we are of opinion that, notwithstanding the distinguishing circumstance to which I have referred, this case falls within the principle of Hochster v. De la Tour, and that, consequently, the present action is well brought.

The considerations on which the decision in Hochster v. De la Tour is founded are that the announcement of the contracting party of his intention not to fulfil the contract amounts to a breach, and that it is for the common benefit of both parties that the contract shall be taken to be broken as to all its incidents, including nonperformance at the appointed time; as by an action being brought at once, and the damages consequent on nonperformance being assessed at the earliest moment, many of the injurious effects of such nonperformance may possibly be averted or mitigated.

It is true, * * * that there can be no actual breach of a contract by reason of nonperformance so long as the time for performance has not yet arrived. But, on the other hand, there is—and the decision in Hochster v. De la Tour proceeds on that assumption—a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus,* and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly.

The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future nonperformance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual nonperformance may therefore, by anticipation, be treated as a cause of action, and damages

be assessed and recovered in respect of it, though the time for performance may yet be remote.

It is obvious that such a course must lead to the convenience of both parties; and though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, and taking timely measures, the promisee may in many cases avert, or at all events materially lessen, the injurious effects which would otherwise flow from the nonfulfilment of the contract; and in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished.

It appears to us that the foregoing considerations apply to the case of a contract the performance of which is made to depend on a contingency, as much as to one in which the performance is to take place at a future time; and we are, therefore, of opinion that the principle of the decision of Hochster v. De la Tour is equally applicable to such a case as the present.

It is next to be observed, that the law as settled by Hochster v. De la Tour and Danube & Black Sea Co. v. Xenos is obviously quite as applicable to a contract in which personal status or personal rights are involved, as to one relating to commercial or pecuniary interests. Indeed, the contract of marriage appears to afford a striking illustration of the expediency of holding that an action may be obtained on the repudiation of a contract to be performed *in futuro*. On such a contract being entered into, not only does a right to its completion arise with reference to domestic relations and possibly pecuniary advantages, as also to the social status accruing on marriage, but a new status, that of betrothment, at once arises between the parties. This relation, it is true, has not, by the law of England, the same important consequences which attached to it by the canon law and the law of many other countries. Nevertheless, it carries with it consequences of the utmost importance to the parties. Each becomes bound to the other; neither can, consistently with such a relation, enter into a similar engagement with another person; each has an implied right to have this relation continued till the contract is finally accomplished by marriage. To the woman, more especially, it is all-important that the relation shall not be put an end to. Independently of the mental pain occasioned by the abrupt termination of such an engagement, the fact of its existence, if followed by such a termination, must necessarily operate to her serious disadvantage. During its continuance others will naturally be deterred from approaching her with matrimonial intentions; nor could she admit of such approaches, if made; while the breaking

off of the engagement is too apt to cast a slur upon one who has been thus treated. We see, therefore, every reason for applying the principle of Hochster v. De la Tour to such a case, and for holding the contract, if repudiated, to be broken, not only in its present, but also in its ultimate obligations and consequences. To hold that the aggrieved party must wait till the time fixed for marrying shall have arrived, or the event on which it is to depend shall have happened, would have the effect of aggravating the injury, by preventing the party from forming any other union, and by reason of advancing age rendering the probability of such a union constantly less. It has been suggested, indeed, that the desire of marrying and the happiness to be expected from it diminish with advancing years, and,therefore, that when by the terms of the contract marriage is only to take place at a remote time, the value of the marriage and the damages to be recovered for a breach of the promise would be less if the refusal were made when the time for marrying was accomplished; and that, consequently, an action ought not to be allowed till the time when the fulfilment of the contract could have been claimed. We cannot concur in this view. We think that, in estimating the amount of injury done and of the compensation to be made for it, if the contract were broken when the time for marrying had arrived, the wasted years and the impossibility of forming any other engagement during the intermediate time should be taken into account, and not merely the age of the parties and the then existing value of the marriage. It is, therefore, manifest that it is better for both parties—for the party intending to break the contract, as well as for the party wronged by the breach of it—that an express repudiation of the contract should be treated as a violation of it in all its incidents, and should give the right to the party wronged to bring an action at once, and have the damages assessed at the earliest moment. No one can doubt that, morally speaking, a party who determines to break off a matrimonial engagement acts far more commendably if he at once gives notice of his intention, than if he keeps that intention secret till the time for fulfilling the promise has come. The reason is that the giving such notice at the earliest moment tends to mitigate, while the delay in giving it necessarily aggravates, the injury of the party wronged.

It has been urged that there must be great difficulty in thus assessing damages prospectively. But this must always be more or less the case whenever the principle of Hochster v. De la Tour comes to be applied. It would equally exist where one of the parties, by marrying another person, gave rise, as in the case of Short v. Stone, to an immediate right of action. It cannot be said that the difficulty is by any means insuperable, and the advantages resulting from the application of the principle of Hochster v. De la Tour are quite sufficient to outweigh any inconvenience arising from the difficulty of assessing the damages. * * *

We are therefore of opinion that the judgment of the Court of Exchequer must be reversed.

*Judgment reversed.*[149]

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## SYNGE *v.* SYNGE.

**(Court of Appeal. [1894] 1 Q. B. 466.)**

The claim in this action was on an ante-nuptial promise, made by the defendant in consideration of marriage, to leave by will to the plaintiff a certain house and land for her lifetime. It was alleged that the defendant had conveyed his whole estate and interest in the property to third persons, and thereby incapacitated himself from keeping his promise; and the plaintiff claimed a declaration that she was entitled to a life estate in the premises commencing on the death of her husband, and that the conveyance thereof was subject to her life estate, and in the alternative, the plaintiff claimed damages for breach of agreement. Mathew, J., gave judgment for the defendant and plaintiff appealed.

KAY, J. L.[150] * * * We are of opinion * * * that accordingly there was a binding contract on the defendant's part to leave to his wife the house and land at Ardfield for her life. * * * Counsel elect to ask for damages only. Sir R. Synge had all his lifetime to perform this contract; but, in order to perform it, he must in his lifetime make a disposition in favour of Lady Synge. If he died without having done so, he would have broken his contract. The breach would be omitting in his lifetime to make such a disposition. True, it would only take effect at his death; but the breach must take place in his lifetime, and as by the conveyance to his daughters he put it absolutely out of his power to perform this contract, Lady Synge, according to well-known decisions (Hochester v. De La Tour, 2 E. & B. 678; Frost v. Knight, L. R. 7 Ex. 111), had a right to treat that conveyance as an absolute breach of contract, and to sue at once for damages; and as this court has both legal and equitable jurisdiction, we are of opinion that such relief should be granted.

We have not before us the materials for assessing such damages. The

[149] "If there is a distinct refusal by one party to be bound by the terms of a contract in the future, the other party may, in our opinion, treat the contract as at an end [citations]. Short of such refusal, we think the true principle to be deduced from all the cases is that you must ascertain whether the action of the party who is breaking the contract is such that the other party is entitled to conclude that the party breaking the contract no longer intends to be bound by its provisions." Lord Alverstone, M. R., in Rhymney R. Co. v. Brecon & Merthye Tydfil R. Co., 83 L. T. (N. S.) 111, 117 (1900).

For the view that a party's statement that he will be unable to perform, not accompanied by a repudiation of the contract, is not an anticipatory breach, see Johnstone v. Milling, 16 Q. B. D. 460 (1886). Compare Dingley v. Oler, 117 U. S. 490 (1886).

[150] Parts of the opinion are omitted.

amount must depend on the value of the possible life estate which Lady Synge would be entitled to if she survived her husband. Their comparative ages, would, of course, be a chief factor in such a calculation. There must be an inquiry as to the proper amount of damages.

Sir R. Synge must pay the costs of the action here and in the court below.

*Appeal allowed.*[151]

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## ZUCK & HENRY *v.* M'CLURE & CO.

(Supreme Court of Pennsylvania, 1881. 98 Pa. St. 541.)

Assumpsit by Zuck & Henry against G. T. Rafferty et al., trading as McClure & Co. The action was brought Nov. 29, 1879, the writ served and *narr.* filed the same day.

The jury found a verdict for the defendants, and certified a balance in their favor of $36,150.12, and judgment was entered thereon. The plaintiff thereupon took this writ of error.

PAXON, J.[152] This action was commenced in the court below on the 29th day of November, 1879, and was to recover about $1,500 for coke delivered by the plaintiffs to the defendants during the previous October. There was no serious dispute as to either the delivery of the coke or the amount; but the defendants set up as a defence the breach of a [subsequent] contract on the part of the plaintiffs for future deliveries of coke. To state said contract briefly, the plaintiffs had agreed to sell and deliver to the defendants the entire product of their Eldorado works, comprising forty ovens, at a fixed price per ton, and also the product of all other ovens built by them during the continuance of the contract. This contract plainly appears by the correspondence between the parties, and was finally closed on Nov. 11, 1879. On the 19th of the same month the plaintiffs notified the defendants in writing that they would not deliver the coke. On the 4th of December, four days after the delivery was to have commenced under the contract, the defendants wrote to the plaintiffs as follows:

"We beg to draw your attention to contract between us by which you agree to furnish us the product of the Eldorado Coke Works (forty ovens); also product of ovens that may be built during the continuance of the contract from December 1, 1879, to May 31, 1880, inclusive, and to advise you that we have been and are now prepared to receive the said coke under said contract. If shipments on our account are not at once commenced, we will go into the

151 But see Warden v. Hinds, 163 Fed. 201 (1908) as to contracts to bequeath. Cf. Pittman v. Pittman, 110 Ky. 306 (1901).

The anticipatory breach doctrine was applied to options to purchase land in Stover v. Gold, 48 Dominion L. R. 620 (1919).

152 The statement of facts is omitted.

market and buy an equal amount of coke which you fail to deliver us, and will hold you responsible for any difference in price which we may have to pay, and will retain the balance which we now have in our hands to secure us against any loss or damage which we may sustain from your failure to comply with contract."

The defendants upon the trial below were allowed to set off their damages by reason of the breach of the above contract, and the jury found a verdict in their favor for $36,150. The single specification of error raises the question whether there was any breach at the time the suit was commenced.

A mere notice of an intended breach is not of itself a breach of the contract. It may become so if accepted and acted on by the other party. If the defendants had accepted the plaintiffs' notice of breach contained in their letter of November 19 and acted upon it, there would plainly have been a breach of the contract.[153] The plaintiffs in such case could not have relieved themselves by commencing to deliver the coke on December 1, but must have been held to all the legal consequences of the breach. The defendants, however, on December 4, still insist upon compliance. They say they "are now prepared to receive said coke under said contract." This certainly kept the contract alive as to both parties. The plaintiffs could have gone on and delivered the coke on December 4, in which case there would have been no breach and no damages. The notice of an intention not to perform the contract, if not accepted by the other party as a present breach, remains only a matter of intention, and may be withdrawn at any time before the performance is in fact due; but if not in fact withdrawn it is evidence of a continued intention to refuse performance down to and inclusive of the time appointed for performance. Ripley v. McClure, 4 Ex. 345; Leake on the Law of Contracts, 873. The promisee may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance. But in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables

[153] "The intention to abandon the contract at some future date is no breach of it, but, when that intention is declared in positive terms and unconditionally, it has the effect, in so far as the promisor is able to do so, to repudiate the contract itself and to terminate the contractual relations between the parties. This affords to the other party the opportunity to accept the declarations, if he chooses to do so, and thus make effective the declarations of intention not to perform, rendering the contract thereby one that is broken on the part of the promisor himself. But to have this effect the declaration of an intention not to perform the contract in the future must be unconditional in its terms. * * * The ground upon which it is held that when one declares that he will not perform a contract, the performance of which is to begin in the future, the other party may accept this declaration as a breach is that the contract is thus repudiated, and, so far as one party can do so, the contractual relation between the parties is destroyed. Clark on Contracts, 645; Zuck v. McClure, 98 Pa. 545." Brown, J., in Kilgore v. N. W. T. Baptist Educational Ass'n, 90 Tex. 139, 142-144 (1896).

the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. Leake on Contracts, *supra*.[154]

It follows from the foregoing principles that on November 29 when the action was commenced below, there was no breach of the contract which the defendants could set up as a set-off to the plaintiffs' claim. Nor does it help the defendants that when the cause was tried the breach was complete. The date of the commencement of the suit is the obvious test in such cases. Morrison v. Moreland, 15 S. & R. 61; Carpenter v. Butterfield, 3 Johns. Cases, 144.

There was error in not affirming the plaintiffs' eighth point.

*Judgment reversed and a venire facias de novo awarded.*

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## WESTER ET AL. *v.* CASEIN CO. OF AMERICA.

**(Court of Appeals of New York, 1912. 206 N. Y. 506, 100 N. E. 438, Ann. Cas. 1914 B, 377.)**

The plaintiffs, residents of the Argentine Republic, sued the defendant, a corporation organized under the laws of New Jersey but having its principal place of business in New York, for breach of a contract for the defendant to buy and the plaintiffs to sell the total product of casein of the plaintiffs. At a time when each was dissatisfied as to the performance by the other, the defendant, though fully aware that under the contract it was for the plaintiffs to tender the casein in Buenos Ayres and for the defendant then to decline or accept, without waiting for such tender, and in reply to a cablegram from the plaintiffs asking for an answer by cablegram, sent from New York a cablegram which the court construed as an unqualified repudiation of the contract. The defendant's cablegram was sent November 29, 1904, and on December 30, 1904, plaintiffs sent an answer which left open for a reasonable time performance by defendant. The defendant did not, however, modify its repudiation of the terms of the contract. This action was brought March 28, 1906, and the question was as to the jurisdiction of the court, which depended on whether the cause of action "arose within the state" within the appropriate code provision, i. e., "whether the breach of said contract" occurred in New York. The plaintiffs had judgment in the Supreme Court, but the Appellate Division reversed the judgment

**154 "Mr. Manisty [counsel for appellants, who were plaintiffs below] * * * argued that whenever a party, within the time which he has for doing an act, refuses to do it a right of action immediately accrues to the other party, although the breach may indeed be afterwards healed by a performance within the time: but that, if before the expiration of the time anything happens which makes the performance illegal, then the contract may be considered to have been substantially broken within the time. I am of opinion that this is not a correct view of the law." Pollock, C. B., in Reid v. Hoskins, 6 E. & Bl. 953, 972 (1856).**

(140 App. Div. 442, 125 N. Y. Supp. 335). Plaintiffs appealed. Reversed and remanded.

CHASE, J.† * * * We are of the opinion as we have stated that the delivery of the cablegram to the telegraph company should be treated as a delivery to the plaintiffs. It is deemed to be a delivery to the plaintiffs, whether received by them or not, for the same reason that when one person, by letter or telegram, makes an offer to another, and the other person accepts such offer, either by post or telegraph, the contract springs into existence at the time of such mailing or sending, because of implied authority in the carrier of the message to receive the reply. Vassar v. Camp, 11 N. Y. 441; Trevor v. Wood, 36 N. Y. 307, 93 Am. Dec. 511; Crown Point Iron Co. v. Boatman's Fire & Marine Ins. Co., 127 N. Y. 608, 28 N. E. 653, 14 L. R. A. 147.

The breach of the contract occurred in this case upon the delivery of the cablegram to the telegraph company, and constituted a breach, not only at that time, but also at that place. It was unnecessary for the defendant to have anticipated the action it would take in case of formal tender in Buenos Ayres. It did, however, anticipate such action by its cablegram of November 29th.

An anticipatory breach of a contract precedes the time prescribed for its performance, or at least the time when tender of performance has been proffered. If it does not precede the time of performance or actual tender, it is not anticipatory. Where, as in this case, it precedes a formal tender under the contract, and is in anticipation of such tender, it is as voluntary; and its effect is the same as when it precedes the time when performance is required, in whole or in part by the contract.

The defendant having voluntarily anticipated its action and repudiated the contract, it should be treated the same, so far as the breach is concerned, as it would if the plaintiffs had in New York tendered the casein to the defendant, and the defendant had then waived the place of delivery, but wholly refused to accept it, and wholly repudiated the contract. It would in that case have been a breach of the contract in New York, although the place of performance, as provided by the contract, was Argentina.

The place where a cause of action for a breach of contract arises is generally, almost universally, the place where the contract is to be performed. The reason why the place of the breach of contract is generally the place of its performance is that unless the place of performance is waived or performance is anticipated, it is only at such place that there is a breach, or that it can be determined whether there is a breach.

An anticipatory breach of contract is not necessarily confined to the place of performance named in the contract. It depends upon the facts and circumstances in each case. In determining the place of the breach,

† The statement of facts is abbreviated from the opinion, and parts of the opinion are omitted.

the time of the breach is important. Hamilton v. Barr, 18 L. R. Ir. 297; Matthews v. Alexander, 7 Ir. R. C. L. 575; Cherry v. Thompson, L. R. (7 Q. B.) 73. Although the doctrine of anticipatory breach is not applicable in all cases (see Kelly v. Security Mut. L. Ins. Co., 186 N. Y. 16, 78 N. E. 584, 9 Ann. Cas. 661), it is applicable to the case now under consideration.

In Hibernia National Bank v. Lacombe, 84 N. Y. 367, at page 383 (38 Am. Rep. 518), this court, in considering the place where a cause of action arose, and quoting from Durham v. Spence, L. R. 6 Ex. Cas. 46, say: " 'I understand by cause of action that which creates the necessity for bringing the action. No doubt, to make the act or omission complained of a cause of action, a contract must have preceded; but so also a negotiation must have preceded the making of the contract. Yet I should not include that negotiation, nor any of the other circumstances that might form part of the necessary evidence in the cause, as the groundwork of the cause of complaint, but only the cause of complaint itself; that is the breach.' * * * 'The cause of action must have reference to some time as well as some place. Does, then, the consideration of the time when the cause of action arises give us any assistance in determining the place where it arises? I think it does. The cause of action arises when that is not done which ought to have been done, or that is done which ought not to have been done. But the time when the cause of action arises determines, also, the place where it arises; for when that occurs which is the cause of action the place where it occurs is the place where the cause of action arises.' "

If the defendant wholly repudiated the contract, the plaintiffs were at liberty, at least at their option, to rescind the whole contract and sue for the damages arising from a complete breach. Wolfert v. Caledonia Springs Ice Co., 195 N. Y. 118, 88 N. E. 24, 21 L. R. A. (N. S.) 864; Pakas v. Hollingshead, 184 N. Y. 211, 77 N. E. 40, 3 L. R. A. (N. S.) 1042, 112 Am. St. Rep. 601, 6 Ann. Cas. 60; Pope v. Porter, 102 N. Y. 366, 7 N. E. 304; Ga Nun v. Palmer, 202 N. Y. 483, 96 N. E. 99, 36 L. R. A. (N. S.) 922; Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953.

The defendant, which has its principal place of business in this state, should not feel aggrieved if the plaintiffs, in reliance upon its cablegram, are enabled to sustain the jurisdiction of the courts of this state and thus come to the place of the defendant's convenience to fight its and their battle.

The judgment of the Appellate Division should be reversed. * * *

*Judgment reversed, etc.*[155]

[155] "It appears that the plaintiff, in New York, made a contract by interchange of letters, whereby defendant undertook to manufacture at its factory in Ridgeway, Pa., and deliver materials to plaintiff, f. o. b. Youngstown, Ohio. At a subsequent time, by letter sent from Ridgeway, Pa., to the plaintiff in New York, defendant repudiated farther performance of the contract

## TRAVER *v.* HALSTED.

(Supreme Court of New York, 1840. 23 Wend. 66.)

Question on sale of real estate. On the twenty-fifth day of December, 1837, an agreement under seal was entered into between the parties, whereby it was stipulated on the part of Halsted to sell to Traver a farm containing about 163 acres of land, to be conveyed as described in his deed without survey, at the rate of $70 per acre, and that on or before the fifth of April then next, on receiving from Traver the price of $70 per acre, that he would, at his own costs and expense, execute a proper conveyance for the conveying and assuring the fee simple of the premises to Traver, free from all incumbrances, except a mortgage, executed by him to Seth Lawton for securing the payment of $5,000—the conveyance to contain a general warranty and the usual full covenants. On the part of Traver, it was stipulated, that on or before the fifth day of April ensuing the date of the agreement, on the execution of such conveyance by Halsted, to pay the sum of $70 per acre for the farm, in manner following; that he would assume and pay the mortgage of $5,000 when due, and secure the balance to be paid in cash on or before the first day of May ensuing the date of the agreement. The parties bound themselves each to the other for the performance of their respective stipulations, in the penalty of $1,500, which were declared liquidated damages. In May, 1838, Traver brought an action of covenant against Halsted, claiming the recovery of the $1,500 stipulated damages. After setting forth the agreement in his declaration, the plaintiff averred that on the 5th April, 1838, he tendered to the defendant an agreement in writing under his hand and seal, whereby he assumed to pay, when due, the mortgage to Lawton, and covenanted to pay the moneys thereby secured, and to indemnify the defendant from the payment thereof; and on the same day tendered to the defendant a bond in the penal sum of $14,000, executed by the plaintiff

and canceled the same. Having been sent by mail, the carrier was but defendant's agent, and it was necessary in order to repudiate the contract, to have such notice reach the plaintiff. Under the circumstances, the breach of contract occurred in this state, and the cause of action, therefore, arose within the jurisdiction of our courts [within a statute permitting service on certain corporation agents if the cause of action 'arose' in the state.]

"Defendant's reliance upon Wester v. Casein Co. of America, 206 N. Y. 506, is misplaced, for that decision was placed upon the fact that the plaintiff there, in order to put an end to a controversy which had arisen by their own telegram, sought a reply, and made the chosen means of communication their agent to receive it." Wagner, J., in Glynn v. Hyde-Murphy Co., 184 N. Y. Supp. 462, 463 (1920). But, as Professor Williston has pointed out, Wester v. Casein Co., *supra*, still remains a decision that an anticipatory breach is a breach before its acceptance as such by the other party. 3 Williston on Contracts, § 1332, p. 2385. Although he does not agree, such a view would seem to present fewer difficulties of theory than does the view of Zuck v. McClure, *ante*, p. 968.

and two other persons as sureties, conditioned to pay on the first day of May then next the balance of what should be due to the defendant, according to the terms of the agreement of 25th December, 1837; and that the sureties were severally worth $7,000, over and above all debts owing by them. He also averred that the defendant did not and would not execute the conveyance on the said fifth day of April, according to the terms of the agreement; and on the contrary thereof, that he had no title whatever to the premises, and wholly neglected and refused to execute any conveyance whatever to the plaintiff conveying and assuring to him the fee simple, etc.

The defendant interposed several pleas in bar. * * * In the eighth plea, the defendant alleged in bar of recovery, that "before 5th April, 1838, to-wit, on the fourth day of said April, said plaintiff wholly refused to accept any deed of conveyance of said premises on the said fifth day of April, under and in pursuance of said articles of agreement, and to perform and keep the covenants and agreements in said articles of agreement on his part to be kept and performed, at the times in the manner prescribed in said articles of agreement," without this, etc. (traversing the refusal to execute the conveyance).

The plaintiff * * * demurred separately to the pleas. * * *

COWEN, J.[156] * * * The eighth plea supposes that a refusal by the plaintiff on the fourth, discharged the defendant from all obligation to convey on the fifth of April. * * *

2. As to the refusal of the plaintiff on the 4th, to receive a conveyance on the day appointed by the contract, or, as we will read it for the present, notice to the defendant that it would [not] be received, I agree that this might have operated as an excuse for the defendant not being ready, and perhaps would have wholly discharged him, had the matter stopped here. Jones v. Barkley, 2 Doug. 684, 694, per Ld. Mansfield, Ch. J., and Buller, J. But the refusal on the 4th was not conclusive on the plaintiff. He had a right to change his mind, as he avers that he did, which is not denied by the plea, and still present himself and offer to perform on the fifth. This was equivalent to a revocation of what he had before said, which could not operate as more than a mere license or excuse to the defendant for not being ready. The refusal did not discharge the covenant; but we would not allow the plaintiff thus to play a trick on the defendant. Franchot v. Leach, 5 Cowen. 506, 508. He does not, however, say he had been thrown off his guard, and that he merely wanted time, therefore. He admits, by not denying, what the plaintiff avers in his declaration, that when he did come, and tender a performance, the defendant met him with a general refusal; and would not even receive the securities. *Non constat* that he had parted with the title, or taken any other steps in consequence

[156] The statement of facts is abbreviated and parts of the opinion are omitted.

of the notice of the day before, so as to be prejudiced by it. If he had, then the plaintiff ought to be estopped from insisting on performance. But he recanted his refusal within the time fixed by the covenant, and the defendant still continued, for aught we hear, on the 5th and up to the time of the recantation, in all respects as able to perform as he would have been had the plaintiff said nothing. * * *

The pleas demurred to are, we think, all bad; and the judgment must be for the plaintiff, with leave, etc.

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## THOMAS J. DANIELS *v.* SAMUEL F. J. NEWTON ET AL.

(Supreme Judicial Court of Massachusetts, 1874. 114 Mass. 530, 19 Am. Rep. 384.)

WELLS, J.[157] This action is for breach of an agreement in writing, under seal, for the purchase of certain land from the plaintiff by the defendants. The time for performance is indicated by two clauses,—one that "said premises are to be conveyed within thirty days from this date;" the other that "in case the said parties of the second part should fail to sell their estate at the expiration of the thirty days, then we agree to extend this agreement for thirty days." The inference from the latter clause is that the defendants were to have the whole thirty days for performance on their part, and, in the contingency mentioned, thirty days more. Such was the effect given to the terms of the written instrument, by the ruling at the trial, and we think correctly.

The plaintiff relied upon a supposed breach of the agreement by the defendants within the thirty days; to-wit, May 29,—the writing being dated May 15,—and thereupon had brought his action May 30. The ruling of the court upon this point was that if the defendants "fixed a day, within said thirty days, for the performance of said agreement by the respective parties, and the plaintiff was then ready to perform his part, and the defendants then refused absolutely to perform said agreement on their part, then or at any other time, that would be a breach of the agreement on their part for which the plaintiff can maintain this action." * * *

The action having been brought immediately upon the refusal, and within the time allowed for performance by the terms of the written contract sued upon, the effect of the ruling was that an absolute refusal of perforamnce, purporting and intended to be a refusal to fulfil the contract at any time, would be of itself a breach of a contract for acts to be done within a time not yet expired, so that an action would lie forthwith. The proposition involved in this ruling, to-wit, that there may be a breach of contract, giving a present right of action, before

[157] Parts of the opinion are omitted.

the performance is due by its terms, seems to have been adopted by recent English decisions. Frost v. Knight, L. R. 7 Ex. 111 (1872); Hochster v. De la Tour, 2 E. & B. 678 (1853).

It is said to be applicable, not only in cases where performance has been rendered impossible by the voluntary conduct of the party, as in agreements for marriage or conveyance of land by marriage or conveyance to another, and by way of exception to the general rule formerly maintained, but to the full extent of a general rule; so that an absolute and unqualified declaration of a purpose not to fulfil or be held by the contract, made by one party to the other, may be treated as of itself a present breach of the contract by repudiation, as well before as after the time stipulated for its fulfilment by such party. The point was elaborately discussed in Frost v. Knight by Lord Chief Justice Cockburn; and the principle evolved is expressed in these propositions on page 114:

"The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the mean time he has a right to have the contract kept open as a substituting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage."

"The contract having been thus broken by the promisor and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote."

The first of these two propositions would apply with peculiar force to commercial paper, especially if its repudiation by the maker were made public. We see no reason for a distinction which should exclude it from the same rule that applies to other promises in writing, in respect to what will constitute a breach of the principal contract between the maker and payee. We are not aware, however, that any decision has carried out the rule by applying it to such contracts; and we doubt if the learned jurists who propounded it would have been willing to follow it to that extent.

The doctrine has never been adopted in this commonwealth, nor has it received any recognition, so far as we are able to learn, beyond that in Heard v. Bowers, 23 Pick. 455, 460. The court in that case refer to Ford v. Tiley, 6 B. & C. 325, 327, and 5 Vin. Ab. 224; the doctrine announced in Ford v. Tiley being, as it appears to us, an erroneous application of the maxims contained in Viner.

A renunciation of the agreement by declarations or inconsistent con-

duct, before the time of performance, may give cause for treating it as rescinded, and excuse the other party from making ready for performance on his part, or relieve him from the necessity of offering performance in order to enforce his rights. It may destroy all capacity of the party, so disavowing its obligations, to assert rights under it afterwards, if the other party has acted upon such disavowal. But we are unable to see how it can of itself constitute a present violation of any legal rights of the other party, or confer upon him a present right of action. An executory contract ordinarily confers no title or interest in the subject-matter of the agreement. Until the time arrives when, by the terms of the agreement, he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of right nor loss upon which to found an action. The true rule seems to us to be that in order to charge one in damages for breach of an executory personal contract, the other party must show a refusal or neglect to perform, at a time when and under conditions such that he is or might be entitled to require performance. Frazier v. Cushman, 12 Mass. 277; Pomroy v. Gold, 2 Met. 500; Hapgood v. Shaw, 105 Mass. 276; Carpenter v. Holcomb, 105 Mass. 280. Such undoubtedly was the interpretation of the common law in all the earlier decisions. Phillpotts v. Evans, 5 M. & W. 475; Ripley v. M'Clure, 4 Exch. 345; Lovelock v. Franklyn, 8 Q. B. 371. * * *

We have examined with care the opinions of Lord Chief Justice Cockburn in Frost v. Knight, and of Lord Campbell in Hochster v. De la Tour, and we are not convinced that the conclusions at which they arrive are founded in sound principles of jurisprudence, or sustained by the authorities cited in their support. * * *

Throughout the whole discussion both in Hochster v. De la Tour and Frost v. Knight, the question as to what conduct of the defendant will relieve the plaintiff from the necessity of showing readiness and an offer to perform at the day, in order to make out a breach by the other, appears to us to be confounded with that of the plaintiff's cause of action; or rather, the question, in what consists the plaintiff's cause of action, is lost sight of,—the court dealing only with the conduct of the defendant in repudiating the obligations of his contract.

Much argument is expended in both cases upon the ground of convenience and mutual advantage to the parties from the rule sought to be established. But before that argument can properly have weight, the point to be reached must first be shown to be consistent with logical deductions from the strictly legal aspects of the case. The legal remedy must be founded on some present legal right, and must conform to the nature of that right. Until the plaintiff has either suffered loss or wrong in respect of that which has already vested in him in right, or has been deprived of, or prevented from, acquiring that which he is entitled to have or demand, he has no ground on which to seek a remedy by way of reparation. The conduct of the defendant is no wrong

to the plaintiff until it actually invades some right of his. Actual injury and not anticipated injury is the ground of legal recovery. The plaintiff's rights are invaded by repudiation of the contract only when it produces the effect of non-performance, or prevents him from entering upon or completing performance on his part, at a time when and in the manner in which he is entitled to perform it or to have it performed.

That this is the natural and ordinary rule seems to be recognized by Lord Campbell, when he declares that "it cannot be laid down as a universal rule," and proceeds to point out exceptions. And Lord Chief Justice Cockburn concedes it to be true "that there can be no actual breach of a contract by reason of non-performance, so long as the time for performance has not yet arrived." L. R. 7 Ex. 114. But preceding "inchoate right" is discovered, and a corresponding obligation implied, upon which there may be held to be "a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it."

In Hochster v. De la Tour, Lord Campbell assigns, as one reason for the decision, that in case of employment as courier, and of promise to marry, a relation is established between the parties by the contract, even before the time of performance; "they impliedly promise that in the mean time neither will do anything to the prejudice of the other inconsistent with that relation;" and "it seems to be a breach of an implied contract if either of them renounces the engagement." In Frost v. Knight, the Lord Chief Justice remarks of the promise to marry: "On such a contract being entered into, not only does a right to its completion arise with reference to domestic relations and possibly pecuniary advantages, as also to the social status accruing on marriage, but a new status, that of betrothment, at once arises between the parties." "Each becomes bound to the other; neither can, consistently with such a relation, enter into a similar engagement with another person; each has an implied right to have this relation continued till the contract is finally accomplished by marriage."

These, however, are considerations which touch the interpretation and effect of the particular kind of contract; and so far as they tend to sustain the decisions upon the ground of implied obligations arising and requiring observance at once upon entering into the relation by means of such a contract, they also tend to remove the decisions themselves out of the range of the question we are now discussing. If there be sound reason to deduce from a promise to marry, or to employ in a special capacity, at a future time, present obligations of implied contract, upon which an action may be founded, in which the breach of the entire agreement "by reason of the future non-performance" will be "virtually involved," "as one of the consequences of the repudiation of the contract," it surely is not sound reasoning by means of that process to arrive at the conclusion that all contracts, having a future day for their

performance, include like rights and obligations, so as to enable one party to sue at once, as for a breach, whenever the other announces beforehand his purpose of future non-fulfilment. If this is the result, as it appears to be, of the English decisions referred to, or of the reasoning in those cases, we cannot accede to it. We have no occasion now to determine what may be the rule where the contract may fairly be interpreted as establishing between the parties a present relation of mutual obligations, because we are of opinion that no such implied obligations can be engrafted upon the contract in the present case. It simply binds the defendants to receive a deed of real estate and pay or secure the purchase money; and its written provisions, by which alone their obligations are to be ascertained, allow them thirty days at least within which to fulfil their agreement. The plaintiff could require nothing of them until the expiration of that time; and no conduct on their part or declaration, whether of promise or denial, could give him any cause of action in respect of that agreement of sale. This action therefore cannot be maintained.

*Exceptions sustained.*[158]

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## ISAAC PARKER *v.* ELECTA P. RUSSELL.

**(Supreme Judicial Court of Massachusetts, 1882. 133 Mass. 74.)**

Contract. At the trial the evidence tended to show that, in March, 1873, the defendant, for a good consideration [a conveyance of land], agreed to support the plaintiff during his life; that she did support him in her house from that time till about October 1, 1878, when her house was destroyed by fire; and that since the fire the defendant had furnished no aid or support to the plaintiff.

The defendant requested the judge to rule that damages could only

[158] North Dakota at first supported this case, which has very small following, in Stanford v. McGill, 6 N. Dak. 536 (1897), but later accepted the anticipatory breach doctrine to the extent that "defendant had the right to tender a breach of the contract by notice that he would never perform, which repudiation plaintiff might have elected to accept as a present and immediate breach." Hart-Parr Co. v. Finley, 31 N. Dak. 130 (1915).

In Miller v. Jones, 68 W. Va. 526 (1911) it is held that a vendee could sue for specific performance immediately on notice of repudiation, as he had a right "to compel defendant to maintain the contractual relation until the time for executing the deed should arrive" (p. 527), but that the court could not compel defendant to receive the purchase money or give the deed until the time fixed in the contract, as it could not make a contract for the parties. See Long v. Wright (Colo.) 197 Pac. 1016 (1921).

On the remedies of a party to a contract upon the anticipatory breach thereof or prevention of performance, see 1 Ann. Cas. 427, note; 12 Ann. Cas. 1108, note; Ann. Cas. 1913 C, 384, note; Ann. Cas. 1917 E, 712, note; 36 L. R. A. (N. S.) 408, note.

be recovered in this action for failure to furnish support to the plaintiff prior to the date of the writ; and that damages for such failure since the date of the writ must be sought in another action. The judge declined to so rule, and instructed the jury that if the defendant, for a period of about two years, neglected to furnish aid or support to the plaintiff, without any fault of the plaintiff, the plaintiff might treat the contract as at an end, and recover damages for the breach of the contract as a whole; and that the plaintiff would be entitled to recover compensation for the past failure of the defendant to furnish him aid and support and full indemnity for his future support.

The defendant also requested the judge to rule that the plaintiff, under his declaration, could not recover damages for any period subsequent to the date of the writ; but the judge declined so to rule.

The jury returned a verdict for the plaintiff in the sum of $972.25; and found specially that the support of the plaintiff, under the terms of the contract, from the date of the fire to the date of the writ, was of the value of $377.40, and that the same from the date of the fire to the date of the trial was of the value of $473.60. In case the plaintiff should not be entitled to damages under the rule laid down by the judge, judgment was to be entered for the one sum or the other, as this court should determine the rule of damages to be. The defendant alleged exceptions.

FIELD, J.[159] In an action for a breach of a contract to support the plaintiff during his life, if the contract is regarded as still subsisting, the damages are assessed up to the date of the writ, and not up to the time when the verdict is rendered. Fay v. Guynon, 131 Mass. 31.

But if the breach has been such that the plaintiff has the right to treat the contract as absolutely and finally broken by the defendant, and he elects so to treat it, the damages are assessed as of a total breach of an entire contract. Amos v. Oakley, 131 Mass. 413; Schell v. Plumb, 55 N. Y. 592; Remelee v. Hall, 31 Vt. 582; Fales v. Hemenway, 64 Maine, 373; Sutherland v. Wyer, 67 Maine, 64; Lamoreaux v. Rolfe, 36 N. H. 33; Mullaly v. Austin, 97 Mass. 30; Howard v. Daly, 61 N. Y. 362.

Such damages are not special or prospective damages, but are the damages naturally resulting from a total breach of the contract, and are suffered when the contract is broken, and are assessed as of that time. From the nature of the contract they include damages for not performing the contract in the future as well as in the past. The value of the contract to the plaintiff at the time it is broken may be somewhat indefinite because the duration of the life of the plaintiff is uncertain, but uncertainty in the duration of a life has not, since the adoption of life

[159] The statement of facts is slightly shortened and part of the opinion is omitted.

tables, been regarded as a reason why full relief in damages should not be afforded for a failure to perform a contract which by its terms was to continue during life.

When the defendant, for example, absolutely refuses to perform such a contract after the time for entering upon the performance has begun, it would be a great hardship to compel the plaintiff to be ready at all times during his life to be supported by the defendant, if the defendant should at any time change his mind; and to hold that he must resort to successive actions from time to time to obtain his damages piecemeal, or else leave them to be recovered as an entirety by his personal representatives after his death.

Daniels v. Newton, 114 Mass. 530, decides that an absolute refusal to perform a contract before the performance is due by the terms of the contract is not a present breach of the contract for which any action can be maintained; but it does not decide that an absolute refusal to perform a contract after the time and under the conditions in which the plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future.

The cases cited by the defendant are not inconsistent with these views. In Pierce v. Woodward, 6 Pick. 206, the declaration was for a breach of a negative promise, namely, "not to set up the business of a grocer" within certain limits; and it was held that the damages could be assessed only to the date of the writ. The defendant might at any time, without the consent of the plaintiff, stop carrying on the business, when the plaintiff's damages would necessarily cease. * * *

In this case, the declaration alleges in effect a promise to support the plaintiff during his life, from and after receiving the conveyance of certain real estate, an acceptance of such conveyance, and a neglect and refusal to perform the agreement. These are sufficient allegations to enable the plaintiff to recover damages as for a total breach. The court instructed the jury that, "if the defendant for a period of about two years neglected to furnish aid or support to the plaintiff, without any fault of the plaintiff, the plaintiff might treat the contract as at an end, and recover damages for the breach of the contract as a whole." We cannot say that this instruction was erroneous as applied to the facts in evidence in the cause, which are not set out.

The jury must have found that the plaintiff did treat the contract as finally broken by the defendant, and the propriety of this finding on the evidence is not before us.

*Judgment on the verdict for the larger sum.*

## GA NUN *v.* PALMER.

(Court of Appeals of New York, 1911. 202 N. Y. 483, 96 N. E. 99, 36 L. R. A. (N. S.) 922.)

Action by Mary F. Ga Nun, on behalf of herself and all other creditors of Jane M. Sands, deceased, against Mary E. Palmer, individually and as executrix of Jane M. Sands, deceased. From a judgment of the Appellate Division (139 App. Div. 910, 123 N. Y. Supp. 1117) affirming a judgment dismissing the complaint on the merits, plaintiff by permission appeals. Reversed, and new trial granted.

See, also, 141 App. Div. 918, 125 N. Y. Supp. 1121.

HAIGHT, J.[160] This action was brought to recover the sum of $20,000, alleged to be due and owing the plaintiff from the defendant's testatrix, and also to set aside certain transfers of property by the testatrix in her lifetime, alleged to have been made in fraud of the rights of creditors. The answer admits the making of a will by the defendant's testatrix and its admission to probate, and denies the other allegations of the complaint, and then alleges that if any cause of action existed it is barred by the statute of limitations.

The contract upon which the plaintiff seeks to recover is as follows: "November 23, 1899—I, Mary F. Ga Nun, do promise to care for Jane M. Sands in sickness and health as long as she lives. I, Jane M. Sands, do promise to pay Mary F. Ga Nun $70.00 a month for the support of the house and her clothes as long as I live, and at my death she is to have $20,000 that she will find in the safe deposit in New York, and she is to take my keys and distribute the packages in box as they are marked, and all my clothing and wearing apparel and silver. In short, everything in the house shall be Mary F. Ga Nun's. [Signed] Jane M. Sands. Louis W. Jansen, A. S. Leonard, M.D., W. G. Bouvier, Witnesses."

The trial court found as facts that, in pursuance of such contract, the plaintiff undertook the care and maintenance of Miss Sands, and continued the same until May, 1900, when Miss Sands left her, and removed from the plaintiff's home in Brooklyn to the defendant's residence in Poughkeepsie, with whom she some time afterwards entered into a similar oral contract with defendant, but for less compensation; that she continued to reside with the defendant until she died on August 17, 1906, leaving a will in which she made the defendant her sole legatee and devisee, and appointed her sole executrix; which will was duly admitted to probate by the surrogate of Westchester county, who issued letters testamentary to the defendant, who thereupon duly qualified, and since has acted as such executrix. The court also found that there was a breach of the contract by decedent in the early part of May, 1900, at which time she left the house of the plaintiff with the intention of never returning to reside with the plaintiff, and with the intention of never permitting

[160] Parts of the opinion are omitted.

the plaintiff to care for her, all of which was well known to the plaintiff at the time decedent left her house and went to live with the defendant at Poughkeepsie; that the plaintiff then employed a lawyer to enforce her claim against the decedent, and he presented bills for the $70 per month up to May 1, 1900, and wrote to the decedent, demanding payment, and threatening action if payment was not made.

This action was brought on the 31st day of May, 1907, after the death of Miss Sands, and the court found as conclusions of law that, more than six years having elapsed after the breach of the contract, the plaintiff's right to action was barred by the statute of limitations.

None of the other issues raised by the pleadings have been tried out or determined, and consequently the only question brought up for review is that upon which the trial court has based its judgment.

The clause of the contract in which Miss Sands agreed to pay the plaintiff $70 a month for the support of the house and her clothes, for which the plaintiff presented a bill up to the 1st of May, 1900, presents no question in dispute. There can be no doubt but that such payments were due and payable monthly, and that the amount thereof, at the time the bill was presented, then being due and payable, the statute commenced to run, and, six years having elapsed before her death, the plaintiff's claim, therefore, became barred by the statute. We do not understand, however, that the plaintiff in this action claims to recover for the monthly allowance specified, but bases her right of action upon the further promise of Miss Sands that at her death the plaintiff is to have the $20,000, which she would find in the safe deposit box.

The trial court, as we have seen, was of the opinion that there was a breach of the contract in its entirety at the time the decedent left the plaintiff's house, and that the statute also ran as to claim for $20,000. In reaching this result, the learned justice in his opinion refers to the case of Henry v. Rowell, 31 Misc. Rep. 384, 64 N. Y. Supp. 488, affirmed on the opinion below, 63 App. Div. 620, 71 N. Y. Supp. 1137, as an authority upon this subject, which he was bound to follow. That was an action on *quantum meruit* to recover for the value of 12 years board and lodging furnished by the plaintiff to the decedent in her lifetime, under an agreement to board and lodge her in his household as long as she should live; she agreeing to leave him by will all of the property she should own at the time of her death. After receiving board and lodging from the plaintiff for 12 years, the decedent left his abode and went elsewhere, and lived for 14 years thereafter, and then died, leaving a will in which she disposed of her property to other persons. Subsequently that action was brought. In that case it was held that there was a breach of the contract at the time that the decedent left the plaintiff's residence, and that the statute of limitations commenced to run at that time; that there was but one cause of action available to the plaintiff, and that was for the value of the board and lodging furnished by him up to that time. In that case there was no agreement to pay a definite sum for board and

lodging per month or by the year; the only agreement to pay therefor being the promise of the decedent to make a will giving the plaintiff all of her property. It is therefore apparent that but one cause of action existed in that case. But whether the court correctly held that the action could not be maintained after the testatrix's death by reason of the running of the statute, we now express no opinion.

The case we have now under review differs from the above case, for under the agreement the decedent promised to pay the plaintiff $70 a month for the support of the house, etc., that being a definite, fixed amount, payable monthly, for which an action could have been maintained therefor at the end of each month. With reference to the other provision of the agreement, instead of the decedent promising to make a will giving the plaintiff all of her property, she agreed at her death that the plaintiff is to have the $20,000 in her safe deposit box, and, instead of this action being brought for the value of services rendered on *quantum meruit*, it is brought upon the contract; the plaintiff claiming the stipulated sum expressed therein. It may be that one cause of action exists in favor of the plaintiff for the breach of the $20,000 clause of the contract, and that such an action could have been maintained at the time the decedent left the plaintiff's house and went to reside elsewhere. But, in view of the fact that the plaintiff might meet with misfortune, disabling her from carrying out her part of the contract to care for the decedent "in sickness and in health as long as she lives," thus rendering the determination of the amount of her damages uncertain and difficult to prove, she saw fit to wait until the amount specified in the contract became due by the terms thereof. Did she have the right to do this? In answering this question, we shall assume, for the purposes of this review only, that the breach of the testatrix's contract was of such a character as to amount to a notice to the plaintiff that she would not carry out the provision with reference to the giving her $20,000 at the testatrix's decease, and that an action for damages could have been maintained immediately after such breach. The question thus arises as to whether the plaintiff was bound to treat the contract as broken and bring her action, or might she, at her option, treat the contract as still in force, and wait until the sum specified became due under its terms?

In this case, as we have seen, the breach occurred after partial performance. This fact was deemed of importance in the case of Henry v. Rowell, *supra*, but we fail to see how it affects the right of the plaintiff to exercise her option. It is quite true that there is a distinction made in the authorities with reference to contracts which still are wholly executory, and are to be performed in the future; but the distinction pertains to that which would constitute a breach of such contracts. Where the contract is wholly executory, there must be some express and absolute refusal to perform, or some voluntary act on the part of the individual which renders it impossible for him to perform, in order to constitute

an anticipatory breach for which an action will lie; whereas, by a partially executed contract, the breach may result from a failure to perform some of the provisions of the contract. But in either case, after a breach by one party, the rights of the other party and his remedies are the same as to the unexecuted provisions of the contract. Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285. * * * [The opinion here quoted from Hochster v. De La Tour, Frost v. Knight and Roehm v. Horst.]

In the case of Heery v. Reed, 80 Kan. 380, 102 Pac. 846, it was held that the fact that there was a renunciation of the contract by the decedent before his death did not compel plaintiff to end the contract relation. She was at liberty to keep the contract alive, and await the time for final performance specified in the contract.

In the case of Foss-Schneider Brewing Co. v. Bullock, 59 Fed. 83, 8 C. C. A. 14, Taft, J., said: "It is true that, where a contracting party gives notice of his intention not to comply with the obligation of his contract, the other contracting party may accept this as an anticipatory breach of the contract, and sue for damages without waiting until the time mentioned for the completion and fulfilment of the contract by its terms; but, in order to enable the latter to sue on such an anticipatory breach, he must accept it as such, and consider the contract at an end."

In the case of Pakas v. Hollingshead, 184 N. Y. 211, 77 N. E. 40, 3 L. R. A. (N. S.) 1042, 112 Am. St. Rep. 601, it was held that, where the vendor of goods to be delivered and paid for in instalments refuses to deliver an instalment, a breach of the entire contract is thereby established, for which the vendee, if he so elects, may immediately recover all his damages; or he may wait until the expiration of the time for the delivery of all the goods, and then recover. While Cullen, C. J., filed a dissenting opinion in this case, he did not dissent as to so much of the decision as is stated above; but, on the contrary, expressly stated that the aggrieved party had the option to treat the contract as still continuing in force, notwithstanding the breach thereof by the other party.

A further citation of authority hardly seems necessary, for the general rule is that a right of action does not accrue upon a contract until it is executed, or payment thereunder becomes due by its terms, and the statute of limitations does not commence to run until that event happens. The right to bring an action previous to that event is exceptional, and is only permitted in cases of a breach of a contract by one of the parties which permits the aggrieved party at his option, to maintain an action for such breach, and recover the damages he has suffered on account thereof. In reaching this conclusion, we have assumed, as above stated, that the breach was of such a character as to permit the bringing of an action for damages. We do not, however, wish to be understood as deciding that question, for the rule that renunciation of a continuous executory contract by one party before the day of performance, giving the other the right to sue at once for damages, is usually applied only to

contracts of a special character; and the question whether it applies to such a contract as we have under review we leave undetermined. Kelly v. Security Mutual Life Ins. Co., 186 N. Y. 16, 78 N. E. 584; Adenaw v. Piffard, 202 N. Y. 122-129, 95 N. E. 555; 25 Cyc. 1074.

We do not deem it our duty to undertake a construction of the contract at this time, and determine whether it contains an absolute promise to pay a specified sum upon the death of the testatrix, or whether it be in the nature of a specific legacy, as defined in the case of Crawford v. McCarthy, 159 N. Y. 514-519, 54 N. E. 277, or the intention of the parties with reference thereto. * * *

The judgment should be reversed and a new trial granted, with costs to abide the event.

*Judgment reversed, etc.*[161]

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## ROEHM *v.* HORST ET AL.

**(Supreme Court of the United States, 1900. 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953.)**

Action for breach of four certain contracts. Judgment for plaintiffs in United States Circuit Court, affirmed by Circuit Court of Appeals. The case was taken on *certiorari* to the Supreme Court. Affirmed.

FULLER, C. J.[162] It is conceded that the contracts set out in the finding of facts were four of ten simultaneous contracts for 100 bales each, covering the furnishing of 1,000 bales of hops during a period of five years, of which 600 bales had been delivered and paid for. If the transaction could be treated as amounting to a single contract for 1,000 bales, the breach alleged would have occurred while the contract was in the course of performance; but plaintiff's declaration or statement of demand averred the execution of the four contracts, "two for the purchase and sale of Pacific coast hops of the crop of 1896, and two for the purchase and sale of Pacific coast hops of the crop of 1897," set them out *in extenso,* and claimed recovery for breach thereof, and in this view of the case, while as to the first of the four contracts the time to commence performance had arrived, and the October shipment had been tendered and refused, the breach as to the other three contracts was the refusal to perform before the time for performance had arrived.

The first contract falls within the rule that a contract may be broken by the renunciation of liability under it in the course of per-

[161] On breach by the promisor during lifetime of contract to compensate for services upon death as starting the statute of limitations, see 36 L. R. A. (N. S.) 922, note.

[162] The statement of facts and parts of the opinion are omitted.

formance and suit may be immediately instituted. But the other three contracts involve the question whether, where the contract is renounced before performance is due, and the renunciation goes to the whole contract, and is absolute and unequivocal, the injured party may treat the breach as complete and bring his action at once. Defendant repudiated all liability for hops of the crop of 1896 and of the crop of 1897, and notified plaintiffs that he should make (according to a letter of his attorney in the record that he had made) arrangements to purchase his stock of other parties, whereupon plaintiffs brought suit. The question is therefore presented, in respect of the three contracts, whether plaintiffs were entitled to sue at once or were obliged to wait until the time came for the first month's delivery under each of them.

It is not disputed that if one party to a contract has destroyed the subject-matter, or disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract, although the time for performance has not arrived; and also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly.

And the doctrine that there may be an anticipatory breach of an executory contract by an absolute refusal to perform it has become the settled law of England as applied to contracts for services, for marriage, and for the manufacture of sale of goods. The cases are extensively commented on in the notes to Cutter v. Powell, 2 Smith Lead. Cas. 1212, 1220, 9th edition, by Richard Henn Collins and Arbuthnot. Some of these, though quite familiar, may well be referred to. * * * [The opinion then considers Hochster v. De la Tour; Frost v. Knight, and other English cases and various Federal Court cases, and after citing "the great weight of authority in the state courts" as in favor of the doctrine, continues:]

The rule is disapproved in Daniels v. Newton, 114 Mass. 530, and in Stanford v. McGill, 6 N. Dak. 536, 38 L. R. A. 760, 72 N. W. 938, on elaborate consideration. The opinion of Judge Wells in Daniels v. Newton is generally regarded as containing all that could be said in opposition to the decision of Hochster v. De la Tour, and one of the propositions on which the opinion rests is that the adoption of the rule in the instance of ordinary contracts would necessitate its adoption in the case of commercial paper. But we are unable to assent to that view. In the case of an ordinary money contract, such as a promissory note, or a bond, the consideration has passed; there are no mutual obligations; and cases of that sort do not fall within the reason of the rule. * * *

We think it obvious that both as to renunciation after commencement of performance and renunciation before the time for perform-

ance has arrived, money contracts, pure and simple, stand on a different footing from executory contracts for the purchase and sale of goods.

The other proposition on which the case of Daniels v. Newton was rested is that until the time for performance arrives neither contracting party can suffer any injury which can form a ground of damages. Wells, J., said: "An executory contract ordinarily confers no title or interest in the subject-matter of the agreement. Until the time arrives when by the terms of the agreement he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation or right, nor loss upon which to found an action."

But there are many cases in which, before the time fixed for performance, one of the contracting parties may do that which amounts to a breach and furnishes a ground of damages. It has always been the law that where a party deliberately incapacitates himself or renders performance of his contract impossible, his act amounts to an injury to the other party, which gives the other party a cause of action for breach of contract; yet this would seem to be inconsistent with the reasoning in Daniels v. Newton, though it is not there in terms decided "that an absolute refusal to perform a contract, after the time and under the conditions in which plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future." Parker v. Russell, 133 Mass. 74.

In truth, the opinion goes upon a distinction between cases of renunciation before the arrival of the time of performance and those of renunciation of unmatured obligations of a contract while it is in course of performance, and it is said that before the argument on the ground of convenience and mutual advantage to the parties can properly have weight, "the point to be reached must first be shown to be consistent with logical deductions from the strictly legal aspects of the case."

We think that there can be no controlling distinction on this point between the two classes of cases, and that it is proper to consider the reasonableness of the conclusion that the absolute renunciation of particular contracts constitutes such a breach as to justify immediate action and recovery therefor. The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract so far as performance is concerned, and that the other party must accept this position, why should there not be speedy action and settlement in regard to the rights of the parties? Why should a *locus pœnitentiæ* be awarded to the party whose wrongful action has placed

the other at such disadvantage? What reasonable distinction *per se* is there between liability for a refusal to perform future acts to be done under a contract in course of performance and liability for a refusal to perform the whole contract made before the time for commencement of performance?

As Lord Chief Justice Cockburn observed in Frost v. Knight, the promisee has the right to insist on the contract as subsisting and effective before the arrival of the time for its performance, and its unimpaired and unimpeached efficacy may be essential to his interests, dealing as he may with rights acquired under it in various ways for his benefit and advantage. And of all such advantage, the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must, of course, deprive him; while, by acting on such repudiation and the taking of timely measures, the promisee may in many cases avert, or, at all events, materially lessen, the injurious effects which would otherwise flow from the non-fulfilment of the contract.

During the argument of Cort v. Amergate, N. & B. & E. Junction R. Co., 17 Q. B. 127, Erle, J., made this suggestion: "Suppose the contract was that plaintiff should send a ship to a certain port for cargo, and defendant should there load one on board; but defendant wrote word that he could not furnish a cargo; must the ship be sent to return empty?" And if it was not necessary for the ship owner to send his ship, it is not perceived why he should be compelled to wait until the time fixed for the loading of the ship at the remote port before bringing suit upon the contract.

If in this case these ten hop contracts had been written into one contract for the supply of hops for five years in instalments, then when the default happened in October, 1896, it cannot be denied that an immediate action could have been brought in which damages could have been recovered in advance for the breach of the agreement to deliver during the two remaining years. But treating the four outstanding contracts as separate contracts, why is it not equally reasonable that an unqualified and positive refusal to perform them constitutes such a breach that damages could be recovered in an immediate action? Why should plaintiff be compelled to bring four suits instead of one? For the reasons above stated, and having reference to the state of the authorities on the subject, our conclusion is that the rule laid down in Hochster v. De la Tour is a reasonable and proper rule to be applied in this case and in many others arising out of the transactions of commerce of the present day.

As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of

which he ought reasonably to have availed himself. If a vendor is to manufacture goods, and during the process of manufacture the contract is repudiated, he is not bound to complete the manufacture, and estimate his damages by the difference between the market price and the contract price, but the measure of damage is the difference between the contract price and the cost of performance. Hinckley v. Pittsburgh Bessemer Steel Co., 121 U. S. 264. Even if in such cases the manufacturer actually obtains his profits before the time fixed for performance, and recovers on a basis of cost which might have been increased or diminished by subsequent events, the party who broke the contract before the time for complete performance cannot complain, for he took the risk involved in such anticipation. If the vendor has to buy instead of to manufacture, the same principle prevails, and he may show what was the value of the contract by showing for what price he could have made sub-contracts, just as the cost of manufacture in the case of a manufacturer may be shown. Although he may receive his money earlier in this way, and may gain, or lose, by the estimation of his damage in advance of the time for performance, still, as we have seen, he has the right to accept the situation tendered him, and the other party cannot complain.

In this case plaintiffs showed at what prices they could have made sub-contracts for forward deliveries according to the contracts in suit, and the difference between the prices fixed by the contracts sued on and those was correctly allowed.

*Judgment affirmed.*[163]

[163] "The rule that renunciation of a continuous executory contract by one party before the day of performance gives the other party the right to sue at once for damages, is usually applied only to contracts of a special character, even in the jurisdictions where it obtains at all. It is not generally applied to contracts for the payment of money at a future time and in some states the principle is not recognized in any way whatever. (Daniels v. Newton, 114 Mass. 530; Stanford v. McGill, 6 N. Dak. 536 [overruled in Hart-Parr Co. v. Finley, 131 No. Dak. 130]; Carstens v. McDonald, 38 Neb. 858; King v. Waterman, 55 Neb. 324.) In other states and in the Federal courts the principle is adopted but applied with caution. (Roehm v. Horst, 178 U. S. 1, 17, 18; Schmitt v. Schnell, 14 Ohio C. C. 153; Brown v. Odill, 104 Tenn. 250; Roebling's Sons Co. v. Fence Co., 130 Ill. 660; Unexcelled Fire Works Co. v. Polites, 130 Pa. St. 536.) In this state it seems to be limited to contracts to marry (Burtis v. Thompson, 42 N. Y. 246); for personal services (Howard v. Daly, 61 N. Y. 362) and for the manufacture or sale of goods (Windmuller v. Pope, 107 N. Y. 674; Nichols v. Scranton Steel Co., 137 N. Y. 471); at least we have not extended it to mutual life insurance policies, perhaps for the reason that the question of fact opened to unscrupulous persons by such extension might undermine the solvency of the company and inflict gross injustice upon the other policy-holders." Vann, J., in Kelly v. Security Mutual Life Ins. Co., 182 N. Y. 16, 19-20 (1906).

In New York it was decided in an early case that the doctrine of anticipatory breach applied to the repudiation of life insurance policies by the company. Fischer v. Hope Mutual Life Ins. Co., 69 N. Y. 161 (1877). This case was not noticed, however, in Langan v. Supreme Council American Legion of Honor,

## CENTRAL TRUST COMPANY OF ILLINOIS, TRUSTEE OF FRANK E. SCOTT TRANSFER COMPANY, BANKRUPT, *v.* CHICAGO AUDITORIUM ASSOCIATION.

(Supreme Court of the United States, 1916. 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917 B, 580.)

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which, reversing a decree of the District Court for the Northern District of Illinois, Eastern Division, allowed, as a provable debt against the bankrupt estate, a part of the damages growing out of the bankrupt's anticipatory breach of an executory contract. Affirmed.

See same case below, 132 C. C. A. 452, 216 Fed. 308.

PITNEY, J.[164] On July 22, 1911, a creditors' petition in bankruptcy was filed against the Frank E. Scott Transfer Company, an Illinois corporation, and it was adjudged a bankrupt on August 7. The act of bankruptcy charged and adjudicated does not appear. When the proceedings were commenced, the bankrupt held contract relations with the Chicago Auditorium Association under a written agreement made bebetween them February 1, 1911, which had been partially performed. By its terms the Association granted to the Transfer Company, for a term of five years from the date of the contract, the baggage and livery privilege of the Auditorium Hotel, in the city of Chicago; that is to say, the sole and exclusive right, so far as it was within the legal capacity of the Association to grant the same, to transfer baggage and carry passengers to and from the hotel and to furnish livery to its guests and patrons. For the baggage privilege the Transfer Company agreed to pay to the Association the sum of $6,000, in monthly instalments of $100 each, and for the livery privilege the sum of $15,000, in monthly instalments of $250 each, and also agreed to furnish to the hotel and its guests and patrons prompt and efficient baggage and livery service at

174 N. Y. 266 (1903), which held that the anticipatory breach doctrine does not apply to such contracts and that the insured cannot recover in his lifetime for repudiation by the company. The earlier New York view is held in O'Neill v. Supreme Council American Legion of Honor, 70 N. J. L. 410 (1904). It has been suggested in a note in 24 Harv. L. Rev. 404, that "An immediate action, founded on an actual and not on an anticipatory breach should be given. The peculiar nature of life insurance contracts necessitates co-operation on the part of the insurer; a contract by the company to accept premiums is implied in fact in every case. Hence repudiation and refusal of premiums is a present breach, giving rise to an action for damages for the loss of the whole contract and starting the running of the Statute of Limitations. Williston's Wald's Pollock, Contracts, 362-364." Massachusetts, however, refuses to recognize it as a present breach, and not having the anticipatory breach doctrine, denies recovery. Porte v. Supreme Council American Legion of Honor, 183 Mass. 326 (1903).

164 Parts of the opinion are omitted.

reasonable rates at all times during the continuance of the privileges. * * *

Coming to the merits: It is no longer open to question in this court that, as a rule, where a party bound by an executory contract repudiates his obligations or disables himself from performing them before the time for performance, the promisee has the option to treat the contract as ended, so far as further performance is concerned, and maintain an action at once for the damages occasioned by such anticipatory breach. The rule has its exceptions, but none that now concerns us. Roehm v. Horst, 178 U. S. 1, 18, 19. And see O'Neill v. Supreme Council, 70 N. J. L. 410, 412. There is no doubt that the same rule must be applied where a similar repudiation or disablement occurs during performance. Whether the intervention of bankruptcy constitutes such a breach and gives rise to a claim provable in the bankruptcy proceedings is a question not covered by any previous decision of this court, and upon which the other federal courts are in conflict. * * *

The contract with which we have to deal was not a contract of personal service simply, but was of such a nature as evidently to require a considerable amount of capital, in the shape of equipment, etc., for its proper performance by the Transfer Company. The immediate effect of bankruptcy was to strip the company of its assets, and thus disable it from performing. It may be conceded that the contract was assignable, and passed to the trustee under § 70a (30 Stat. at L. 565, chap. 541, Comp. Stat. 1913, § 9654), to the extent that it had an option to perform it in the place of the bankrupt (See Sparhawk v. Yerkes, 142 U. S. 1, 13, 35 L. Ed. 915, 918, 12 Sup. Ct. Rep. 104; Sunflower Oil Co. v. Wilson, 142 U. S. 313, 322, 35 L. Ed. 1025, 1028, 12 Sup. Ct. Rep. 235); for although there was a stipulation against assignment without consent of the Auditorium Association, it may be assumed that this did not prevent an assignment by operation of law. Still, the trustee in bankruptcy did not elect to assume performance, and so the matter is left as if the law had conferred no such election.

It is argued that there can be no anticipatory breach of a contract except it result from the voluntary act of one of the parties, and that the filing of an involuntary petition in bankruptcy, with adjudication thereon, is but the act of law resulting from an adverse proceeding instituted by creditors. This view was taken, with respect to the effect of a state proceeding restraining a corporation from the further prosecution of its business or the exercise of its corporate franchises, appointing a receiver, and dissolving the corporation, in People v. Globe Mut. L. Ins. Co., 91 N. Y. 174, cited with approval in some of the federal court decisions above referred to. In that case, it did not appear that the company was the responsible cause of the action of the state, so as to make the dissolution its own act; but, irrespective of this, we cannot accept the reasoning. As was said in Roehm v. Horst, 178 U. S. 19, 44 L. Ed. 960, 20 Sup. Ct. Rep. 780: "The parties to a contract which is wholly

executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due." Commercial credits are, to a large extent, based upon the reasonable expectation that pending contracts of acknowledged validity will be performed in due course; and the same principle that entitles the promisee to continued willingness entitles him to continued ability on the part of the promisor. In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement. It is the purpose of the bankruptcy act, generally speaking, to permit all creditors to share in the distribution of the assets of the bankrupt, and to leave the honest debtor thereafter free from liability upon previous obligations. Williams v. United States Fidelity & G. Co., 236 U. S. 549, 554, 59 L. Ed. 713, 716, 35 Sup. Ct. Rep. 289. Executory agreements play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the act in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from participation in bankrupt estates, while the bankrupts themselves, as a necessary corollary, were left still subject to action for nonperformance in the future, although without the property or credit often necessary to enable them to perform. We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement within the doctrine of Roehm v. Horst, *supra.*

The claim for damages by reason of such a breach is "founded upon a contract, express or implied," within the meaning of § 63a-4, and the damages may be liquidated under § 63b. Frederic L. Grant Shoe Co. v. W. M. Laird Co., 212 U. S. 445, 448, 53 L. Ed. 591, 593, 29 Sup. Ct. Rep. 332. It is true that in Zavelo v. Reeves, 227 U. S. 625, 631, 57 L. Ed. 676, 678, 33 Sup. Ct. Rep. 365, Ann. Cas. 1914 D 664, we held that the debts provable under § 63a-4 include only such as existed at the time of the filing of the petition. But we agree with what was said in *Ex parte* Pollard, 2 Low. Dec. 411, Fed. Cas. No. 11,252, that it would be "an unnecessary and false nicety" to hold that because it was the act of filing the petition that wrought the breach, therefore there was no breach at the time of the petition. As was held by the same learned judge in Re Pettingill, 137 Fed. 143, 147: "The test of provability under the act of 1898 may be stated thus: If the bankrupt, at the time of bankruptcy, by disenabling himself from performing the contract in question, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is the equivalent of disenablement and

repudiation. For the assessment of damages proceedings may be directed by the court under § 63b (30 Stat. at L. Ed. 563, chap. 541, Comp. Stat. 1913, § 9647)." It was in effect so ruled by this court in Lesser v. Gray, 236 U. S. 70, 75, 59 L. Ed. 471, 475, 35 Sup. Ct. Rep. 227, where it was said: "If, as both the bankruptcy and state courts concluded, the contract was terminated by the involuntary bankruptcy proceeding, no legal injury resulted. If, on the other hand, that view of the law was erroneous, then there was a breach and defendant Gray became liable for any resulting damage; but he was released therefrom by his discharge." Of course, he could not be released unless the debt was provable.

We therefore conclude that the Circuit Court of Appeals was correct in holding that the intervention of bankruptcy constituted such a breach of the contract in question as entitled the Auditorium Association to prove its claim. * * *

*Decree [allowing claim] affirmed.*[165]

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## HEISER *v.* MEARS ET AL.

(Supreme Court of North Carolina, 1897. 120 N. C. 443, 27 S. E. 117.)

Action by Charles Heiser against G. A. Mears & Sons. From the judgment rendered, plaintiff appeals. Affirmed.

FAIRCLOTH, C. J. The defendants, retail merchants in Asheville, N. C., on May 21, 1894, contracted with the plaintiff, a wholesale manufacturer of Baltimore, Md., for a lot of shoes, to be soon thereafter manufactured and delivered. On May 26, 1894, the plaintiff received written notice from the defendants not to make the shoes, and that the defendants could not take them. At that time the plaintiff "had cut the leather for the uppers, preparatory to making the shoes, and partly fitted them to the lasts." The plaintiff refused to accept the countermand, finished the shoes, and tendered them to the defendants, who refused to receive and pay for them. The plaintiff now sues for the entire contract price. His honor charged the jury that the measure of the plaintiff's damages was the difference between the contract price and the market value of the goods at the time they were to be delivered. Plaintiff appealed.

In a contract for the sale of specific articles, then in existence and ready for delivery, and the purchaser refuses compliance, the seller has

[165] The bankruptcy adjudication is treated as an anticipatory breach whether the proceedings are voluntary or involuntary. Merchants' Nat. Bank v. Continental Building & Loan Assoc., 232 Fed. 823 (1916).

On damages for an anticipatory breach of contract as a provable claim in bankruptcy, see L. R. A. 1917 B, 585, note; L. R. A. 1918 A, 545, note.

three remedies, at his option: (1) to treat the property as his own and sue for damages; (2) as the property of the buyer, and sue for the price; (3) as the property of the buyer, and to resell it for him, and sue for the difference between the contract price and that obtained on resale. A contract for specific articles, to be thereafter manufactured and delivered, is executory, and no title to the article passes until finished and delivered, and the buyer has no title to or interest in the material used. The option, in the instance first above stated, is allowed the vendor because he is ready to comply, and the vendee is guilty of a breach of promise. When the contract is executory, and the buyer countermands his order, that is notice to the other party that he elects to rescind his contract and submit to the legal measure of damages, which must result from every breach of contract.

We think his honor gave the jury proper instruction, except that he should have said "at the time of the breach," instead of "at the time the goods were to be delivered."[166] That error does not hurt the defendants, as they do not appeal. And his honor properly refused the plaintiff's prayer for special instructions. When the plaintiff was notified of the defendants' rescission of the agreement, it seems unreasonable that the plaintiff should continue to manufacture and thus continue to increase his damages. This conclusion assumes that the title to the shoes never passed, as it could not possibly do, before they were finished and put in the condition contemplated by the contractors. Benj. Sales, §§ 1117, 1121, 860, note 9; Hosmer v. Wilson, 7 Mich. 294, 303; Devane v. Fennell, 2 Ired. 36. This was the only question in the case.

*Affirmed.*[167]

[166] But see 3 Williston on Contracts, § 1397. See note 172, p. 1008, *post.*

[167] The great weight of American authority supports this case on the enhancement of damages point. Illinois is one of the few states which in language, at least, allows a party notified not to proceed to go ahead and compel the other party to pay unnecessarily more than he would have had to pay if the notified party had stopped. Roebling's Sons Co. v. Lock-Stitch Fence Co., 130 Ill. 660 (1889).

In Davis v. Bronson, 2 N. Dak. 300 (1891) the court held that it was the duty of the party notified of repudiation to stop enhancing damages, although the co-obligors of the one giving the notice did not repudiate. But if the co-obligors desire to have performance take place, is not such a decision as in Davis v. Bronson really an unjustifiable recognition of the so-called "right" to break a contract?

In Wigent v. Marrs, 130 Mich. 609 (1902), Hooker, C. J., said: "It is undisputed that defendant unqualifiedly renounced this contract before the monument was completed, and forbade its completion and erection upon her premises. Many authorities hold that she had the right to do this, and thereafter plaintiff's right of recovery would be limited to damages for the breach of the contract involved in the renunciation. * * * This subject is discussed in the case of Hosmer v. Wilson, 7 Mich., at page 305, 74 Am. Dec. 716, where Mr. Justice Christiancy says:

"'And it is certainly very questionable whether the party thus notified has a right to go on after such notice to increase the amount of his own damages.

## LEWIS *v.* SCOVILLE.

(Supreme Court of Errors of Connecticut, 1919. 94 Conn. 79, 108 Atl. 502.)

Action by Herbert Cecil Lewis against George C. Scoville.

The defendant, under date of September 2, 1914, signed a written order the material part of which reads as follows:

"Army and Navy Magazine, Washington, D. C.—Gentlemen: Please deliver to any common carrier, addressed to me, one set of the 'Messages and Papers of the Presidents,' * * * bound in full black leather, at $59.50 per set, * * * all in eleven volumes, for which I agree

In Clark v. Marsiglia, 1 Denio (N. Y.) 317, 43 Am. Dec. 670, it was held he had no such right, and that the employer has a right (in a contract for work and labor) to stop the work, if he chose, subjecting himself to the consequences of a breach of his contract; and that the workman, after notice to quit work, has no right to continue his labor, and recover pay for it. This doctrine is fully approved in Derby v. Johnson, 21 Vt. 21.' Mr. Justice Christiancy adds that: 'This would seem to be good sense, and therefore sound law; and it would seem that any other rule must tend to the injury, and in many cases to the ruin, of all parties.' In the case of Danforth v. Walker, 37 Vt. 244, the court said of a similar case: 'While a contract is executory, a party has the power to stop the performance on the other side by an explicit direction to that effect by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that point or stage in the execution of the contract. The party thus forbidden cannot afterwards go on and thereby increase the damages, and then recover such increased damages of the other party.'"

On the right of a party to proceed to execute the contract after his adversary declines to do so on his part, see 33 Am. St. Rep. 791, note; 16 L. R. A. 655, note.

But see those correspondence school cases which permit the school to recover the full contract price against the repudiating pupil. International Text-Book Co. v. Martin, 221 Mass. 1 (1915); International Text-Book Co. v. Martin, 82 Neb. 403 (1908). See La Salle Extension University v. Ogbum, 174 N. Car. 427 (1917). In the Massachusetts case the promises to instruct on the one hand and to pay on the other were treated as independent, but in the Nebraska case it was said that "the contract is entire" and the likelihood of the loss of one pupil diminishing the expense of the school in an appreciable degree was deemed so slight as to put the burden on the pupil to "show some facts that reasonably and definitely tend to mitigate plaintiff's damages." That the promises are dependent, that it must be presumed that it costs the school something to furnish the service, that after notice from the pupil to stop the service the school can recover only damages caused by breach of contract and that unless the school supplies the evidence necessary to fix the damages it is entitled to only nominal damages, see International Text-Book Co. v. Schulte, 151 Mich. 149 (1908); International Text-Book Co. v. Jones, 166 Mich. 86 (1911). The Michigan cases rely on Wigent v. Marrs, *supra*.

See also Oxweld Acetylene Co. v. Davis (So. Car.) 106 S. E. 157 (1921), where a contract clause providing that "upon the acceptance of this order the contract so made cannot be canceled or revoked by either party * * * except by agreement in writing," prevented a countermand of the order which had been accepted.

to pay $59.50 to the Army and Navy Magazine, or its assigns. I also agree to pay cost of transportation. * * * This order is unconditional and not subject to cancellation, or to any agreement not written on the contract. * * *

"I hereby acknowledge receipt of a duplicate of this contract and say that all representations relative to this purchase have been made in accordance with the above understanding.

"G. C. Scovill,
"Business Address, Norfolk, Conn.

"Received payment $5.
"J. J. Swift,
"For the Army and Navy Magazine, Washington and New York."

On the same day the defendant executed and delivered to the representative of the Army and Navy Magazine a written confirmation of this order by which other payments were to be made at the rate of $5 on the 3d day of each month, beginning on the 3d day of October, 1914 and by which it was provided that

"In the event that any payment as stipulated shall not be made within twenty days thereafter, the entire balance then remaining unpaid shall at once become due and payable."

Under date of September 3, 1914, the defendant wrote the following letter:

"Army & Navy Magazine, New York, N. Y.—Gentlemen: Upon consideration I find that I have no use for the books ordered Sept. 2d from your Mr. J. J. Swift. Kindly cancel this order at once. I am returning receipt given me and request you to return my check for $5.00.

"Respectfully, G. C. Scoville."

This letter was indorsed as received on September 4, 1914. On October 16, 1914, the defendant's attorney wrote the Army and Navy Magazine, stating that the "defendant absolutely refused to accept the books," giving his reasons, which are not now material. This letter was indorsed as received October 19, 1914. The complaint, in addition to the substance of these letters, alleged prompt shipment, offer of the books to the defendant by the carrier, refusal by defendant to receive the books, and stoppage of payment of the check given with the order in payment of the $5 acknowledged to have been received at the foot of the order. The plaintiff claims payment for the entire purchase price as due him under the terms of the contract.

In the writ the plaintiff is described as "Herbert Cecil Lewis, of the city of Washington, in the District of Columbia, doing business under the name of 'Army and Navy Magazine.' "

After the plaintiff rested his case the court granted defendant's motion for a judgment as of nonsuit, and denied a motion to set this judgment aside. Plaintiff appealed.

GAGER, J.[168] The Sales Act (General Statutes, § 4729) provides:

"Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods."

The present action is for the price of the goods. The defendant claims that this action will not lie because no proof of delivery has been made, and for the further reason that the proof showed a countermand of the order by the defendant on the day after the order was executed, and apparently before the goods were shipped. Delivery of goods to a carrier for transmission to the buyer pursuant to the terms of a contract requiring delivery to a carrier is a delivery to the buyer. General Statutes, § 4712. The defendant's order was:

"Deliver to any common carrier addressed to me. * * * I agree to pay the cost of transportation."

Under this provision of the contract delivery to the carrier was delivery to the defendant, the property in the goods then passed to the defendant and it became his duty to accept and pay according to the terms of the contract. Kinney v. Horwitz, 93 Conn. 211, 105 Atl. 438; Illustrated Postal Card & Novelty Co. v. Holt, 85 Conn. 140, 81 Atl. 1061; 23 R. C. L. § 248. The evidence upon this point is in substance this: The defendant, having testified to his signature to the order and also to the letter of cancellation, further testified that he gave directions to his bookkeeper to refuse the books in case a package or box came from the Army and Navy Magazine, but that the box had not been tendered to him personally, though he would have refused it had it been so tendered. This latter was confirmed by the letter of the defendant's counsel to the plaintiff. The driver of the Adams Express Company during September and October, 1914, testified that he had delivered a number of parcels at defendant's place of business and that the shipment in question was a box that he offered to deliver, but delivery was refused, and that he took the box back to the express office. The express agent was not produced as a witness because of his absence in the United States military service. In the absence of any contradictory testimony, the court, in view of the contract, and the defendant's direction to his bookkeeper, was justified in not basing the nonsuit on the ground of nondelivery.

The facts, unexplained, would justify the inference of a delivery by the plaintiff to the carrier for the defendant, as the contract required. This, under the Sales Act, was a delivery to the defendant.

The defendant further claims that because, on September 3, 1914, and before the goods were tendered, he wrote to the plaintiff the letter of cancellation, no action to recover the price of goods sold and delivered

[168] The statement of facts is slightly abbreviated and parts of the opinion are omitted.

can be maintained, but that the plaintiff is limited to an action to recover damages for breach of contract. Whether the goods were sent before or after receipt of this letter does not clearly appear. As the goods were manifestly not goods thereafter to be manufactured, this is not material. The attempted cancellation was not accepted or acquiesced in by the plaintiff, and the goods were, pursuant to contract, delivered to the carrier, which, by the contract was defendant's agent. The effect of such an attempted cancellation appears to have been undetermined in this state until the decision in Wells v. Hartford Manilla Co., 76 Conn. 27, 55 Atl. 599. After a careful examination of the English and American authorities, the court there adopted the rule stated in the headnote of the case as follows:

"A breach of an executory contract by anticipation occurs only when there is a distinct, unequivocal, and absolute refusal to perform the promise by one party, before the time for its performance has arrived, and an equally clear acquiescence in or acceptance of such renunciation by the other; in other words, the contract remains a subsisting one until the parties have mutually elected to treat it as broken, and have given unmistakable evidence of such election."

In Home Pattern Co. v. Mertz, 86 Conn. 494, 86 Atl. 19, the same question was presented as to one branch of that case that arises in the present case. There the defendant agreed to buy dress patterns to be manufactured by the plaintiff from time to time, to place them on sale in its store, receiving credit at stated intervals for all discarded undamaged patterns which were returned. After the first instalment of patterns had been manufactured, but before its shipment, the defendant repudiated the contract and refused to accept the goods. The plaintiff declined to treat the repudiation as a breach of the contract, and at the appointed time delivered the goods to the carrier designated by the defendant. The court, citing Wells v. Hartford Manilla Co., supra, and other cases, said at page 501 of 86 Conn., 86 Atl. 21:

"The repudiation of the contract without the acquiescence of the plaintiff did not put an end to the contract. The plaintiff could still treat it as subsisting, and, notwithstanding the notice of repudiation, assume that the defendant would perform its part of the contract when the time for such performance should arrive. Had it chosen to consent to the renunciation, it might have done so and brought an action at once for breach of the contract, but there can be no anticipatory breach of a contract by one party without the acquiescence of the other. A breach by one party alone can only occur after the time for performance has arrived. * * * The repudiation of the contract was not, therefore, a breach of it, and the plaintiff, having declined to acquiesce, was bound to tender performance when the time for delivery of the goods arrived. This it did, and the goods were received in New York by the carrier designated by the defendant. The defendant, by the express terms of the contract, was to pay the freight on the goods from the place

of shipment. When the goods were thus received by the carrier, and the bill of lading had been forwarded to the defendant, the plaintiff had fully performed its contract with respect to those goods. The delivery to the railroad was delivery to the defendant, and the title thereby passed to the defendant."

And the court, upon these facts, held that title to the goods had passed to the defendant, and that plaintiff was entitled to recover the contract price of the same.

The same question was again presented upon a retrial of the Home Pattern Company Case, and the rule announced in that case was confirmed and adopted. Home Pattern Co. v. Mertz, 88 Conn. 22, 90 Atl. 33. Our own decisions are so recent and so clear that further examination of the question is unnecessary. Applying our rule to the case in hand, we find that under the contract there was to be a delivery of the goods, apparently already manufactured and ready for shipment, to the defendant by a carrier in general terms designated by the defendant, the defendant to pay transportation charges, a repudiation or attempted cancellation of the contract by the defendant, no acquiescence in this repudiation by the plaintiff, and actual shipment of the goods the carrier designated in the contract, and it does not appear that the goods are not still in the hands of the carrier, by the contract defendant's agent to receive the goods. Repudiation of the contract was not a breach of it. Delivery to the carrier was delivery to the defendant, and the title passed to the defendant upon such delivery. Refusal by the defendant to receive the goods did not revest title in the plaintiff, and he is, under the ruling in the above-named cases, and so far as this case has yet been developed, entitled to recover the contract price. Upon no ground urged by the defendant does it appear that he was entitled to judgment as of nonsuit. * * *

There is error, the judgment is set aside, and a new trial ordered.

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## L. J. KADISH ET AL. *v.* A. N. YOUNG ET AL.

(Supreme Court of Illinois, 1883. 108 Ill. 170, 43 Am. Rep. 548.)

This was an action of assumpsit, brought by A. N. Young and George Bullen, against J. L. Kadish and Charles Fleischman. A trial was had, resulting in a verdict and judgment of $20,000 damages against the defendants.

SCHOLFIELD, J.[169] This was assumpsit, by appellees, against appellants, to recover damages sustained by the breach of an alleged contract, whereby, on the 15th of December, 1880, appellees sold to appellants 100,000 bushels of No. 2 barley, at one dollar and twenty cents per

[169] Parts of the opinion are omitted.

bushel, to be delivered to appellants, and paid for by them, at such time during the month of January, 1881, as appellees should elect. Appellees tendered to appellants warehouse receipts for 100,000 bushels of No. 2 barley on the 12th of January, 1881, but appellants refused to receive the receipts and pay for the barley. Within a reasonable time thereafter appellees sold the barley upon the market, and having credited appellants with the proceeds thereof, they brought this suit, and on the trial in the circuit court they recovered the difference between the contract price and the value of the barley in the market on the day it was to have been delivered by the terms of the contract. Upon the trial appellants * * * contended, if a contract was shown, then that on the next day after it was made they gave notice to appellees that they did not consider themselves bound by the contract, and they would not comply with its terms, and evidence was given tending to sustain this contention. * * *

The questions of law to which our attention has been directed by the arguments of counsel, arise upon the rulings of the circuit judge in giving and refusing instructions. He thus ruled, among other things, that appellants, by giving notice to appellees on the next day after the making of the contract that they would not receive the barley and comply with the terms of the contract, did not create a breach of such contract which appellees were bound to regard, or impose upon them the legal obligation to resell the barley on the market, or make a forward contract for the purchase of other barley of like amount and time of delivery, within a reasonable time thereafter, and credit appellants with the amount of such sale, or give them the benefit of such forward contract, but that appellees had the legal right, notwithstanding such notice, to wait until the day for the delivery of the barley by the terms of the contract, and then, upon appellants failure to receive and pay for it on its being tendered, to resell it on the market, and recover from appellants the difference between the contract price of the barley and its market value on the day it was to have been delivered.

That in ordinary cases of contract of sale of personal property for future delivery, and failure to receive and pay for it at the stipulated time, the measure of damages is the difference between the contract price and the market or current value of the property at the time and place of delivery, has been settled by previous decisions of this court (see McNaught v. Dodson, 49 Ill. 446, Larrabee v. Badger, 45 *id.* 440, and Saladin v. Mitchell, *id.* 79), and is not contested by appellants' counsel. But their contention is, that in case of such contract of sale for future delivery, where, before the time of delivery, the buyer gives the seller notice that he will not receive the property and comply with the terms of the contract, this, whether the seller assents thereto or not, creates a breach of the contract, or, at all events, imposes the legal duty on the seller to thereafter take such steps with reference to the subject of the contract, as, by at once reselling the property on the market on account

of the buyer, or making a forward contract for the purchase of other property of like amount and time of delivery, shall most effectually mitigate the damages to be paid by the buyer in consequence of the breach, without imposing loss upon the seller. If the buyer may thus create a breach of the contract without the consent of the seller, we doubt not the duty to sell (where the property is in the possession of the seller at the time), at least within a reasonable time after such breach, will result as a necessary consequence of the breach. When the breach occurs by a failure to accept and pay for property tendered pursuant to the terms of a contract at the day specified for its delivery, this is doubtless the duty of the seller, and no reason is now perceived why it should not equally result from any breach of the contract upon which the seller is legally bound to act.

But the well settled doctrine of the English courts is, that a buyer cannot thus create a breach of contract upon which the seller is bound to act. In Leigh v. Patterson, 8 Taunt. 540 (4 Eng. C. L. 267), Phillpotts et al. v. Evans, 5 M. & W. 475; Ripley v. McClure, 4 Exch. 359, and, it may be, also in other early cases, it was held a party to a contract to be performed in the future cannot, by merely giving notice to the opposite party that he will not perform his part of the contract, create a breach of the contract. Subsequently, however, in Cort v. Ambergate, Nottingham, &c. Ry. Co., 17 Q. B. 127, and more explicitly in Hochster v. De la Tour, 2 E. & B. 678, the doctrine was announced as not in conflict with previous decisions, that the party to whom notice is given in such cases will be justified in acting upon the notice, provided it is not withdrawn before he acts. Lord Campbell, C. J., in delivering his opinion in the latter case, and speaking for the court, used this language: "The man who wrongfully renounces a contract into which he has deliberately entered, cannot justly complain if he is immediately sued for a compensation in damages by the man whom he had injured, and it seems reasonable to allow an option to the injured party either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrong-doer."

The leading text-writers who treat of this question follow the authority of these cases, and the rule they announce is thus expressed in Sedgwick on Damages, (6th ed.) 340, * 284: "An effort has been made in many cases by the purchaser to relieve himself from the contract of sale before the time fixed for performance by giving notice that he would not be ready to complete the agreement, and in these cases it has been insisted that the damages should be estimated as at the time of giving notice; but the English courts have justly denied the right of either party to rescind the agreement, and have adhered to the day of the breach as the period for estimating damages." To like effect see Chitty on Contracts, (11th Am. ed.) 1079; 2 Parsons on Contracts,

(6th ed.) 67; Benjamin on Sales, (1st ed.) 559, (4th Am. ed.) 973; Addison on Contracts, * 952; Wood's Mayne on Damages, 250, * 150.
* * *

After breach of a contract, as before herein intimated, we do not, at present question that it is the duty of the party entitled to damages to do what he reasonably may, without prejudice to his rights, to lighten the burden falling on his adversary.

There is nothing in the more recent English cases, as we understand them, repugnant to those to which we have referred upon this question.

In Frost v. Knight, L. R. 7 Exch. 111 (1 Moak, 218), decided in the Exchequer Chamber in February, 1872, the suit was for breach of a marriage contract, whereby the defendant had promised to marry the plaintiff upon the death of his father, but the father still living, the defendant had announced his intention of not fulfilling his promise on his father's death, and broke off the engagement. Cockburn, C. J., in delivering the opinion of the court, thus states the law, after referring to the previous decisions: "The promisee, if he pleases, may treat the notice of intention" (i. e. not to perform the contract) "as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it, and in such action he will be entitled to such damages as would have risen from the nonperformance of the contract at the proper time, subject, however, to abatement in respect of any circumstance which may have afforded him the means of mitigating his loss." This was followed, and its doctrine reiterated, in Brown v. Miller, L. R. 7 Exch. 319 (3 Moak, 429), decided in the Court of Exchequer in June, 1872, and Roper v. Johnson, L. R. 8 C. P. 167 (4 Moak, 397), decided in the Common Pleas in February, 1873.

Counsel for appellants refer to the fact that Keating, J., in Roper v. Johnson, says: "If there had been any fall in the market, or any other circumstances calculated to diminish the loss, it would be for defendant to show it,"—and then cites with approval from the opinion of Cockburn, C. J., in Frost v. Knight, *supra,* to the effect that "the damages are subject to abatement in respect of any circumstances which would entitle him to a mitigation," etc., and insist they recognize the duty, here, of appellees, upon receiving notice, etc., to have sold upon the market or have entered into another contract for January delivery, etc. It is enough to observe, in answer to this, that in both Frost v.

Knight and Roper v. Johnson, *supra*, the notice that defendant would not comply with the contract was accepted and acted upon by the plaintiff as a breach of the contract; and so what was said in respect of the duty of the plaintiff to mitigate damages was said with reference to a case wherein he recognized the contract as having been broken by the notice of the adverse party, and with reference to what was to be done by him upon and after the recognition of that breach, and hence can have no application here. If a party is not compelled to accept the declarations of the other party to a contract that he will not perform it, as a breach, it must logically follow that he is under no obligation to regard that declaration for any purpose; for, as we have seen, the theory in such case, as laid down by Cockburn, C. J., in Frost v. Knight, *supra*, is: "He keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it."

Nothing would seem to be plainer than that while the contract is still subsisting and unbroken, the parties can only be compelled to do that which its terms require. This contract imposed no duty upon appellees to make other contracts for January delivery, or to sell barley in December, to protect appellants from loss. It did not even contemplate that appellees should have the barley ready for delivery until such time in January as they should elect. If appellees had then the barley on hand, and had acted upon appellant's notice, and accepted and treated the contract as then broken, it would, doubtless, then have been their duty to have resold the barley upon the market, precisely as they did in January, and have given appellants credit for the proceeds of the sale; but it is obviously absurd to assume that it would have been appellees' duty to have sold barley in December to other parties which it was their duty to deliver to appellants, and which appellants had a legal right to accept in January.

We have been referred to Dillon v. Anderson, 43 N. Y. 231, Danforth et al. v. Walker, 37 Vt. 240 (and same case again in 40 Vt. 357), and Collins v. Delaporte, 115 Mass. 159, as recognizing the right of either party to a contract to create a breach of it obligatory upon the other party, by giving notice, in advance of the time for the commencement of the performance of the contract, that he will not comply with its terms. An examination of the cases will disclose that they do not go so far, but that they are entirely in harmony with what we have heretofore indicated is our opinion in respect of the law applicable to the present question.

In Dillon v. Anderson, the action was for a breach of contract for the construction of a pair of boilers for a steamboat. After work had been commenced under the contract, and a certain amount of material

had been purchased therefor by the plaintiff, notice was given by the defendant to stop work, that the contract was rescinded by the defendant, and that he would make the plaintiff whole for any loss he might suffer. The court held that it was the duty of the plaintiff, as soon as he received the notice, to have so acted as to save the defendant from further damage, so far as it was in his power.

In Danforth et al. v. Walker, 37 and 40 Vt., the defendant made a contract with the plaintiffs to purchase of them five car-loads of potatoes, being fifteen hundred bushels, to be delivered at a designated place as soon as the defendant should call for them, and as soon as he could get them away, some time during the winter. Soon after the first car-load was taken, potatoes fell in the market, and the defendant thereupon wrote the plaintiffs not to purchase any more potatoes until they should hear from him. The court held this created a breach of the contract, and that plaintiffs were not authorized to purchase any more potatoes on account of the defendant after they received the notice. The court, in the case in 37 Vt., on page 244, use this language: "While a contract is executory a party has the power to stop performance on the other side by an explicit direction to that effect, by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that point or stage in the execution of the contract. The party thus forbidden cannot afterwards go on, and thereby increase the damages, and then recover such increased damages of the other party." And this same rule, upon the authority of these cases, is laid down in 2 Sutherland on Damages, 361.

The points in issue in Collins v. Delaporte are not pertinent to the present question, but in the opinion the court quotes the rule as above laid down, upon the authority of Danforth et al v. Walker, and other cases.

It will be observed that in each of these cases the time for the performance of the contract had arrived, and its performance had been entered upon. In neither of them was the defendant at liberty, after notifying the plaintiff not to proceed further in the performance of the contract, to demand that he should proceed to perform it, as it was said in Frost v. Knight, *supra*, the defendant was, in case of notice, not to perform a contract the time of the performance of which is to commence in the future. In these cases there is no time or opportunity for repentance or change of mind,—in those there was. * * *

There was proof, upon the trial, tending to show that although appellees owned and had in their possession, at the time of the making of the alleged contract, an amount and kind of barley equal to or greater than that professed thereby to be sold, yet that they then only had of the warehouse receipts, which they actually tendered to appellants in January, those for 48,500 bushels, and that they subsequently obtained from Huck & Lefens the warehouse receipts for the remain-

ing 51,500 bushels, upon a contract, whereby appellees agreed to pay Huck & Lefens therefor, at all events, one dollar per bushel, and one dollar and twenty cents per bushel if appellees shall recover from appellants in this suit. The court, in giving and refusing instructions, ruled that this in no wise concerned appellants,—that if the facts were as claimed, it did not make Huck & Lefens necessary parties to the suit, nor entitle appellants to any reduction in the measure of damages. In this there was surely no error. Huck & Lefens have no privity of contract with appellants, and whether appellees pay much or little for the barley with which to comply with their contract, cannot concern appellants. It was sufficient they owned and tendered the barley at the appointed time. If it had been given them, their measure of damages must be precisely the same as it would be had they paid ten-fold more than it was worth. The only effect of the transactions by which they obtained the barley was to vest title in them, and when thus vested it was absolutely theirs to do with as they pleased. No court, so far as our researches have enabled us to know, ever held that the price paid by the seller for an article sold and contracted to be delivered in the future, was a circumstance to be taken into consideration by the jury in determining the amount of damages the seller is entitled to recover upon the buyer's refusing to receive and pay for the property, and the distinguished counsel representing appellants have been unable to refer us to any such decision. * * *

*Judgment affirmed.*[170]

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## ROTH & CO. *v.* TAYSEN, TOWNSEND & CO. AND OTHERS.

**(Court of Appeal, 1896. 1 Commercial Cases 306.)**

This was an action for damages for the non-acceptance by the defendants, Grant & Grahame, of a cargo of maize. The alleged contract was contained in telegrams which passed between the parties on May 23, 1895, and the trial judge and the Court of Appeal found it to be a contract to ship the cargo by a named boat, the ship to be ready to load on July 15, and the buyers to have the power of cancelling on August 15 if the ship was not ready to load by that day. May 29 defendants

[170] If the plaintiff makes a new forward contract, he may be held not entitled to damages on the basis of it. See Missouri Furnace Co. v. Cochran, 8 Fed. 463 (1881). It is for the defendant to make contracts to protect himself, if he deems protection needed, for there is no one but himself responsible if he does not. It is not like the case where for plaintiff to go ahead will unnecessarily increase the damages against a defendant, who has done all he could to prevent the increase, for here going ahead may diminish rather than increase the damages and any way, the defendant is in no way kept from making his own protecting contract, which would be as effective as one made by the plaintiff. See also 3 Williston on Contracts, § 1397.

repudiated because an option to cancel if the ship was not loaded by August 15 was not given. Plaintiff did not sue until July 24 and did not resell the cargo until September 5. The resale on September 5 was at a loss of £3807 3*s.* 8*d.* The trial court (Mathew, J.) fixed the damages at £1557, which would have been the amount of the loss if the cargo had been sold on July 24, when the plaintiffs issued the writ.

Against this judgment the defendants, Grant & Grahame, appealed on the ground that there was no binding contract between the parties, and that the damages were excessive. The damages, they contended, if payable, were £688 only, the amount of the loss if the cargo had been sold on May 29, when they repudiated the contract. The plaintiffs entered a cross-appeal, claiming by way of damages £3807 3*s.* 8*d.*, the amount of the loss sustained by the sale of the cargo on September 5.

LORD ESHER, M. R.† * * * Then comes the question of damages. When there is a repudiation which the other party chooses to treat as a breach, the primary rule is that the damages are the difference between the contract price and the market price of the goods at the date of the breach. If the repudiation takes place before the day of delivery, the other party has the right to bring an action immediately, and it follows that he has the right to have his damages assessed at the time he brings his action. In such a case the damages are not the difference between the contract and market price on the day the action is brought. It is the duty of the jury to assess them, having regard to, and making allowance for, the fact that the party plaintiff is receiving damages before the date of delivery has arrived. There is this further rule. The party who has treated a repudiation as a breach is bound to do what is reasonable to prevent the damages from being inflamed or increased. Now, did the plaintiffs do what was unreasonable in declining to sell till September 5? * * *

The evidence before the judge was that the market was falling steadily from day to day and from week to week, and was still falling when the writ was issued. Any one acquainted with the market must have seen the strong probability that the market would continue to fall. The plaintiffs had no right to suppose that the market would begin to rise, and no ordinary business man who was not a speculator would have thought that it was likely to do so. Buyers were refusing to come forward, being of opinion that they would have to sell at a still lower price. The judge had the right to come to the conclusion, as a jury, that ordinary business men (such as the plaintiffs), who were desirous of diminishing the loss, would have sold the maize at an earlier date, and I cannot undertake to say that his finding was wrong. The appeal and the cross-appeal therefore fail.

† The facts are rewritten so as to present only the damages question, and parts of the opinions are omitted.

LOPEZ, L. J. * * * What are the plaintiffs' rights? Ever since the case of Hochster v. De la Tour, 2 E. & B. 678, it has been the rule that if a payor repudiates a contract and the payee accepts his repudiation, the payee may bring an action. If no time has been fixed for the fulfilment of the contract, the plaintiff is entitled to such damage as he has sustained calculated at the date of the breach; if a time has been fixed for fulfilment, the damages are the loss of the plaintiff calculated as at the date of fulfilment. Here the breach was on July 24. The plaintiffs were bound to take reasonable steps to mitigate the damages; and, if they could have sold the cargo at any time previous to the date of fulfilment of the contract, or about the time of the breach, they ought to have done so. The learned judge held that they might have sold, and that they ought to have done so, about July 24. It is said for the plaintiffs that, though there is that rule of law, there was no evidence upon which a judge or jury could hold that it would have been prudent for the plaintiffs to sell. Of course, it is true that if the plaintiffs had sold and the market had then risen, they might have been told that they were wrong to sell; but I think that they were indiscreet in holding on when the market was falling, and that they would have been well advised if they had sold at an earlier date. The learned judge has held that they did not act reasonably, and I am not prepared to say that he was wrong. I think the amount of damages which he awarded was right.

RIGBY, L. J. * * * The only question, then, is as to the measure of damages. Now, taking in its full effect in favor of the plaintiffs the rule laid down in Roper v. Johnson, L. R. 8 C. P. 167, it may be that, prima facie, this being the breach of a contract to deliver goods, the damages are to be assessed as at the agreed date of delivery. But here the plaintiffs put an end to the contract at an earlier date. Judges have always held that a person availing himself of his right to accept repudiation of a contract must take measures to mitigate the damages which he has sustained by the breach. It is true that by so doing he may take some risk upon himself, but the tribunal will take that fact into consideration. In the present case there seems to be sufficient evidence, though it is not conclusive, to justify the learned judge in holding that the plaintiffs ought to have sold the cargo when they put an end to the contract by accepting the defendants' repudiation. I gather that there was evidence that the market was falling, and that the state of things did not render a recovery of prices probable within a reasonable time. I cannot accept the argument of Mr. Bigham [of counsel for the plaintiffs] that it is sufficient to show that the plaintiffs acted to the best of their judgment. The standard which one must use in these cases is the conduct of an ordinary prudent man under similar circumstances. The result is that both appeals must be dismissed.

*Appeal and cross-appeal dismissed.*[172]

[172] "In my opinion the true rule is that where there is an anticipatory breach

Section 3. Impossibility of Performance.

## THORNBOROW *v.* WHITACRE.

**(Court of King's Bench, 1706. 2 Ld. Raym. 1164.)**

Action upon the case, in which the plaintiff declares upon an agreement between the plaintiff and defendant that the defendant in consideration of 2*s.* 6*d.* in hand paid, and of 41. 17*s.* 6*d.* to be paid upon the defendant's performing the agreement of his part, *deliberaret* to the plaintiff two grains of rye corn on Monday the 29th of March, and four grains of rye corn on Monday then next following, and eight grains of rye corn on Monday next after the Monday last mentioned, and sixteen grains of rye corn on Monday next after the said third Monday, and double the number of grains of rye corn, viz. thirty-two grains of rye corn on Monday next after, being the fifth Monday, *et progressu sic deliberaret quolibet alio die Lunae successive infra unum annum ab eodem 29 Martii bis tot grana secalis quot die Lunae proximo praecedente respective deliberanda forent*, etc., the defendant demurs to the declaration.

Mr. *Salkeld* [173] to maintain the demurrer said, that the agreement appeared upon the face of it to be impossible, the rye to be delivered amounting to such a quantity, as all the rye in the world was not so much, and being impossible was void, and the defendant not bound

by a seller to deliver goods for which there is a market at a fixed date, the buyer without buying against the seller may bring his action at once, but that if he does so his damages must be assessed with reference to the market price of the goods at the time when they ought to have been delivered under the contract. If the action comes to trial before the contractual date for delivery has arrived, the court must arrive at the price as best it can.

"To this rule there is one exception for the benefit of the defaulting seller—namely, that if he can show that the buyer acted unreasonably in not buying against him the date to be taken is the date at which the buyer ought to have gone into the market to mitigate damages." Bailhache, J., in Melachrino v. Nickoll, [1920] 1 K. B. 693, 699. See also, Millett v. Van Heek & Co., [1920] 3 K. B. 535, 543, where Bray, J., says that in the case of an anticipatory breach of a contract for the sale of goods "*prima facie* the damages should be the difference between the contract price and the price at which the goods should have been delivered," but that "If it can be shown by either party that the reasonable course for minimizing the damages would be, otherwise this prima facie rule should not be applied. For instance, if it could be shown that the reasonable course to be pursued would be for the buyer to enter into a forward contract on the date when the [seller's] repudiation was accepted, the damages should be assessed according to the difference between that price in that forward delivery and the contract price, and so, also, if it could be shown that the reasonable course to be pursued would have been to enter into a forward contract at some later date."

See Joseph H. Beale, Jr., Damages Upon Repudiation of a Contract, 17 Yale L. J. 443, and the comment on that article in 17 Yale L. J. 511. See also, 3 Williston on Contracts, § 1397, which criticizes adversely the English rule.

[173] Part of the argument of counsel is omitted.

to perform it. He said, that there were three sorts of imposibilities: [First,] *impossibilitas legis,* such are all immoral actions, as to murder J. S. etc.; secondly, *impossibilitas rei,* such as are all natural impossibilities, which cannot be done from the nature of the thing; thirdly, *impossibilitas facti,* viz., such an impossibility as though there is nothing in the nature of it impossible to be done, yet it is impossible for a man to do, as to touch the heavens, or go to Rome in a day. And a covenant or condition to do any of these impossibilities is void. * * *

HOLT, Chief Justice. Suppose A, for money paid him by B, will undertake to do an impossible thing, shall not an action lie against him for not performing it; as in case of a bond with such an impossible condition, the bond is single. So where a man will for a valuable consideration undertake to do an impossible thing, though it cannot be performed, yet he shall answer damages.

And as to the impossibility the court said it was only impossible with respect to the defendant's ability, which was not such an impossibility as would make the contract void. And the chief justice said the words, *quolibet alio die Lunae,* must be construed what we say in English, every other Monday, that is, every next Monday but one, and that would bring the contract nearer to the defendant's ability of performance. And he said, that *impossibilitas rei et facti* were all one.

POWELL said, that though the contract was a foolish one, yet it would hold in law, and that the defendant ought to pay something for his folly.

Upon this occasion the case in 1 Lev. 111, 1 Keb. 569, James v. Morgan, was remembered, which was an agreement to pay for a horse, a barley corn a nail, for every nail in the horse's shoes, and double every nail, which came to 500 quarters of barley; and at a trial before Hide, Chief Justice, the jury gave the plaintiff the value of the horse in damages, and he had his judgment; which case was admitted of all hands to be good law, and did, as the counsel for the plaintiff urged, rule this. But Mr. *Salkeld* said, that differed from this, because that was possible to be performed, though it was an ill bargain, but this impossible.

The counsel for the defendant perceiving the opinion of the court to be against his client, offered the plaintiff his half crown and his cost, which was accepted of, and so no judgment was given in the case.[174]

[174] In Thornborow v. Whitacre the impossibility was doubtless known to the plaintiff, and the contract voidable for fraud. That would explain why the plaintiff accepted his money back and costs. The situation is much like that of "snapping up an offer" of contract based on a material mistake of which the offeree is aware.

For a case of apparent mutual mistake where the court refused to enforce the impossible contract, see Bennett v. Morse, 6 Colo. App. 122 (1894), where Thompson, J., said:

"If a joint agreement is invalid or incapable of enforcement against all of

## JOHN A. STEES, ET AL. *v.* CHARLES LEONARD, ET AL.

(Supreme Court of Minnesota, 1874. 20 Minn. 494.)

The defendants, who are architects and builders, having at plaintiffs' request, furnished them with plans and specifications for a building pro-

its makers, it is invalid and incapable of enforcement against any one or more of them. In this case sixteen men agreed to purchase 400 shares each, making a total of 6,400 shares, to come out of one certificate—No. 44—for 5,000 shares. As shown by the complaint, this is the exact contract which the parties made, and it is not in our power to vary it. If they had been jointly sued, the plaintiffs must have been ready to deliver to them 6,400 shares; but there were only 5,000 shares from which they could be taken. Such a contract is inherently absurd. The parties could not purchase and the plaintiffs could not deliver 6,400 shares from 5,000 shares. Mr. Bishop says: 'A mutual undertaking between parties to do what both know to be impossible is vain and idle, lacking the elements of a contract, and no suit can be maintained upon it.' Bish. Cont., § 579. See also, Chit. Cont. (11th Am. Ed.) 64, note; Faulkner v. Lowe, 2 Exch. 595; Gilmer v. Gilmer, 42 Ala. 23. If the agreement had by its terms been several, a recovery could have been had against each of the parties as long as the stock remained unexhausted, because his agreement was complete in itself, and independent of that of the others; but, the contract being joint, and, as a joint contract, being upon its face impossible of performance, it is void, and no action is maintainable upon it against all or any of the parties to it."

In the topic of impossibility the difficulty is to draw the line in the proper place. Freedom of contract calls for permission to a sane person to contract to do the impossible or pay damages. On the other hand mutual mistakes of sufficient seriousness call for judicial rectification. While the common law started with the general proposition that impossibility is no defense to an action on a contract obligation, because the party had his chance to protect himself by proper stipulations in his contract, but did not do it, a number of exceptions have moderated the severity of that rule and even today "the law upon the matter is undoubtedly in process of evolution." McCardie, J., in Blackburn Ribbon Co., Ltd. v. T. W. Allen & Sons, Ltd., reported *post*. See also William H. Page, The Development of the Doctrine of Impossibility of Performance, 18 Mich. L. Rev. 589. The difficulty of finding a satisfactory stopping point is greater in the case of impossibility, so called, than in the case of conditions implied by law, because normally in the case of impossibility the plaintiff is free from blame whereas in the case of conditions implied by law normally he is reprehensible. In the case of a condition implied by law the defendant's defense is that he has not had or is not going to receive the performance which the plaintiff was to give the defendant in exchange for the latter's performance. Where impossibility is recognized as a defense, the plaintiff's performance in exchange for the defendant's usually has been given or is assured, and the defendant's defense is simply that because of the extraordinary circumstances which the courts consider to constitute impossibility, it is not fair to require the defendant to perform as nearly as is possible (on as nearly as possible, see Board of Education v. Townsend, 63 Oh. St. 514 (1900) ) or else to pay damages, unless by his contract he assumed the risk of the happening of those extraordinary circumstances.

In an article on Impossibility of Performance as an Excuse for Breach of Contract in 1 Col. L. Rev. 529 at 533, Professor F. C. Woodward suggests that in the impossibility cases, not within the exceptions about local law, destruc-

posed to be erected by them on their own land, afterwards, and on the 18th August, 1868, the plaintiffs and defendants made and executed a contract under seal, in which they are all described as "of the city of St. Paul," etc. By the terms of the contract, the defendants "agree to and with the said John A. and Washington M. Stees, to well and truly build, erect, and complete the three-story business house proposed to be erected by the said J. A. & W. M. Stees, on Minnesota Street, between Third and Fourth Streets; all in accordance with the plans and specifications of the same, with such alterations as are mentioned in said specifications, prepared by M. Sheire & Bro., architects, and signed by both parties; the building, with the exception of painting, to be completed on or before the first day of January, 1869. In consideration whereof the said John A. & W. M. Stees * * * agree to pay, or cause to be paid, unto the said Charles Leonard, Monroe and Romaine Sheire, * * * the sum of $6,735 in payments as follows: $500 when the excavation is completed; $800 when the basement walls are up; $800 when the first-story walls are up; $1,000 when the second-story walls are up; $1,200 when the third-story walls are up and the roof on; $1,200 when the plastering is done; and the balance when the building is completed." The specifications annexed to the contract are very full, and provide (among other things) that "All the walls shall be of the following thickness: foundation walls, two feet thick, and shall have footings six inches thick, which shall run clear across walls and project six inches on each side of wall above it." The specifications contain no other provisions relating to the character of the foundation for the building.

The defendants entered upon the performance of the contract and erected the proposed building to a height of three stories, when it fell to the ground, on the 1st November, 1868. In the following year the defendants again attempted to perform the contract, and again erected the building to the same height as before, when it again fell, on the 1st August, 1869, whereupon the defendants abandoned the work, and

tion of specific property and death or illness of parties bound to render personal services, the rule should be: "If the contingency which makes the contract impossible of performance is such that the parties to the contract, had they actually contemplated it, would probably have regarded it as so obviously terminating the obligation as not to require expression, failure of performance should be excused." He explains that "In other words, the proper inquiry is not: Would the parties as reasonable men, if their attention had been called to the contingency, have provided for it, in their contract? That, as has been said, would be making a contract for them different from that which they had actually made for themselves. But: Would the parties, had their attention been called to the contingency, have thought it unnecessary to provide for it in the contract? That is not altering or adding to the contract, but merely construing it, as already made by the parties." But see note in 15 Harv. L. Rev. 418, and see, also, William C. Conlen, Intervening Impossibility of Performance as Affecting the Obligations of Contracts, 66 U. of Pa. L. Rev. 28, 33.

refused to perform the contract. [The plaintiffs then brought this action and demanded judgment] * * * for the sum of $5,214.80, with interest, as the damages sustained by the plaintiffs; being $3,745.80 paid, pursuant to the contract, during the progress of the work, $1,000 as damages for loss of the use of the lot on which the building was to be erected; and $469, as damages occasioned by the fall of the building, to an adjacent house of the plaintiffs and property stored therein. * * *

At the trial in the district court for Ramsey County, the defendants made the following offers of proof: * * *

That in architecture and building, "footings," when used in a building, are the lowest portion of the structure, and the only artificial foundation employed for the building, when footings are employed.

That they constructed each of these buildings that fell, in all respects as required by the contract and specifications.

The evidence thus offered * * * was objected to as incompetent, irrelevant, and immaterial, and in each case the objections were sustained, and the defendants excepted.

The jury found for the plaintiffs. The defendants moved, upon a bill of exceptions, for a new trial, and appeal from the order denying their motion.

YOUNG, J.[175] The general principle of law which underlies this case is well established. If a man bind himself, by a positive, express contract, to do an act in itself possible, he must perform his engagement, unless prevented by the act of God,[176] the law, or the other party to the contract. No hardship, no unforeseen hindrance, no difficulty short of absolute impossibility, will excuse him from doing what he has expressly agreed to do. This doctrine may sometimes seem to bear heavily upon contractors; but, in such cases, the hardship is attributable, not to the law, but to the contractor himself, who has improvidently assumed an absolute, when he might have undertaken only a qualified liability. The law does no more than enforce the contract as the parties themselves have made it. Many cases illustrating the application of the doctrine to every variety of contract, are collected in the note to Cutter v. Powell, 2 Smith Lead. Cas. 1.

The rule has been applied in several recent cases, closely analogous to the present in their leading facts. In Adams v. Nichols, 19

[175] The statement of facts is abbreviated and parts of the opinion are omitted.

[176] "The defendant insists that where the thing contracted to be done becomes impossible by the act of God, the contract is discharged. This is altogether a mistake. * * * The act of God will excuse the not doing of a thing where the law had created the duty, but never where it is created by the positive and absolute contract of the party." Ellsworth, J., in School District v. Dauchy, 25 Con. 530, 536 (1857). See Berg v. Erickson, 234 Fed. 817 (1916).

Pick. 275, the defendant Nichols contracted to erect a dwelling-house for plaintiff on plaintiff's land. The house was nearly completed when it was destroyed by accidental fire. It was held that the casualty did not relieve the contractor from his obligation to perform the contract he had deliberately entered into. The court clearly state and illustrate the rule, as laid down in the note to Walton v. Waterhouse, 2 Wms. Saunders, 422, and add: "In these and similar cases, which seem hard and oppressive, the law does no more than enforce the exact contract entered into. If there be any hardship, it arises from the indiscretion or want of foresight of the suffering party. It is not the province of the law to relieve persons from the improvidence of their own acts."

In School Dist. v. Dauchy, 25 Conn. 530, the defendant contracted to build and complete a schoolhouse. When nearly finished, the building was struck by lightning, and consumed by the consequent fire; and the defendant refused to rebuild, although plaintiffs offered to allow him such further time as should be necessary. It was held that this nonperformance was not excused by the destruction of the building. The court thus state the rule: "If a person promise absolutely, without exception or qualification, that a certain thing shall be done by a given time, or that a certain event shall take place, and the thing to be done, or the event, is neither impossible nor unlawful at the time of the promise, he is bound by his promise, unless the performance, before that time, becomes unlawful."

School Trustees v. Bennett, 3 Dutcher, 513, is almost identical in its material facts with the present case. The contractors agreed to build and complete a schoolhouse, and find all materials therefor, according to specifications annexed to the contract; the building to be located on a lot owned by plaintiff, and designated in the contract. When the building was nearly completed it was blown down by a sudden and violent gale of wind. The contractors again began to erect the building, when it fell, solely on account of the soil on which it stood having become soft and miry, and unable to sustain the weight of the building; although, when the foundations were laid, the soil was so hard as to be penetrated with difficulty by a pickaxe, and its defects were latent. The plaintiff had a verdict for the amount of the instalments paid under the contract as the work progressed. The verdict was sustained by the Supreme Court, which held that the loss, although arising solely from a latent defect in the soil, and not from a faulty construction of the building, must fall on the contractor.

In the opinion of the court, the question is fully examined, many cases are cited, and the rule is stated, "that where a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.

* * * If before the building is completed or accepted, it is destroyed by fire or other casualty, the loss falls upon the builder; he must rebuild. The thing may be done, and he has contracted to do it. * * * No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foundations in good sense and inflexible honesty. He that agrees to do an act should do it, unless absolutely impossible. He should provide against contingencies in his contract. Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or rather, the law leaves it where the agreement of the parties has put it. * * * Neither the destruction of the incomplete building by a tornado, nor its falling by a latent softness of the soil, which rendered the foundation insecure, necessarily prevented the performance of the contract to build, erect, and complete this building for the specified price. It can still be done, for aught that was opened to the jury as a defence, and overruled by the court."

In Dermott v. Jones, 2 Wall. 1, the foundation of the building sank, owing to a latent defect in the soil, and the owner was compelled to take down and rebuild a portion of the work. The contractor having sued for his pay, it was held that the owner might recoup the damages sustained by his deviation from the contract. The court refer with approval to the cases cited, and say: "The principle which controlled them rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires a party to do what he has agreed to do. If unexpected impediments lie in the way, and a loss ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated."

Nothing can be added to the clear and cogent arguments we have quoted, in vindication of the wisdom and justice of the rule, which must govern this case unless it is in some way distingushable from the cases cited.

It is argued that the spot on which the building is to be erected is not designated with precision in the contract, but is left to be selected by the owner; that, under the contract, the right to designate the particular spot being reserved to plaintiffs, they must select one that will sustain the building described in the specifications, and if the spot they select is not, in its natural state, suitable, they must make it so; that in this respect the present case differs from School Trustees v. Bennett.

The contract does not, perhaps, designate the site of the proposed building with absolute certainty; but in this particular it is aided by the pleadings. The complaint states that defendants contracted to erect the proposed building on "a *certain piece* of land of which

the plaintiffs then were and now are the owners in fee, fronting on Minnesota Street, between Third and Fourth Streets, in the city of St. Paul." The answer expressly admits that the defendants entered into a contract to erect the building, according to the plans, etc., "on that certain piece of land in said complaint described," and that they "entered upon the performance of said contract, and proceeded with the erection of said building," etc. This is an express admission that the contract was made with reference to the identical piece of land on which the defendants afterwards attempted to perform it, and leaves no foundation in fact for the defendants' argument.

It is no defence to the action, that the specifications directed that "footings" should be used as the foundation of the building, and that the defendants, in the construction of these footings, as well as in all other particulars, conformed to the specifications. The defendants contracted to "erect and complete the building." Whatever was necessary to be done in order to complete the building, they were bound by the contract to do. If the building could not be completed without other or stronger foundations than the footings specified, they were bound to furnish such other foundations.[177] If the building could not

[177] "Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. Day v. United States, 245 U. S. 159, 38 Sup. Ct. 57, 62 L. Ed. 219; Phœnix Bridge Co. v. United States, 211 U. S. 188, 29 Sup. Ct. 81, 53 L. Ed. 141. Thus one who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil. Simpson v. United States, 172 U. S. 372, 19 Sup. Ct. 222, 43 L. Ed. 482; Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762. But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. MacKnight Flintic Stone Co. v. The Mayor, 160 N. Y. 72, 54 N. E. 661; Filbert v. Philadelphia, 181 Pa. 530; Bentley v. State, 73 Wis. 416, 41 N. W. 338. See Sundstrom v. State of New York, 213 N. Y. 68, 106 N. E. 924. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work, as is shown by Christie v. United States, 237 U. S. 234, 35 Sup. Ct. 565, 59 L. Ed. 933; Hollerbach v. United States, 233 U. S. 165, 34 Sup. Ct. 553, 58 L. Ed. 898, and United States v. Stage Co., 199 U. S. 414, 424, 26 Sup. Ct. 69, 50 L. Ed. 251, where it was held that the contractor should be relieved, if he was misled by erroneous statements in the specifications." Brandeis, J., for the court, in U. S. v. Spearin, 248 U. S. 132, 39 Sup. Ct. 59, 61 (1918).

While the rule as to responsibility for defective plans so announced by Justice Brandeis is plausible as stated, the real question should be one of fact as to whether the owner personally, or through his architect, or the contractor, was in fact and properly, relied upon to see that the plans were practicable. In any event, there is a conflict in the cases. As in the principal case, the contractor was held responsible in Lonergan v. San Antonio Trust Co., 101 Tex. 63 (1907); Leavitt v. Dover, 67 N. H. 94 (1892).

In Cavanagh v. Tyson, Weare and Marshall Co., 227 Mass. 437 (1917), the

be erected without draining the land, then they must drain the land, "because they have agreed to do everything necessary to erect and complete the building." (3 Dutcher, 525; and see Dermott v. Jones, *supra*, where the same point was made by the contractor, but ruled against him by the court.)

As the draining of the land was, in fact, necessary to the erection and completion of the building, it was a thing to be done, under the contract, by the defendants. * * *

There was, therefore, no error in the exclusion of the evidence offered, and the order appealed from is affirmed.[178]

court had to consider whether there was a material enough mistake for rescission of contract where the contract was for driving piles for a pier and where the soil, instead of being soft and easily penetrable, as indicated by the plans, consisted largely of stone rip rap of large size, deposited there when the ground was filled in. On the whole the court decided against rescission, there being no fraud and opportunity to investigate. Pierce, J., said: "In the case at bar the character of the fill through which the piles were to be driven was of importance only in the determination of the price to be demanded and paid for the performance of the work. Had the burden of performance proved less than anticipated it scarcely will be claimed that the defendant could, in an appropriate action have had relief from the contract through rescission or to recover any excess in payment over reasonable compensation. Yet such would be the defendant's right if the contract were void *ab initio*. Sherwood v. Walker, 66 Mich. 568. In the case at bar the mistake of fact is collateral to the essential thing contracted about and therefore does not invalidate the contract" (p. 444).

But in Faber v. City of New York, 222 N. Y. 255 (1918), where the city had made an investigation as to bed rock and the plans indicated where it was, the contractor having no reasonable opportunity to find out the truth, the city was deemed to have made by its plans such a representation or warranty that the situation of the bed rock was farther from the surface than it was as to render the city liable for the great additional expense of excavation caused by the mistake.

178 "The general rules governing the rights of the parties to a building contract, where the building to be erected is partially constructed and is destroyed by fire before full completion, in cases where the contract is entire and contains no express provisions regarding their rights in that contingency, are not seriously controverted. If, in such a case, the parties do not rescind or abandon, but stand upon the contract, it controls their rights. The contractor and the owner each must perform his part of the contract. If the whole price is due upon completion, the contractor must complete it before he can lawfully demand payment. If it is payable in installments during the progress of the work, he cannot recover an installment earned but not paid at the time of the fire, until the reconstruction has proceeded to the stage necessary to make it due. He must stand the loss resulting from the fire, and must replace at his own expense the structure that is destroyed. When he has done so, he may recover the full contract price. He is not excused, from completing the performance of the contract by the fact that the fire has destroyed the structure already made. It is nevertheless possible for him to begin again and rebuild the entire building. Such destruction does not prevent performance within the meaning of section 1511 of the Civil code. (Wilmington T. Co. v. O'Niel, 98 Cal. 5 (32 Pac. 705); Barrere v. Somps, 113 Cal. 97. 104 (45 Pac. 177, 572);

## IN RE ARTHUR

## ARTHUR *v.* WYNNE.

(High Court of Justice, Chancery Division, 1880. L. R. 14 Ch. D. 603.)

Administration action. Claim by trustees of a marriage settlement to be admitted as creditors for the £10,000 for which the deceased had covenanted to insure his life.

Sample v. Fresno Flume, Etc., Co., 129 Cal. 222, 228 (61 Pac. 1085); Wilson v. Alcatraz, Etc., Co., 142 Cal. 182 (75 Pac. 787); Polack v. Ploche, 35 Cal. 416, 422 (95 Am. Dec. 115); 30 Am. & Eng. Ency. of Law, 1249; Civ. Code, sec. 1439.) There are cases which hold that upon such a contract if the contractor neglects to complete the performance after such destruction, the owner may recover from him the installments which had been paid prior to the destruction. (Green v. Wells, 2 Cal. 584; Tompkins v. Dudley, 25 N. Y. 272 (82 Am. Dec. 349.)

"From these principles it logically follows that if there are progress payments on the work which are due, or earned, but unpaid, at the time of the fire, the contractor cannot rightfully demand payment thereof, or recover the same, until he has rebuilt the structure to the point where, by the terms of the contract, the work required to make the particular payment due is again performed. As we have said, these principles apply where the contract contains no provisions declaring the rights of the parties in case of the destruction of the partly completed building. The contract sued on contained a provision on this subject." Shaw, J., in Ahlgren v. Walsh, 173 Cal. 27, 31-32 (1916).

Except where very exceptional facts exist, the builder, as in the principal case of Stees v. Leonard, is not excused. Professor Corbin states the rule as follows: "Increased or unexpected difficulty and expense do not, as a rule, excuse from performance. * * * In building contract cases like School District v. Danchy (1857), 25 Conn. 530, and Trustees v. Bennett (1859), 27 N. J. L. 513, performance at the time agreed may have become practically impossible; but time might not be of the essense; and, if so, substantial performance is still possible. Even if time is of the essence this may be waived by the party whose duty was conditional on performance on time." Corbin's Anson on Contracts, pp. 430-431, note 4.

In Board of Education v. Townsend, 63 Oh. St. 514 (1900), and Sickinger v. Board of Directors of Public Schools for Parish of Orleans, 147 La. 479, 85 So. 212 (1920), school boards under a contract for the exchange of property to move a house of the other party to the lot he was to receive were compelled to reconstruct the house, though it was wrecked by storms. In both cases the contract failed to provide that the method of removal should be without dismantling the building, and in the Louisiana case the court said that "Our opinion is that it was the duty of the school board to reconstruct the building after the storm, using what material was yet suitable and substituting like material for that which was destroyed" (85 So. at p. 215).

That problem is somewhat like that in Drake v. White, 117 Mass. 10 (1875). where a debtor deposited collateral with his creditors as security for the debt and they promised to return it or pay for it in money. The collateral being destroyed by fire, the creditors were made to pay for it, the court saying: "The fact that one part of this alternative promise has become impossible of fulfillment does not relieve them from the other" (p. 13).

If the defendant contracts to repair an existing house or chattel of the plaintiff or to furnish part of the labor and materials for a house for plaintiff,

JESSEL, M. R.[179] * * * There is here a covenant to effect an insurance on or before a given day. The covenantor had nearly two years in which to do it, but he put off doing anything till a day or two before the last day; however, just previously he became so ill, and he thenceforward continued so ill, that no policy could be effected on his life. Now, it does appear to me to be clear that he cannot avail himself of that negligence or omission on his part to take any steps towards the performance of his covenant till a day or two before the expiration of the two years, to say that there had been no breach of the covenant. There was a time, nearly two years, during which he might have performed it, and he did not perform it during the time when he could have per-

towards the erection of which house the plaintiff is to furnish other labor and materials under an arrangement in substance like a contract by defendant to repair, and the house is destroyed without the defendant's fault, the defendant is excused from further performance. Butterfield v. Byron, 153 Mass. 517 (1891); Cook v. McCabe, 53 Wis. 250 (1881); Krause v. Board, 162 Ind. 278 (1903). But in Vogt v. Hecker, 118 Wis. 306 (1903), a contract to build a barn upon a foundation and with materials furnished by the property owner was held to be one for the construction of a complete building, or, at least, governed by the rule applicable to such a contract, and in Chapman v. Beltz & Sons Co., 48 W. Va. 1 (1900), where under a contract to remodel and rebuild a house, using some of the old walls, the building without the builder's fault collapsed, the builder was held liable in damages for breach of contract, because the owner notified the builder that he expected to restore the building to the condition it was in when the builder began the improvements and thereby required the builder to finish it in accordance with the contract, and where the builder on receiving the notice wrote the owner it would insist that there was no obligation on it to restore or complete the improvements on said building, it was held that the owner was entitled to restore the substructure and to require the builder to complete performance of its contract. But that such offer of the owner will not make the builder liable, see Krause v. Board, 162 Ind. 278, 291-293 (1903).

The question whether there may be a quasi-contractual recovery for repairs prior to the destruction of the house or chattel will be answered variously in different jurisdictions. By the general American rule recovery for the work done prior to the destruction, after deducting payments made, is allowed. Woodward on Quasi Contracts, §§ 116, 117, 119. But in England and in some American jurisdictions both parties are discharged and neither may recover against the other, unless the contract is severable in the sense that instalment payments to be made as the work progresses are, in the language of Denman, J., in Anglo-Egyptian Navigation Co. v. Rennie, L. R. 10 C. P. 271, 283 (1875), "to be in payment of the work certified to be done, neither more nor less," in which latter event recovery may be had for the amount already earned at the time of the destruction of the building. Anglo-Egyptian Navigation Co. v. Rennie, *supra;* Siegel Cooper & Co. v. Eaton & Prince Co., 165 Ill. 550 (1897). See The Madras, [1898] P. 90. Compare, Chandler v. Webster, reported *post* p. 1038. Of Siegel Cooper & Co. v. Eaton & Prince Co., *supra*, it has been said: "The court held the contract in that case severable, but without apparent reason." Harriman on Contracts, 2 ed., sec. 274, note 5.

On right of contractor to recover for work performed in erection of building destroyed without fault of either owner or contractor, see Ann. Cas. 1913 A, 458, note. See also 1 Ann. Cas. 466, note.

[179] Parts of the opinion are omitted.

formed it. Why is he not to be answerable in damages? It seems to me that he has committed a breach of the covenant, and not the less so because misfortune subsequently overtook him, for he might have performed it up to a short period before the expiration of the time. It is no answer to say that there would have been no breach if he had done it on the last day, because he has not done it on the last day; and, whether or not he would be excused from performance if it had been a covenant to do it on that day, it appears to me that is not an excuse when he has not done it. On that ground I should be in favour of the applicants.

[The learned Master of the Rolls then discussed the question whether there was an implied condition in the covenant to insure only if his life remained insurable, and held "that there is no implied exception of the kind suggested" and that "on that point I think the applicants are also entitled to succeed."] * * *

The amount of damages payable to the trustees of the settlement was fixed by arrangement between the parties.

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## MERIWETHER *v.* LOWNDES COUNTY.

**(Supreme Court of Alabama, 1890. 89 Ala. 362, 7 So. 198.)**

SOMERVILLE, J.[180] The bond of the defendant's intestate, which is here sued on, for the consideration specified, bound him, by covenant, not only to build the bridge contracted for by the county of Lowndes, but also for five years to keep the structure in repair. The express condition of the undertaking is that said bridge shall be "kept in good repair" by the obligor, and shall "remain safe continuously from the time of its acceptance [by the county,] for the period of five years, for the passage of travelers and other persons, as well as for all purposes for which said bridge may be properly and lawfully used."

It is not denied, on the one hand, that the bridge in question was constructed in a skillful and workmanlike manner, nor, on the other, that the county had the authority to contract generally for the construction of bridges, free or toll, and to take a bond to keep them in good repair for a stipulated period. Code 1886 §§ 1442, 1456, 1457. The breach of the bond assigned is that the bridge was washed away by a flood, within the period it was stipulated to stand, and thereby became impassable to the public, and that the defendant's intestate refused to rebuild and repair the bridge, although notified to do so by the board of revenue of the county, which was invested with the jurisdiction and powers conferred by the statute on courts of county commissioners in reference to the subject of bridges.

The main defense urged to the suit is that the bond imposed no duty

180 Part of the opinion is omitted.

on the obligor to rebuild the bridge, but only to keep it in repair so long as it stood; and that the structure was destroyed from no defect in the work, but by an extraordinary and unprecedented flood, which was an act of God, not covered by the covenants of the bond. This defense was clearly not good. There is a long line of cases, both in England and this country, which settle the proposition that an unconditional express covenant to repair or keep in repair is equivalent to a covenant to rebuild, "and binds the covenantor to make good any injury which human power can remedy, even if caused by storm, flood, fire, inevitable accident, or the act of a stranger;" and that, while an act of God will excuse the nonperformance of a duty created by law, it will not excuse a duty created by contract. Abby v. Billups, 35 Miss. 618, 72 Amer. Dec. 143, and note, p. 148; Ross v. Overton, 3 Call, 309; Polack v. Pioche, 95 Amer. Dec. 115, note, 121, 122; Hoy v. Holt, 91 Pa. St. 88; Miller v. Morris, 40 Amer. Rep. 814; School-Dist. v. Dauchy, 68 Amer. Dec. 371; Beach v. Crain, 49 Amer. Dec. 369, note, 374; Van Wormer v. Crane, 16 N. W. Rep. 686; Warren v. Wagner, 75 Ala. 188; Nave v. Berry, 22 Ala. 382. The courts have no authority to relieve contracting parties from the hardships often occasioned by such contracts, as it is within the power of obligors to provide in advance by excepting liability for casualties of this nature from the terms of their contracts, if they so elect. The contract, moreover, shows that the duty of keeping "in good repair" is coupled with the covenant that the bridge shall "remain safe" for the period stipulated. And the statute clearly contemplates that when a bridge, constructed under such a contract, is "washed away, or so damaged [in any manner] as to become unsafe to the public," within the period covered by the bond, such accident shall be such a breach of the bond as to constitute a ground of action. Code 1886, § 1457. The second plea interposing this defense was bad, and the court did not err in sustaining the demurrer to it. * * *

[*Judgment for plaintiff*] *affirmed.*

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## JOHN D. CLANCY *v.* BENJAMIN OVERMAN.

**(Supreme Court of North Carolina, 1835. 18 N. Car. 402.)**

Action of covenant brought upon an indenture, made the 22d day of January, A. D., 1827, between John D. Clancy, of, etc., of the one part, and Benjamin Overman, of, etc., of the other part, whereby the said John D. Clancy bound unto the said Benjamin Overman a negro boy, named Essex, to serve him faithfully for the term of three years from date, and the said Benjamin Overman covenanted that he would teach and instruct, or cause to be taught and instructed, the said negro boy, in the art and mystery of the coach-making business. The

breach assigned in the plaintiff's declaration was, that the defendant had not taught and instructed, nor caused to be taught and instructed, the slave Essex, mentioned in the covenant, the art and mystery of the coach-making business.

Pleas. Covenants performed and not broken; previous covenants not performed.

Upon the trial at Guilford, on the last Circuit, before his Honor, Judge Norwood, the plaintiff offered evidence to show that the slave Essex did not understand the coach-making business at the expiration of his term of service with the defendant. The defendant, on his part, offered evidence to show that he made all proper exertions to teach the slave Essex, but that said slave had not capacity enough to learn the coach-making business. His Honor charged the jury that the covenant of the defendant was absolute, and that he could not be excused from its performance, for want of capacity in the boy Essex to learn the coach-making business; but that the jury might take that into consideration in estimating the damages, if they should find for the plaintiff. Under this charge, a verdict was returned for the plaintiff; and the defendant appealed.

GASTON, J.[181] There is a well known distinction between obligations imposed by law, and those created by express contract. When the law imposes a duty, and the party charged is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him; but when the party, by his own contract, imposes unconditionally a duty or charge upon himself, he is bound to perform it, or answer in damages for its nonperformance, notwithstanding any accident by inevitable necessity. In the latter case, the contract constitutes the law between the parties, and if it contain no exception, none will be presumed. This court agrees, therefore, with the judge below, in holding that the engagement of the defendant was absolutely binding to the extent of that engagement; and it is also of opinion with him that the covenants of the respective parties to this indenture were mutual and independent. But we do not concur in the construction which was given below to the covenant of the defendant. It seems to us that an engagement to teach the apprentice, or to cause the apprentice to be taught, a trade, is not an engagement that the apprentice will learn that trade. If it were so, then had the apprentice died on the day succeeding the execution of the indenture, or had been visited by an infirmity which utterly disabled him to learn, or had obstinately resisted every proper effort to make him learn, the covenant would have been broken, and the defendant responsible in damages for the breach. Nor do we think that, in such a case, these circumstances should avail to lessen the damages; for if an individual deliberately bind himself to insure a certain result, and the obligation is broken, the extent of the

[181] The statement of facts is abbreviated and part of the opinion is omitted.

injury forms the measure of damages, however the performance may have been defeated. It would be doing violence, we think, to the words found in this covenant, to regard them as stipulating for more than faithful, diligent and skillful instruction. The case of Winston v. Linn, 4 Eng. C. L. Rep. 131, which has been cited for the plaintiff, does not conflict with this opinion. It was there held that the covenants were mutual and independent, and that disobedience on the part of the apprentice, and his temporary withdrawal from the service of the master, did not warrant the latter in insisting that the indenture was dissolved. It decides no more. * * *

PER CURIAM.

*Judgment reversed.*[182]

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## THE MARQUIS OF BUTE *v.* THOMPSON.

(Court of Exchequer, 1844. 13 Meeson & Welsby, 487.)

Action of covenant for £216, 13*s.* 4*d.*, being half a year's fixed rent under a lease.

POLLOCK, C. B.[183] * * * This is an action of covenant: the defendants have expressly covenanted that they, their executors, adminis-

[182] So in Raymond v. Minton, L. R. 1 Exch. 244 (1866), where an apprentice to a house decorator, etc., refused to be taught. There Martin, B., said: "The willingness of the apprentice to learn is naturally a condition precedent to the master's teaching him. Reduce the matter to a particular instance, and this becomes apparent. The master says to the apprentice, 'Get up on that ladder, and I will teach you the business of a house decorator;' the apprentice refuses, and stands upon the floor. It is obvious that the cause of the apprentice not being taught is that he has made it impossible, and the master cannot be called upon to perform an impossibility."

But in general a defendant is not excused from performance because the necessary cooperation of a third person cannot be obtained. That is because the parties must be deemed to have contemplated that the third person might not cooperate and the promisor must be deemed to have assumed the burden of getting that cooperation since he has not conditioned his promise upon it.

"There can be no question that a party may by an absolute contract, bind himself to perform things which subsequently become impossible, or pay damages for the non-performance, and such construction is to be put upon an unqualified undertaking where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." Chicago, M. & St. P. Ry. Co. v. Hoyt, 149 U. S. 1, 14, 15 (1893).

[183] The statement of facts and the introductory words of the opinion are omitted.

trators, and assigns, or some or one of them, should and would raise and work 13,000 tons of coal in each and every year during the term, and pay at the rate of 8*d.* per ton royalty for the same, or pay in money annually, £433, 6*s.* 8*d.* each year, as fixed rent, whether coals should be wrought or not, and also 9*d.* upon each ton over and above that quantity, to whatever extent the same might be wrought. We are of opinion that this stipulation for a fixed rent, coupled with a covenant that coal should be wrought to that extent, and if above it, that there should be a payment of 9*d.* for each ton over and above, does not carry with it, by any implication, a condition that there shall be coals to that amount capable of being wrought.[184] It appears to us to be a stipulation on the part of the defendants that they would work and get that quantity, and that if they did not get it, they would pay a fixed rent to the landlord; and we cannot import into that covenant a condition that there should be coals to that extent. If that was the intention of the parties, they should so have expressed it. This is the short ground on which we are of opinion that plaintiff, the Marquis of Bute, is entitled to the judgment of the court.

*Judgment for the plaintiff.*

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## LORD CLIFFORD *v.* WATTS.

(Court of Common Pleas, 1870. L. R., 5 Common Pleas, 577.)

WILLES, J.[185] This is an action upon a demise or grant by Lord Clifford to Watts of certain mines, pits, etc., of clay, by which demise the rent was made payable at a certain rate per ton upon the clay raised; and the indenture contained, amongst others, a covenant that Watts shall work and make trials for clay under the lands in question. The first breach is founded upon that covenant, and in respect of that the defendant has paid 40*s.* into court. The indenture also contains a covenant that Watts shall dig and raise from the land an aggregate amount of not less than 1,000 tons, or more than 2,000 tons, of pipe or potter's clay in each year of the term. The term granted was twelve years; and for the pipe or potter's clay the defendant was to pay a royalty of 2*s.* 6*d.* per ton. The breach assigned on that covenant is that with which we have to deal on this occasion; it is, that the defendant has not dug an aggregate amount of not less than 1,000 tons of

184 The defendants contended, to quote Erle, the plaintiff's counsel, "that if the colliery be exhausted, so that coals sufficient to make up that amount [of 13,000 tons] cannot be raised, they are discharged from the payment of the fixed rent."

185 The statement of the pleadings, the opinions of Brett, J., and Montague Smith, J., and parts of the opinion of Willes, J., are omitted.

pipe and potter's clay in each year of the demise. The plea, the validity of which is now in question, is, that the defendant could not dig 1,000 tons of clay each year according to his covenant, because there was not at the time of the demise, nor since existing under the lands, 1,000 tons of such clay; that the performance of the covenant had always been impossible, and that such impossibility was unknown to the defendant at the time, and he had no reasonable means of knowing or ascertaining the same. To that plea there is a demurrer. It is obvious that this plea may be considered from two points of view: First, with reference to the abstract question whether a covenant to perform an impossibility is or is not valid in point of law; whether the covenantor can set up such impossibility from the begnning as an answer to a breach, or must pay damages, which, according to Mr. Preston (Shep. Touch. 7th Ed. 164), may only be nominal. The second, and with reference to this case the most important, consideration appears to me to arise from the question whether the defendant has by this covenant contracted to perform an impossibility, or whether the true meaning of the covenant, construing it by the rest of the deed, is, not that the defendant undertakes to get the stipulated quantity of clay whether it be there or not, or to pay the stipulated tonnage as if the clay had been raised, but rather, dealing with it as subsidiary to the main object of the demise, that he will raise such pipe or potter's clay as may be found under the land, at the rate and price specified. If the latter be the true construction of the covenant, it is not an independent covenant to do the thing contracted for, whether possible or not, but only a stipulation as to the rate at which that is to be done which both parties at the time contemplated. According to that construction of the covenant, the plea is a good defence to the second breach. And this is the view to which, after the best consideration I am able to bring to the case, and after having heard the very learned arguments on both sides, my opinion inclines.

The deed, without any recital, witnesses that Lord Clifford, in consideration of the rent, payments, covenants, etc., demised to Watts the mines, pits etc., of clay under certain lands particularly described. It then proceeds to grant Watts a license to enter upon the land to dig and search for clay and to make pits, etc., with rights of way for carrying it away, etc., subject to compensation for damage. Then comes the habendum,—to have, hold, etc., the said mines, etc., of pipe and potter's or other clay, with the powers thereby granted, for twelve years; and to have and to hold all and every the said beds or veins of clay that shall be found and raised within the term out of any part of the land so authorized to be worked, unto Watts, his executors, etc., unto his and their own use. So far we are dealing with the demising part of the instrument, which refers to specific lands and to specific clay which is believed by both parties to be under the lands described at the time. The whole scope of the contract is that the defendant

shall take that clay. Whether the speculation would turn out to be a profitable one to the tenant or not was uncertain. So far it was natural that he should take the risk. But the question is whether we are justified in importing another element into a bargain like this, namely, a warranty by the tenant that clay shall be found, or an undertaking to pay for the quantity stipulated for, whether found or not. * * * The bare statement of the provisions of the deed leads me to the conclusion that the tenant never intended to warrant that there was clay upon the land, and that neither party contemplated that he should, in the event of no clay being found there, at all events pay a minimum fixed rent during the term. It is a bare stipulation as to the rate of payment for the clay which should be raised. That appears to me to be the natural and ordinary construction of the covenant when read by the light of the context. It turned out that there was no clay of the descriptions mentioned on the land. The covenant therefore became inapplicable, and has not been broken. * * *

Cases may be conceived in which a man may undertake to do that which turns out to be impossible, and yet he may still be bound by his agreement. I am not prepared to say that there may not be cases in which a man may have contracted to do something which in the present state of scientific knowledge may be utterly impossible, and yet he may have so contracted as to warrant the possibility of its performance by means of some new discovery, or be liable in damages for the nonperformance, and cannot set up by way of defence that the thing was impossible. But before we arrive at such a conclusion we must be satisfied, if no other reasonable construction suggests itself, that the party really did intend to warrant that to be possible which was impossible. The authorities relied on for the plaintiff appear to me to be cases where a man either undertook to do a thing which was possible at the time, but which, without any fault of his adversary, became afterwards impossible, or where he, notwithstanding the thing was impossible of performance, took upon himself to warrant that it should be possible. Barker v. Hodgson, 3 M. & S. 267, was a case where the charterer of a ship had covenanted to send a cargo alongside at a foreign port, but in consequence of the prevalence of an infectious disorder at the port, all public intercourse was prohibited by the authorities of the place, and yet he was held to be responsible in damages for the nonperformance of his covenant. If the intercourse with the foreign port had been prohibited by the law of this country, the act would have been illegal, and the defendant would have been excused, not because he could not, but because he ought not to do it. But where the performance of the thing covenanted to be done is not made impossible by the law of this country, the case falls within the principle laid down in the leading case of Paradine v. Jane, Aleyn, 26, where the defendant, in an action for rent, sought to excuse himself by reason of his having been expelled from the premises by

alien enemies, and his plea was held insufficient. The material resolution of the court was, that "where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him;" but "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; and therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it." Where a thing becomes impossible of performance by the act of a third person, or even by the act of God, its impossibility affords no excuse for its nonperformance; it is the defendant's own folly that has led him to make such a bargain without providing against the possible contingency. In the present case, if the allegations in the plea be true, there was nothing upon which the covenant could attach at the time it was entered into. Hills v. Sughrue, 15 M. & W. 253, has no application, for another reason. There the charterer by his contract warranted that, the ship being ready to take a cargo of guano at Ichaboe, he would there provide her with a full cargo. The impossibility of obtaining a cargo there was no excuse for the nonperformance of his contract. That case therefore falls within the second category of cases, where the defendant had warranted the possiblity of doing the thing contracted for.

It remains only to deal with Marquis of Bute v. Thompson, 13 M. & W. 487. There, by the express terms of the contract, the lessee covenanted absolutely to raise a given quantity of coal in each year, or to pay a minimum rent which should represent the minimum amount of coal agreed to be worked; and the lessee failing to raise the stipulated quantity of coal, he was held bound at all events to pay the minimum rent. The judgment of the court is very short, and but for the facts might possibly be taken to bear the construction put upon it by Mr. Kingdon, namely, that the lessee was bound to perform his covenant whether there was coal to be found or not. The judgment, however, must be read with reference to the subject-matter with which the court was dealing; and so reading it, it is plain that the court construed the covenant, not as a stipulation exhausting itself upon the first branch as to the raising of the coal, but as an alternative covenant to secure the lessor at all events a minimum rent during the term, whether or not coal was worked or was there to be worked. There is, however, no such covenant here; there is only a covenant to work out all the clay under the land, and this covenant was not broken by the defendant's failure to work clay if none was to be found there. I therefore think the defendant is entitled to judgment.

*Judgment for the defendant.*[186]

[186] "If [the impossibility is] unknown to both parties there is little occasion

## TAYLOR v. CALDWELL.

(Court of Queen's Bench, 1863. 3 Best & Smith, 826.)

BLACKBURN, J.[187] In this case the plaintiffs and defendants had, on May 27th, 1861, entered into a contract by which the defendants agreed to let the plaintiffs have the use of the Surrey Gardens and Music Hall on four days, then to come—viz., June 17th, July 15th, August 5th, and August 19th, for the purpose of giving a series of four grand concerts, and day and night *fêtes*, at the Gardens and Hall, on those days respectively; and the plaintiffs agreed to take the Gardens and Hall on those days, and pay £100 for each day.

The parties inaccurately call this a "letting," and the money to be paid, a "rent;" but the whole agreement is such as to show that the defendants were to retain the possession of the Hall and Gardens, so that there was to be no demise of them, and that the contract was merely to give the plaintiffs the use of them on those days. Nothing, however, in our opinion, depends on this. The agreement then proceeds to set out various stipulations between the parties as to what each was to supply for these concerts and entertainments, and as to the manner in which they should be carried on. The effect of the whole is to show that the existence of the Music Hall in the Surrey Gardens, in a state fit for a concert, was essential for the fulfilment of the contract—such entertainments as the parties contemplated in their agreement could not be given without it.

After the making of the agreement, and before the first day on which a concert was to be given, the Hall was destroyed by fire. This destruction, we must take it on the evidence, was without the fault of either party, and was so complete, that in consequence the concerts could not be given as intended. And the question we have to decide is whether, under these circumstances, the loss which the plaintiffs have sustained is to fall upon the defendants. The parties, when framing their agreement, evidently had not present to their minds the possibility of such a disaster, and have made no express stipulation with reference to it, so that the answer to the question must depend upon the general rules of law applicable to such a contract.

to distinguish existing impossibility from supervening impossibility. Parties deal with unknown present situations on the same basis as future contingent occurrences, and the law of contracts should adopt this method of dealing with them. There is, therefore, no more difficulty in finding a binding contract to perform something in fact impossible from the outset, if the facts or their import are unknown to the parties than there is in making a contract in which a promisor takes the risk of supervening impossibility." 3 Williston on Contracts, § 1933, p. 3285.

In Mineral Park Land Co. v. Howard, 172 Cal. 289 (1916), where gravel and earth was to be taken and existed, but where it turned out to be possible of removal only at ten to twelve times the usual cost, performance was excused.

[187] The statement of facts and parts of the opinion are omitted.

There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible. The law is so laid down in 1 Roll. Abr. 450, Condition (G), and in the note 2 to Walton v. Waterhouse, 2 Wms. Saund. 421*a*, 6th ed., and is recognized as the general rule by all the judges in the much discussed case of Hall v. Wright, E. B. & E. 746. But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition. * * *

There is a class of contracts in which a person binds himself to do something which requires to be performed by him in person; and such promises—for example, promises to marry, or promises to serve for a certain time, are never in practice qualified by an express exception of the death of the party; and therefore in such cases the contract is in terms broken if the promisor dies before fulfilment. Yet it was very early determined that, if the performance is personal, the executors are not liable. Hyde v. The Dean of Windsor, Cro. Eliz. 552, 553. See 2 Wms. Exors. 1560, 5th ed., where a very apt illustration is given. "Thus," says the learned author, "if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract, for the undertaking is merely personal in its nature, and, by the intervention of the contractor's death, has become impossible to be performed." For this he cites a dictum of Lord Lyndhurst in Marshall v. Broadhurst, 1 Tyr. 348, 349, and a case mentioned by Patteson, J., in Wentworth v. Cock, 10 A. & E. 42, 45-46. In Hall v. Wright, E. B. & E. 746, 749, Crompton, J., in his judgment, puts another case. "Where a contract depends upon personal skill, and the act of God renders it impossible, as, for instance,

in the case of a painter employed to paint a picture who is struck blind, it may be that the performance might be excused."

It seems that in those cases the only ground on which the parties or their executors can be excused from the consequences of the breach of the contract, is, that from the nature of the contract there is an implied condition of the continued existence of the life of the contractor, and perhaps in the case of the painter, of his eyesight. In the instances just given, the person, the continued existence of whose life is necessary to the fulfilment of the contract, is himself the contractor, but that does not seem in itself to be necessary to the application of the principle, as is illustrated by the following example. In the ordinary form of an apprentice deed, the apprentice binds himself in unqualified terms to "serve until the full end and term of seven years to be fully complete and ended," during which term it is covenanted that the apprentice his master "faithfully shall serve," and the father of the apprentice in equally unqualified terms binds himself for the performance by the apprentice of all and every covenant on his part. See the form, 2 Chitty on Pleading, 370, 7th ed., by Greening. It is undeniable that if the apprentice dies within the seven years, the covenant of the father that he shall perform his covenant to serve for seven years is not fulfilled, yet surely it cannot be that an action would lie against the father. Yet the only reason why it would not is that he is excused because of the apprentice's death.

These are instances where the implied condition is of the life of a human being, but there are others in which the same implication is made as to the continued existence of a thing. For example, where a contract of sale is made amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day; there, if the chattels, without the fault of the vendor, perish in the interval, the purchaser must pay the price, and the vendor is excused from performing his contract to deliver, which has thus become impossible.

That this is the rule of the English law is established by the case of Rugg v. Minett, 11 East, 210, where the article that perished before delivery was turpentine, and it was decided that the vendor was bound to refund the price of all those lots in which the property had not passed; but was entitled to retain without deduction the price of those lots in which the property had passed, though they were not delivered, and though in the conditions of sale, which are set out in the report, there was no express qualification of the promise to deliver on payment. It seems in that case rather to have been taken for granted than decided that the destruction of the thing sold before delivery excused the vendor from fulfilling his contract to deliver on payment.

The same principle seems to be involved in the decision of Sparrow v. Sowgate, W. Jones, 29, where, to an action of debt on an obliga-

tion by bail, conditioned for the payment of the debt or the rendor of the debtor, it was held a good plea that before any default in rendering him the principal debtor died. It is true that was the case of a bond with a condition, and a distinction is sometimes made in this respect between a condition and a contract. But this observation does not apply to Williams v. Lloyd, W. Jones, 179. In that case the count, which was in assumpsit, alleged that the plaintiff had delivered a horse to the defendant, who promised to redeliver it on request. Breach, that though requested to redeliver the horse he refused. Plea, that the horse was sick and died, and the plaintiff made the request after its death; and on demurrer it was held a good plea, as the bailee was discharged from his promise by the death of the horse without default or negligence on the part of the defendant. "Let it be admitted," say the court, "that he promised to deliver it on request, if the horse die before, that is become impossible by the act of God, so the party shall be discharged, as much as if an obligation were made conditioned to deliver the horse on request, and he died before it." And Jones, adds the report, cited 22 Ass. 41, in which it was held that a ferryman who had promised to carry a horse safe across the ferry was held chargeable for the drowning of the animal only because he had overloaded the boat, and it was agreed that notwithstanding the promise no action would have laid had there been no neglect or default on his part.

It may, we think, be safely asserted to be now English law, that in all contracts of loan of chattels or bailments if the performance of the promise of the borrower or bailee to return the things lent or bailed, becomes impossible because it has perished, this impossibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to redeliver the chattel. * * * The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given, that being essential to their performance.

We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the Hall and Gardens and

other things. Consequently the rule must be absolute to enter the verdict for the defendants.

*Rule absolute.*[188]

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## HOWELL *v.* COUPLAND.

(Court of Appeal, 1876. 1 Q. B. D., 258.)

The plaintiff is a potato merchant at Holbeach, Lincolnshire, and the defendant a farmer at Whaplode, in the same county.

In 1872 the defendant, at the proper season, and in the due course

[188] In Shawmut National Bank v. Boston, 118 Mass. 125 (1875), Morton, J., said: "The case presents, therefore, the question as to the rights of the lessees where different rooms in the same building are leased to different tenants, and the whole building is destroyed by fire. In Stockwell v. Hunter, 11 Met. (Mass.) 448, this question was carefully considered. In that case the tenant had a lease of the cellar and basement story of a building three stories high, each story being occupied by separate tenants, his lease containing no stipulations as to rebuilding in case of fire, and it was held that the destruction of the building terminated the interest of the lessee in the premises. This was upon the ground that such leases of distinct rooms do not carry any interest in the land beyond that connected with the enjoyment of the particular room; that the room was the thing leased, and that the destruction of the principal thing leased necessarily terminated the lessee's interest therein. This decision has been followed in Graves v. Berdan, 26 N. Y. 498; Ainsworth v. Ritt, 38 Cal. 89, and McMillan v. Solomon, 42 Ala. 356."

See Martin, etc., Co. v. Siegel, etc., Co., 237 Ill. 610 (1909), where a contract for the third floor in a department store was held discharged by the total destruction of the building, and where Dunn, J., at p. 616, said: "And in case a new building is erected having a similar space in the same location as in the old building, the tenant is not entitled to occupy it. Stockwell v. Hunter, 11 Metc. 456."

If a leasehold building is accidentally destroyed, the common law doctrine was that the lessee is nevertheless bound to perform his covenant to pay rent. Fowler v. Bott, 6 Mass. 63 (1809). See Stubbings v. Evanston, 136 Ill. 37 (1891). This was so even though the destruction was total. Izon v. Gorton, 5 Bing. N. C. 501 (1839). But in general in the United States, total destruction of the building is a defense. Humiston, Keeling & Co. v. Wheeler, 175 Ill. 514 (1898); Hahn v. Baker Lodge, 21 Ore. 30 (1891). See local statutes. If a lease contains an express covenant by the lessee to make repairs or a covenant to surrender the premises at the expiration of the term in as good condition as at the beginning of the tenancy, the common law doctrine was that if the premises are injured by third persons (Polack v. Pioche, 35 Cal. 416 (1868); see Beach v. Crain, 2 N. Y. 86 (1848)), or the building thereon is destroyed by accidental fire (Phillips v. Stevens, 16 Mass. 238 (1819); Hoy v. Holt, 91 Pa. St. 88 (1879); Armstrong v. Maybee, 17 Wash. 24 (1897)), the performance of the covenant was not excused, but the premises must be restored. But this common law doctrine has been changed in some states. Wattles v. South Omaha Ice & Coal Co., 50 Neb. 251 (1897). See local statutes.

On intervening impossibility of performance of a contract as a defense, see 14 L. R. A. 215, note; L. R. A. 1916 F, 10, note.

of husbandry, appropriated between 80 and 90 acres of land for the growth of potatoes: 68 acres at Whaplode, and about 20 in Holbeach.

In March of the same year the plaintiff and the defendant entered into the following contract: "A memorandum of agreement, made this day of , 1872, between Robert Coupland, of Whaplode, and John Howell, of Holbeach, whereby Robert Coupland agrees to sell, and the said John Howell agrees to purchase, 200 tons of regent potatoes grown on land belonging to the said Robert Coupland in Whaplode, at and after the rate of £3 10*s.* 6*d.* per ton, to be riddled on 1⅝-inch riddle, and delivered at Holbeach railway station, good and marketable ware, during the months of September or October, as the said John Howell, may direct, and under his direction, the purchaser to find riddles. It is further agreed between the said Robert Coupland and the said John Howell, that the said potatoes shall be paid for when and as they are taken away."

At the time of making the contract, out of the 68 acres in Whaplode 25 were actually sown with potatoes, and the remaining 43 acres were ready for sowing. The 43 acres were afterward sown in due course, and the whole 68 acres together were amply sufficient, in an ordinary season and in the ordinary course of cultivation, to produce a much larger quantity than 200 tons, the land producing, on an average, 7 tons to the acre.

In July and August, without any default on the part of defendant, a disease which no skill or care on the part of the defendant could have prevented attacked the crop and caused it to fail; and when the time for taking it up arrived, the whole marketable produce of the crop of the lands of the defendant, both in Whaplode and Holbeach together, amounted to no more than 79 tons 8 cwt., and this quantity the defendant delivered to the plaintiff. The rest of the crop had perished from the disease.

If the defendant had had other land to plant with potatoes at the time when the disease was discovered, which in fact he had not, it would have been too late to sow it.

The present action was brought to recover damages for the non-delivery of the residue of the 200 tons, and the verdict at the trial was entered for £432 5*s.*, leave being reserved to move to enter the verdict for the defendant, on the ground that he was not liable to deliver the ungrown potatoes.

A rule having been obtained accordingly, it was made absolute by the Court of Queen's Bench on May 22d, 1874. Plaintiff appealed.

JAMES, L. J. I think the case was rightly considered in the court below to turn upon the construction of the contract. Is it a contract for a certain quantity of potatoes of a particular sort, with a warranty that they shall be supplied, or is it a contract to deliver 200 tons of potatoes out of a specific crop? I am of opinion it is the latter; and

if so, the principle of the cases relied on applies, and the defendant is excused by reason of his being prevented by causes for which he is not answerable.

BAGGALLAY, J. A. [189] I at first doubted whether the contract excluded the possibility of the defendant being able to perform his contract by delivering potatoes grown on other land; but on consideration it is clear the contract is confined to particular land; and the statement in the case is that 68 acres, the amount actually sown with potatoes, was a due proportion to enable the defendant to perform his contract in an ordinary season.

CLEASBY, B. I am of the same opinion. I put my decision, not so much on the ground that the defendant was excused by the act of God rendering the performance impossible, as upon the terms of the contract itself. This is not like a contract where the parties have agreed to deliver a cargo of grain at Odessa or any other port by a given time, in which case the parties are bound by the contract, although its performance has become impossible by *vis major*. Here there was not an absolute contract to deliver 200 tons of potatoes in September and October, but 200 tons of potatoes grown on particular land. Not 200 tons of potatoes simply, but 200 tons off particular land. The crop on this particular land has failed, and there is nothing to which the promise can apply. If the crop had existed at the time of the contract, and had afterward failed, there can be no doubt that the principle of the decided cases would apply and the defendant would be excused; and I cannot see any difference in principle from the fact that the crop had not been sown at the date of the contract.

*Appeal dismissed.*[190]

189 The opinions of Lord Coleridge, C. J., and Mellish, L. J., are omitted.

190 "The court did not err in directing a verdict for the defendant. It is true, as contended by counsel for the plaintiffs, that the general rule is that, when the contract is to do a thing which in itself is possible, the promisor will be liable for a breach thereof, notwithstanding it was beyond his power to perform it. The reason is that it was his own fault to run the risk of undertaking to perform an impossibility, when he might have provided against it by his contract. There are, however, well-known exceptions to this general rule, and one of them is that, where from the contract it is apparent that the parties contracted on the basis of the continued existence of a given thing, a condition is implied that, if the performance became impossible from the perishing of the thing, that shall excuse the performance.

"In the instant case, according to the evidence adduced by the plaintiffs, the defendant agreed to sell to the plaintiffs 300 bales of cotton which were growing on his farm in Miller county, Ark. The contract was executed on the 1st day of August. The defendant had planted 1,000 acres in cotton, and that number of acres usually made 500 or 600 bales of cotton. The contract related to the crop to be grown by the defendant on the latter's farm in Miller county. Under these circumstances the performance of it, in the contemplating of both parties, depended upon the future growth and continued existence of the cotton.

"The defendant delivered to the plaintiffs all the cotton that grew on the

## ANDERSON *v.* MAY.

(Supreme Court of Minnesota, 1892. 50 Minn. 280, 52 N. W. 530, 17 L. R. A. 555, 36 Am. St. Rep. 642.)

GILFILLAN, C. J. The defendant having alleged as a counterclaim a contract in June, 1890, between him and plaintiff, whereby the latter agreed to sell and deliver to the former, on or before November 15th, certain quantities of specified kinds of beans, and that he failed so to do except as to a part thereof, the plaintiff, in his reply, alleged in substance that the contract was to deliver the beans from the crop that he should raise that year from his market gardening farm near

farm, and he was therefore excused from a further performance of the contract. * * *

"Of course, if the defendant by the terms of the contract had warranted that he would raise 300 bales of cotton, he would be bound by the terms of his warranty, notwithstanding on account of weather conditions or other matters over which he had no control he failed to raise the designated number of bales." Hart, J., in C. G. Davis & Co. v. Bishop, 139 Ark. 273, 275-276, (1919).

"It is true that where an absolute executory contract is made, the contractor is not excused by inability to execute it caused by unforeseen accident or misfortune, but must perform or pay damages unless he has protected himself against such contingency by stipulation in the contract. Harmony v. Bingham, 12 N. Y. 99; Tompkins v. Dudley, 25 N. Y. 272; Wheeler v. Conn. Mut. L. Ins. Co., 82 N. Y. 543. But there may be in the nature of a contract an implied condition by which he will be relieved from such unqualified obligation, and when, in such case, without his fault, performance is rendered impossible, it may be excused. That is so when it inherently appears by it to have been known to the parties to the contract, and contemplated by them when it was made, that its fulfilment would be dependent upon the continuance or existence at the time for performance, of certain things or conditions essential to its execution. Then in the event they cease, before default, to exist or continue, and thereby performance becomes impossible without his fault, the contractor is, by force of the implied condition to which his contract is subject, relieved from liability for the consequences of his failure to perform. People v. Bartlett, 3 Hill 570; Dexter v. Norton, 47 N. Y. 62; Booth v. S. D. R. Mill Co., 60 N. Y. 491; Taylor v. Caldwell, 3 B. & S. 826.

"By the contract now under consideration, the cheese and butter were to be manufactured at this factory, and to be made from the milk furnished by the patrons, of whom the plaintiff and his assignors were members. The existence of that particular factory was terminated by its destruction, and the loss with it of the manufactured product and of the milk then remaining there unconverted into cheese and butter rendered it impossible for the defendant to further proceed with the performance of his contract in respect to those articles of material and product. And as the nature of the agreement was such that it must be deemed to have been contemplated by the parties to it, that the articles to be manufactured should be made only from the materials furnished by the patrons and at the factory referred to, there was necessarily an implied condition so qualifying the defendant's undertaking, as to relieve him from performance rendered impossible without his fault, and from the consequences of his inability thus occasioned to fulfil his contract in respect to the subject of the bailment which was destroyed by the fire." Bradley, J., in Stewart v. Stone, 127 N. Y. 500, 507-508 (1891).

Red Wing. Upon the trial the contract was proved by letters passing between the parties. From these it fairly appears that the beans to be delivered were to be grown by plaintiff, though it cannot be gathered from them that he was to grow the beans on any particular land. They contain no restriction in that respect. There can be no question that, if grown by him, and of the kinds and quality specified, defendant would have been obliged to accept the beans, though not grown on any land previously cultivated by plaintiff. The contract, therefore, was, in effect, to raise and sell and deliver the quantities, kinds, and quality of beans specified—a contract in its nature possible of performance.

As an excuse for not delivering the entire quantity contracted for, the plaintiff relies on proof of the fact that an early unexpected frost destroyed or injured his crop to such extent that he was unable to deliver the entire quantity.

What, in the way of subsequently arising impossibility for the party to perform, will suffice as excuse for nonperformance of a contract, is well settled in the decisions; the only apparent difference in them arising from the application of the rules to particular circumstances. The general rule is as well stated as anywhere in 2 Chit. Cont. 1074, thus: "Where the contract is to do a thing which is possible in itself, or where it is conditioned on any event which happens, the promisor will be liable for a breach thereof, notwithstanding it was beyond his power to perform it; for it was his own fault to run the risk of undertaking to perform an impossibility, when he might have provided against it by his contract. And therefore, in such cases, the performance is not excused by the occurrence of an inevitable accident, or other contingency, although it was not foreseen by, or within the control of the party." An application of this rule is furnished by Cowley v. Davidson, 13 Minn. 92 (Gil. 86). What is sometimes called an "exception to the rule" is where the contract is implied to be made on the assumed continued existence of a particular person or thing, and the person or thing ceases to exist, as, where it is for personal service, and the person dies, or it is for repairs upon a particular ship or building, and the ship or building is destroyed. An agreement to sell and deliver at a future time a specific chattel existing when the agreement is made would come under this exception. The exception was extended further than in any other case we have found in Howell v. Coupland, L. R. 9 Q. B. 462. That was a contract to sell and deliver a certain quantity from a crop to be raised on a particular piece of land, and the entire crop was destroyed by blight. The court held the contract to be to deliver part of a specific thing, to wit, of the crop to be grown on a given piece of land, and held it to come within the rule that, where the obligation depends on the assumed existence of a specific thing, performance is excused by the destruction of the thing without the parties' fault. Without intimating whether we would fol-

low that decision in a similar case, we will say that the case is unlike this, in that in this case the plaintiff was not limited or restricted to any particular land. It was not an undertaking to sell and deliver part of a specific crop, but a general undertaking to raise, sell, and deliver the specified quantity of beans. We have been cited to and found no case holding that, where one agrees generally to produce, by manufacture or otherwise, a particular thing, performance being possible in the nature of things, he may be excused from performance by the destruction, before completion or delivery, of the thing, from whatever cause, except the act of the other party. Applications of the general rule, where the thing agreed to be produced was, before completion, destroyed without the party's fault, are furnished in Adams v. Nichols, 19 Pick. 275, 279; School Dist. v. Dauchy, 25 Conn. 530; and Trustees v. Bennett, 27 N. J. Law 513, approved and followed in Stees v. Leonard, 20 Minn. 494 (Gil. 448). Where such causes may intervene to prevent a party performing, he should guard against them in his contract.

*Order reversed.*[191]

191 Often the court will evade this harsh rule by straining the construction of the contract to make it call for crops from particular land.

In Whipple v. Lyons Beet Sugar Refining Co., 118 N. Y. Supp. 338 (1909), the contract was to seed and grow eight acres of sugar beets in the town of Ridgeway, N. Y., following printed directions on the back of the contract. Plaintiff sowed eight acres according to contract, but there was a total failure of crop on four acres due to no fault on the part of the plaintiff, but attributed to drought. Plaintiff sued for the price of beets grown and delivered and the defendant counterclaimed for liquidated damages of $25 per acre for failure to live up to the contract as to four acres. Plaintiff could have taken any eight acres, but since plaintiff was to follow and did follow the instructions absolutely, it was held that the contract was one for a crop to be raised according to the defendant's specific instructions, and was subject to the implied condition that, if the seeds planted failed to grow on a portion of the land selected in accordance wtih such instructions by reason of drought or other climatic conditions over which the plaintiff had no control, performance would be excused. The court said: "The contract in suit is not a contract to deliver a certain quantity of beets absolutely, nor, on the other hand, is it, in terms, a contract to deliver a specific crop merely." But the court treated it as if it were the latter.

With the principal case compare Whitman v. Anglum, 92 Conn. 392 (1918), where defendant contracted to sell plaintiff so much milk a day for a year, the plaintiff to come for it, and where, though the defendant and all his cattle and all the products of his farm were quarantined and though, shortly after, the cows were killed by the proper public authorities to prevent the spreading of the hoof and mouth disease, the defendant was held liable for failure to deliver milk under the contract. That was because the contract did not require the milk to be produced on the premises and it was not illegal for the defendant to deliver milk or procure its delivery.

## CHANDLER *v.* WEBSTER.

**(High Court of Justice, King's Bench Division. [1904] 1 K. B. 493.)**

COLLINS, M. R.[192] In this case the plaintiff agreed with the defendant for the hire of a room for the purpose of viewing the coronation procession [of King Edward VII]. The price of the room was to be £141 15s. The plaintiff paid £100 before the date fixed for the procession, leaving a balance of £41 15s. unpaid. The procession did not take place [because of the illness of King Edward]. The plaintiff thereupon brought an action to recover the £100 which he had paid, and in that action the defendant counterclaimed for the unpaid balance of £41 15s. The learned [trial] judge [Wright, J.], decided that both the claim and the counterclaim failed; that the plaintiff was not entitled to recover back the £100 paid by him and the defendant was not entitled to be paid the balance of £41 15*s*. Against this decision both the parties appealed, the defendant's appeal being the first in date. He contends that in the event which happened, having regard to the terms of the contract, he is entitled to the balance of £41 15*s*. which the plaintiff has refused to pay him. I will deal with that appeal first. The question appears really to depend upon the terms of the contract made by the parties. Contracts in these cases arising out of the postponement of the coronation have formed the subject of several decisions; and it has been held that, in cases where the doctrine of Taylor v. Caldwell, 3 B. & S. 826, applies, that is to say, where the parties have made no express stipulation that money paid for viewing the procession shall be returned in the event of no procession taking place, and where, under the circumstances of the contract, no condition to that effect can be implied, the result of the procession being prevented from taking place is, that the further performance of the contract having become impossible, the person who has paid his money in pursuance of it, on the footing of the contract being subsequently performed in full, must nevertheless, abide the loss of what he has paid; and the person to whom a sum would have become payable on performance of the contract must also abide the loss, and cannot impose on the other party the obligation of paying that sum; in the event which has happened the fulfilment of the contract having become impossible, both parties are relieved from further performance of it. The question is how the law so laid down is to be applied in the present case.

Dealing first with the defendant's counterclaim for the balance of £41 15*s*., I think that, upon the authorities, it is clear that the defendant has a right to recover that balance, if the contract was that the price of the room should be paid before the time at which the procession became impossible. A person who has agreed to pay a sum

[192] The statement of facts, the opinions of Romer, L. J., and Mathew, L. J., and parts of the opinion of Collins, M. R., are omitted.

of money cannot be in a better position by reason of his having failed to perform his obligation to pay it at the time when he ought to have done so, than that which he would have occupied if he had paid the money in accordance with the contract. If that be so, the question which we have to consider is whether the contract entered into bound the plaintiff to pay the price of the room before the date at which the procession became impossible. In my opinion it did so bind him, and it was not a condition precedent to his obligation to pay the money that the procession should take place. The terms of the contract are to be gathered from the correspondence between the parties. I need not refer to it in detail. It appears to me to be clear upon the correspondence that the understanding was that the £141 15*s.* for the use of the room was to be paid, either immediately or, at any rate, as soon as possible after the making of the contract, and certainly before the date when the procession became impossible. * * * That being so, in my opinion the application of the law, as established by the authorities which have been cited, to this case, is clear. The fulfilment of the contract having become impossible through no fault of either party, the law leaves the parties where they were and relieves them both from further performance of the contract. Therefore, if by the contract the obligation to pay for the room did not arise until after the procession had taken place, then, the obligation being based on the happening of the procession which has become impossible, the hirer is relieved from that obligation; but if by the contract the obligation to pay for the room had accrued before the procession became impossible, the hirer, if he has paid, cannot get his money back, and, if he has not paid, is still liable to pay. That being so, it appears to me that the defendant is entitled to succeed on the counterclaim.

Then, with regard to the plaintiff's claim for a return of the £100, to a very considerable extent I have already dealt incidentally with the considerations which apply to that claim. The plaintiff contends that he is entitled to recover the money which he has paid on the ground that there has been a total failure of consideration. He says that the condition on which he paid the money was that the procession should take place, and that, as it did not take place, there has been a total failure of consideration. That contention does no doubt raise a question of some difficulty, and one which has perplexed the courts to a considerable extent in several cases. The principle on which it has been dealt with is that which was applied in Taylor v. Caldwell, 3 B. & S. 826,—namely, that, where, from causes outside the volition of the parties, something which was the basis of, or essential to the fulfilment of the contract, has become impossible, so that, from the time when the fact of that impossibility has been ascertained, the contract can no further be performed by either party, it remains a perfectly good contract up to that point, and everything previously done in pursuance of it must be treated as rightly done, but the par-

ties are both discharged from further performance of it. If the effect were that the contract were wiped out altogether no doubt the result would be that money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine; it only releases the parties from further performance of the contract. Therefore the doctrine of failure of consideration does not apply.

The rule adopted by the courts in such cases is, I think, to some extent, an arbitrary one, the reason for its adoption being that it is really impossible in such cases to work out with any certainty what the rights of the parties in the event which has happened should be. Time has elapsed, and the position of both parties may have been more or less altered, and it is impossible to adjust or ascertain the rights of the parties with exactitude. That being so, the law treats everything that has already been done in pursuance of the contract as validly done, but relieves the parties of further responsibility under it. In the case of Blakeley v. Muller & Co., [1903] 2 K. B. 760, Wills, J., in giving judgment made some valuable observations on this point. He said, with regard to the decision in Appleby v. Myers, L. R. 2 C. P. 651, "That decision is, in my opinion, distinctly in point. The argument for the plaintiffs must be that the contract was rescinded *ab initio*. There is no authority to warrant that contention, and I cannot think it is well founded. The process of constructing a hypothetical contract by supposing what terms the parties would have arrived at if they had contemplated the possibility of what was going to happen is, to my mind, very unsatisfactory. It is very difficult to construct such a contract for them. Probably, in the present case, the defendants would have stipulated for compensation for their outlay, and the plaintiffs for a return of their money; but it is impossible to say with any certainty what the result of their bargaining would have been." It seems to me that he there points out the reason why the courts have been obliged to stop short where they have, namely, at the position of the parties when the further performance of the contract was excused for both, and why they have felt themselves constrained to adopt what appears to be a more or less arbitrary rule on the subject. * * *

For these reasons I think the judgment was right as to the claim, but wrong as to the counterclaim. The appeal must therefore be allowed and the cross-appeal disallowed.

*Appeal allowed and cross-appeal dismissed.*[193]

[193] See Krell v. Henry, [1903] 2 K. B. 740. Compare Herne Bay Steamboat Co. v. Hutton, [1903] 2 K. B. 683. Of these two cases and Chandler v. Webster, Professor Corbin has said: "It is to be observed in the first place that these coronation cases do not belong under the head of impossibility of performance. In all three of the cases mentioned in the text the performance of every act agreed upon by plaintiff and defendant remained as easy to perform after the king's illness as before. These acts consisted of delivery of posses-

## PERLEE *v.* JEFFCOTT.

(Supreme Court of New Jersey, 1916. 89 N. J. L. 34, 97 Atl. 789.)

Action by John H. Perlee against Robert C. Jeffcott.

From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

On August 30, 1913, Perlee, by writing under his hand and seal, in consideration of $500 cash and a promissory note for $500 payable September 1, 1914, gave and granted to Jeffcott an option to purchase a farm.

In case the option was not exercised by Jeffcott and all its terms complied with, the note was to be paid at maturity. If Jeffcott purchased the premises, the $1,000 paid, represented by the cash and the note, was to be credited on the purchase price. On August 20, 1914, the barn, which added substantially to the value of the premises, was struck by lightning, and, with other outbuildings, was totally destroyed. There is a suggestion in the case that the option was extended for two days from September 1, 1914, but no proof that this extension was by mutual agreement, or that it was anything more than the voluntary act of Perlee. On September 2d Jeffcott demanded the return of the cash and the note. On September 3d Perlee by written notice offered to extend the option to September 10th and to reduce the purchase price by $2,000 on account of the loss by fire. The defendant had insured the house and premises for $5,000 about two months after the date of the option. This suit was brought on the note in January, 1915, and Jeffcott counterclaimed the cash he had paid. The trial judge gave judgment for the plaintiff for the amount of the note, and also on the counterclaim.

SWAYZE, J. The only ground upon which the cash paid by Jeffcott may be reclaimed is that there was a total failure of consideration. The consideration in a legal sense was Perlee's promise to keep the offer to sell open for a year. It was the promise, not the performance. The offer itself was a continuing offer, open to Jeffcott's acceptance at any time, and Perlee's promise was partially performed. Jeffcott has had the benefit of the option, and Perlee has suffered the detriment of being unable to sell or mortgage or lease his property for nearly the whole year. What has happened has been, not a total failure of consideration, but an inability to perform, due, not to any fault of either

sion by the owner on the one hand and the payment of the agreed sum by the hirer on the other hand." Corbin's Anson on Contracts, 430, n. Accordingly, Professor Corbin regards the real question as one of whether the law shall construct conditions precedent or subsequent, as the case may require. He points out that in Chandler v. Webster, "the active duty of the defendant to pay actually arose," and asks: "Should it be discharged by the occurrence of some constructive condition subsequent?"

party, but to an act of God. The contract was for the conveyance of a specific thing—the farm and premises upon which Jeffcott resided. Both parties undoubtedly contemplated the conveyance of the buildings as an essential part of the premises. The destruction of the barn made this impossible. Such a contract is to be construed as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor. Taylor v. Caldwell, 3 B. & S. 826, 834. In that case Blackburn, J., said:

"The principle seems to us to be that in contracts in which the performance depends on the continued existence of a given person or thing a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."

Taylor v. Caldwell is the leading case. It has been approved by our Court of Errors and Appeals in Middlesex Water Co. v. Knappmann Whiting Co., 64 N. J. Law, 240, at 252, 45 Atl. 692, 49 L. R. A. 572, 81 Am. St. Rep. 467, and was there recognized as an exception to the rule. It has been followed and applied under varying states of fact in several cases growing out of contracts made in view of the proposed coronation of Edward VII, which was postponed on account of his illness. Elliott v. Crutchley, [1903] 2 K. B. 476, affirmed [1906] 1 K. B. 565; Herne Bay Steamboat Co. v. Hutton, [1903] 2 K. B. 683; Krell v. Henry, [1903] 2 K. B. 740; Civil Service Co-operative Society v. General Steam Navigation Co., [1903] 2 K. B. 756.

We think therefore that the trial judge was right in giving judgment for the plaintiff on Jeffcott's counterclaim to recover the cash paid.

The same reasoning leads us to think he was wrong in giving judgment against the defendant for the amount of the note. This note was not due when the performance of the contract became impossible by reason of the fire. Both parties were excused from further performance. Jeffcott was excused from payment of the note as Perlee was excused from his promise to keep the option open for the whole year. The option provided that the note when paid should be credited on account of the purchase price of the farm. Since the farm could no longer be conveyed in the condition contemplated by the parties, the contract in this respect could not be carried out. There should have been judgment for the defendant in the claim on the note.

The judgment must be reversed, but without costs, and the record remitted for a new trial.[194]

[194] See Martin Emerich Outfitting Co. v. Siegel, 237 Ill. 610 (1909).

If the performance of a contract for the sale of existing goods, where the title has not passed to the buyer and the risk has not been assumed by him, becomes impossible without the fault of the promisor because of the destruction of the goods after the making of the contract, the seller is excused from performance. J. S. Potts Drug Co. v. Benedict, 156 Cal. 322 (1909).

## PETER GOULED *v.* MICHAEL L. HOLWITZ.

(Supreme Court of New Jersey, 1921. 113 Atl. 323.)

On defendant's rule to show cause after verdict for plaintiff.

GUMMERE, C. J. The plaintiff and defendant entered into an agreement in writing, under date of December 13, 1918, by the terms of which the former rented to the latter a team of horses, a farm wagon, and a set of double harness. They were delivered to the defendant upon the following expressed understanding:

"To give board to said horses, free of charge for their care, and for reasonable work, for a period of twelve weeks from above date, and to return said horses and other property upon demand in as good condition as they are at present."

During the period covered by the bailment one of the horses was taken sick. A veterinarian was thereupon sent for by the defendant, who diagnosed the horse's disease as spinal meningitis, and left instructions as to what should be done. These instructions were carried out. A day or two afterwards an agent from the Society for the Prevention of Cruelty to Animals visited the defendant's premises, and, going to a shed where the horse was stabled, shot and killed him over the protest of the defendant. It is submitted that proper care had been taken of the animal by the defendant up to the time he became ill. The plaintiff conceiving that, under the terms of the contract of bailment, the defendant was not excused from the performance of his agreement to return the horse in good condition, notwithstanding the above-recited facts, instituted the present action to recover its value. The trial judge, concurring in the plaintiff's view of the law, charged the jury that the defendant's agreement to return the horse in good condition was an absolute one, and that consequently he was liable for the value of the horse. The jury thereupon found for the plaintiff and assessed his damages at $350. The determination of this rule depends upon the soundness of the instruction to the jury.

As a general rule, where a party contracts expressly to do a thing not unlawful, the contractor must perform his agreement, and if, by some unforeseen accident, the performance is prevented, he must pay damages for not doing it. And there is no distinction between accidents that could be foreseen when the contract was entered into and those that could not have been foreseen. Where from the result of such an accident one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or, rather, leaves it where the agreement of the parties has put it, and will not insert for the benefit of one of the parties by construction an exception which the parties have, either by design or neglect, omitted to insert in their agreement. School Trustees v. Bennett, 27 N. J. Law, 513, 72 Am. Dec. 373; Middlesex Water Co. v. Knappmann Whiting Co., 64 N. J. Law, 240, 45 Atl. 692, 49 L. R. A. 572, 81 Am. St. Rep. 467. But, as was stated in the case last cited, this general rule is not universally applicable, and one

of the exceptions to it is where the continued existence of something essential to the performance is an implied condition of the contract; and the question, therefore, before us is whether the agreement to return the horse at the end of the term of bailment in as good condition as it was when the plaintiff received it was absolute, and so within the general rule, or whether its destruction, without the fault of the defendant, before the time of its return to the plaintiff had arrived, brought the case within the exception to the rule, and absolved the former from performance. Speaking of a similar contract, Peckman, J., in the case of Young v. Leary, 135 N. Y. 569, 576, 32 N. E. 607, 609, declared that where the contract relates to the hiring for use of the thing hired, and the bailee expressly agrees to redeliver the article hired upon the determination of the term of hiring, there is implied a condition of the continued existence of the thing which is the subject of the contract, and if it perish without any fault of the hirer, so that redelivery becomes impossible, the hirer is excused. That, for instance, if a horse be delivered to one under an express promise to redeliver when demanded, and the horse die before the demand, and without fault on the part of the bailee, he is excused. And he concludes with the following statement of the legal rule:

"The authorities establish the principle that where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done, then in the absence of any express or implied warranty that a thing shall exist, the contract is not to be construed as a positive contract, but is subject to an implied condition that the party shall be excused in case before breach the contract becomes impossible [of performance] from the perishing of the thing without the default of the contractor."

And Swayze, J., in the case of Perlee v. Jeffcott, 89 N. J. Law, 34, 97 Atl. 789, says that the true rule in cases of this kind is laid down by Mr. Justice Blackburn in Taylor v. Caldwell, 3 B. & S. 826, namely, that:

"In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing [without the fault of the person against whom the contract is sought to be enforced] shall excuse the performance."

In our opinion, the present case comes within exception to the general rule stated in the Middlesex Water Co. Case, and is controlled by the decision in Perlee v. Jeffcott, *supra*.

The rule to show cause will be made absolute.

## ROWE ET AL. *v.* TOWN OF PEABODY.

## TOWN OF PEABODY *v.* UNITED STATES FIDELITY & GUARANTY CO.

**(Supreme Judicial Court of Massachusetts, 1911. 207 Mass. 226, 93 N. E. 604.)**

Actions by Ransome Rowe and another against the Town of Peabody, and by the Town of Peabody against the United States Fidelity & Guaranty Company, tried together. The first was contract on an account annexed for work, labor, and materials and machinery furnished the town of Peabody in the construction of a tunnel for its waterworks. The second action was on a bond given by the Guaranty Company to secure the performance by Rowe & Perini (the plaintiffs in the first action) of a contract to construct the tunnel. The court directed a verdict for the defendant in the first case, and Rowe & Jerini excepted. In the second case a verdict was returned for the plaintiff for the face of the bond and interest, and the Guaranty Company excepted. Exceptions overruled.

SHELDON, J.[195] The plaintiffs in the first suit, hereinafter called the contractors, made in July, 1905, an agreement with the town of Peabody for the building of a tunnel from Suntaug Lake for a distance of 1,550 feet, and for the laying of certain pipe and the performance of other specified work. The contractors were to do all the work and supply the materials, so as to furnish to the town a completed tunnel with all its equipment, and were to be paid fixed prices for the different parts of what they were to do. They gave to the town a bond with the defendant in the second suit as surety, conditioned for their faithful performance of the contract. The work was to be a timber-supported tunnel, in which was to be constructed a masonry conduit 30 inches in diameter. The judge instructed the jury that the contract required as essential conditions "the construction of a tunnel 30 inches in diameter by the use of timber props, roof supports and lagging. It was not a contract for constructing a suitable tunnel by whatever method should become available." He further ruled that under the contract the officers acting for the town had no power "to require the contractors without their consent to construct a tunnel by pneumatic process 48 inches in diameter. Such requirement would not be a mere variation in form and dimensions which the contractors must adopt, * * * but would be the substitution of a different contract." Both of these rulings were made at the request of the contractors and apparently without objection by any party. They must now be taken as correct. MacKnight Flintic Stone Co. v. New York, 160 N. Y. 72, 54 N. E. 661.

The contractors began to construct the tunnel as required by the

[195] Part of the opinion is omitted.

contract, but presently found that owing to the nature of the soil there were serious difficulties, so great, they contended, as to make the construction in that way practically impossible, and certainly so great as to make it impracticable without a very large and disproportionate expense, such as they were not able to incur. Finally, on October 27th, after some negotiations with the engineer and with the committee of the town, which so far as necessary will be referred to hereafter, the contractors sent to the committee a letter formally abandoning the contract. The town then completed the tunnel by what is called the pneumatic construction, which necessarily involved a cost of $47,805.12 in excess of the contract price. It was also necessary under this mode of construction to make the diameter of the tunnel 48 inches instead of 30 inches. This mode of construction, as already pointed out, was essentially different from that originally contracted for; but it does not seem to have been disputed that if not the only practicable method, it was at least the cheapest, most expeditious and most economical method by which the tunnel could be constructed.

The first contention made in behalf of the contractors is that the performance of their contract was impossible, or at least that it might have been found by the jury to be impossible, and that for this reason the contract was no longer binding upon the parties. They argue that a contract to build a particular tunnel of specified dimensions by a described method of construction is like a contract to ship goods by a certain steamer, or to sell potatoes to be raised upon certain specified land, or to account for the proceeds of butter to be made in a certain factory, or to build a bridge by the caisson method—in each of which cases it has been held that the continued existence of the subject-matter of the contract or the continued practicability of the essential details that are stipulated for is an implied condition of the continued validity of the agreement. Krell v. Henry, [1903] 2 K. B. 740; Chandler v. Webster, [1904] 1 K. B. 473; Howell v. Coupland, 1 Q. B. D. 258; Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; Buffalo & Lancaster Land Co. v. Bellevue Improvement & Land Co., 165 N. Y. 247, 59 N. E. 5, 51 L. R. A. 951; Lovering v. Buck Mountain Coal Co., 54 Pa. 291. This is the same principle which we recently considered in Hawkes v. Kehoe, 193 Mass. 419, 79 N. E. 766, 10 L. R. A. (N. S.) 125. It has frequently been applied in the courts. See, besides the cases already cited, Agnus v. Scully, 176 Mass. 357, 57 N. E. 674, 49 L. R. A. 562, 79 Am. St. Rep. 318; Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654; Elliott v. Crutchley, [1903] 2 K. B. 476; McKenna v. McNamee, 15 Canada S. C. 311. But the question is as to the construction of the contract which the parties have made. This was recognized in most of the cases above cited. One who chooses to contract absolutely for the performance of a certain thing is not to be excused from such performance, in the

absence of any other ground, merely because it either was originally or has since become impossible of execution. As was said by Blackburn, J., in the leading case of Taylor v. Caldwell, 3 Best & S. 826, 833, "Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible." This also has been frequently declared by the courts. Jones v. St. John's College, L. R. 6 Q. B. 115, 127; Paradise v. Jane, Aleyn, 26; Atkinson v. Ritchie, 10 East 530; Hill v. Sughrue, 15 M. & W. 253; Harvey v. Murray, 136 Mass. 377; Drake v. White, 117 Mass. 10; Stees v. Leonard, 20 Minn. 494 (Gil. 448). As was said by the present Chief Justice in Butterfield v. Byron, 153 Mass. 517, 520, 27 N. E. 667, 668, 12 L. R. A. 571, 25 Am. St. Rep. 654, "the fundamental question is, What is the true construction of the contract?"

In the case at bar the contract expressly stated that the nature of the underground plot had not been investigated, and that the committee of the town denied any responsibility for its character. The contractors also agreed by the twenty-third article of the contract to take all responsibility for the work and to bear all losses resulting on account of its nature or character or because of the nature of the ground being different from what was estimated or expected. The difficulties which it was claimed made the prescribed mode of construction impossible arose wholly from the character of the soil beneath the surface. They were warned that there might be such difficulties, and no one could say in advance, that these might not be very great, or even insuperable. But they chose to make their agreement an absolute one, and the court cannot relieve them from the bargain which they saw fit to make. The case is well within the decisions. Boyle v. Agawam Canal Co., 22 Pick. 381, 33 Am. Dec. 749; Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762; Eastman v. St. Anthony Falls Water Power Co., 24 Minn. 437; Thorn v. Mayor of London, L. R. 9 Exch. 163; L. R. 10 Exch. 112, 1 App. Cas. 120. There are three English cases, decided respectively in the House of Lords or in the Court of Appeals, which resemble closely the case at bar. Jackson v. Eastbourne Local Board, 2 Hudson, Building Contracts (3d Ed.) 67; Bottoms v. Lord Mayor of York, *Id.* 220; and McDonald v. Mayor of Workington, *Id.* 240. In the first of these cases, Lord Esher said in the Court of Appeal: "When a man is asked to tender upon specifications, he must inquire whether it is possible for him to do the work which he engages to do, and if he does not then find out that it is impossible, he is not excused by reason that, from the difficulties of the work it is afterwards found impossible. He has contracted to do it, and must fulfil his contract."

We are clearly of opinion that these contractors were not excused from the performance of their agreement by reason of its alleged im-

possibility, but that they were bound either to accomplish what they had promised to do or to respond in damages for their failure. * * *

The exceptions in each case must be overruled.

*So ordered.*[196]

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## PHILLIPS *v.* ALHAMBRA PALACE COMPANY.

(High Court of Justice, Queen's Bench Division. [1901] 1 Q. B. 59.)

The plaintiffs were a troupe of four music-hall performers, and in October, 1897, they entered into a contract with certain music hall proprietors calling themselves the Alhambra Palace Company to appear and perform at the Alhambra Palace Hall, for a period of twelve nights commencing August 8, 1898, at a weekly salary of 28*l.*, and also for a further period of twelve nights commencing October 23d, 1899, at a similar salary. It was provided by the contract that "in the event of any unforeseen calamity by which the business may be suspended or stopped, all engagements will terminate immediately." In the contract the proprietors of the music hall were described simply as the Alhambra Palace Company, and it was signed on their behalf by T. H. Greasley, who was described as the managing director. The Alhambra Palace Company was in fact a partnership, which at the time of the making of the said contract consisted of three partners, T. H. Greasley, H. Willford, and P. Robson, but it was admitted that the plaintiffs had at that time no knowledge of the composition or nature of the company with which they were contracting. The property of the company was at that time heavily mortgaged. On December 16, 1897, Willford died, and the business was carried on by the surviving partners, but no notice was given to the plaintiffs of the death. In August, 1898, the plaintiffs carried out the first part of their engagement, and were paid for their services. On July 4, 1899, the mortgagees sold the music hall under their power of sale. The plaintiffs had meanwhile been on tour fulfilling engagements abroad, and returned to this country in September, 1899, in readiness to perform the second part of their engagement in October. On arriving at Plymouth they received a notice to the effect that in consequence of the death of one of the proprietors and consequent dissolution of partnership, the Alhambra Palace had been sold and closed, and all contracts were void. The plaintiffs declined to accept the notice cancelling their engagement, and claimed their right to carry it out. They presented themselves at the music hall at the time fixed by the contract, but were not allowed to perform. They then commenced this action in the High Court against

[196] The general rule as to impossibility where there are unexpected difficulties is applied in Runyon v. Culver, 168 Ky. 45 (1916).

the surviving partners, and the executor of Willford to recover the sum of 56*l.*, being the amount of salary which they would have been entitled to if the contract had been carried out. The action was remitted for trial to the county court. The defendants resisted the claim on the grounds—(1) that, the contract being one for personal service, was cancelled by the death of one partner, and (2) that the sale by the mortgagees was an "unforeseen calamity." The county court judge overruled both objections and gave judgment for the plaintiffs as against the surviving partners Greasley and Robson, but dismissed the executors of Willford from the action. The defendants appealed.

LORD ALVERSTONE, C. J.[197] * * * With regard to the second point, I do not think that interference by the mortgagees in the exercises of their power of sale can be regarded as an unforeseen calamity of the kind contemplated by the provision of the contract. As to the other point, whether the death of one partner puts an end to the contract, there is more difficulty. The principle of law, however, seems to be that it must be determined in each case whether the obligation which it is sought to enforce depended upon the personal conduct of the deceased party. * * * If in any particular case the contract is one which has relation to the personal conduct of the contracting party, then the death of that party puts an end to the contract; if, on the other hand, it has no such relation, the death of the contracting party has not that effect. In the present case I have come to the conclusion that the plaintiffs did not rely on the personnel of the partners, who were unknown to them. And under those circumstances I am of opinion that the liability contracted by the three partners can after the death of one of them be enforced against the two survivors.

The appeal must be dismissed.

KENNEDY, J. I agree that the case is one of some difficulty. I think on the authority of the decisions and also of the text books, the true question in each case must be, What did the contracting parties intend to do by their contract? Each contract must be considered with reference to its terms, to the relation between the parties, and the nature of the engagement. It may be that the contract is so dependent on the continued existence of the partnership business, as in Tasker v. Shepherd, 6 H. & N. 575, or on the personal honesty or capacity of the particular partner, as in Robson v. Drummond, 2 B & Ad. 303, that the death of one partner will put an end to the contract altogether. * * * It is clear that no absolute rule can be laid down which shall be applicable to all cases. The case of Tasker v. Shepherd, *supra*, has certainly gone as far as any case. But even there the judges did not go upon the ground that the case fell within the principle of those cases

[197] Parts of the opinions are omitted.

in which the contract has been held to be put an end to by reason of the personal skill of the parties being involved. They only said that it might be so. They expressed no opinion upon it. The real ground of the decision was that the contract had reference to the existing partnership business only. So I can conceive that a contract such as we have to deal with in the present case might be made under circumstances under which it would be unjust to compel the plaintiffs to perform for the surviving partners, and under which it would be equally unjust to compel the surviving partners to employ them. But here, if the plaintiffs are provided with the agreed stage on which to perform, and are only required to perform at the agreed time and under the agreed conditions, it surely cannot matter to them who the particular persons are by whom they are to be paid. The case does not fall within the decision of Tasker v. Shepherd, *supra*.

*Appeal dismissed.*[198]

[198] Compare Brace v. Calder, [1895] 2 Q. B. 253.

While the principal case is to be supported, it displays more liberality than is customary, whether the employer who dies is the only employer or is one of several partners. In Yerrington v. Greene, 7 R. I. 589 (1863), for example, the plaintiff was employed by a manufacturing jeweler named Keach as the latter's clerk and salesman under a three years' contract. After about a year of the service Keach died and the administrators, after continuing to employ the plaintiff for two months, declined longer to employ him. When he sued for breach of his three years' contract, it was held, that he could not recover. Ames, C. J., said:

"It is, in general, true, that death does not absolve a man from his contracts; but that they must be performed by his personal representatives, or their nonperformance compensated, out of his estate. An exception to this rule, equally well established, at both the civil and common law, is, that in contracts in which performance depends upon the continued existence of a certain person or thing, a condition is implied, that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. The implication arises in spite of the unqualified character of the promissory words, because, from the nature of the contract, it is apparent that the parties contracted upon the basis of the continued existence of the particular person or chattel. * * *

"Does the case at bar fall within the general rule, or within the exception we have been considering? This must depend upon the nature of the contract, whether one, requiring the continuing existence of the employer, Keach, for performance on his part, or one which could, according to its spirit and meaning, be performed by the defendants, his administrators. The contract was, to employ the plaintiff as clerk and agent of the intestate, in his business, in New York and Philadelphia; and it seems to us undoubted, that the continued existence of both parties to the contract for the whole stipulated term, was the basis upon which the contract proceeded, and if called to their attention at the time of the contract, must have been contemplated as such by them. The death of the plaintiff within the three years would certainly have been a legal excuse from the further performance of his contract; since it was an employment of confidence and skill, the duties of which, in the spirit of the contract, could be fulfilled by him alone. If this be the law in application to a covenant for ordinary service (Shep. Touch. 180), how much more in application to a contract for service of such confidence and skill as that

## THOMAS F. MOORE *v.* JAMES P. ROBINSON.

(Supreme Court of Illinois, 1879. 92 Ill. 491.)

PER CURIAM. Assumpsit by appellant against appellee, to recover money paid on the following agreement:

of a clerk and agent for sale. On the other hand, this employment could continue no longer than the business in which the employer was engaged, and the plaintiff retained. The intestate, when living, could, by the contract, have required the services of the plaintiff in no other business than that in which he had engaged him, and with no other person than himself. It would seem, then, necessarily to follow, that when the death of the employer put a stop to this business, and left no legal right over it in the administrators, except to close it up with the least loss to the estate of their decedent, they were, by the contract, bound no longer to employ the plaintiff, any more than he to serve them. The act of God had taken away the master and principal,—the law had revoked his agency, and stopped the business to which alone his contract bound him,—and if he would serve the administrators in winding up the estate, it must be under a new contract with them, and under renewed powers granted by them. Any other result than that this contract of service was upon the implied condition that the employer, as well as the employed, was to continue to live during the stipulated term of employment, would involve us in the strange conclusion, that the administrators might go on with the business of their intestate, in which the plaintiff must continue with powers unrevoked by the death of his principal, or, that he, with new powers from them, was bound by the contract to serve them as new masters, and in a different service, and that they were bound to grant him such powers, and employ him for the stipulated time in such service. The novelty of such a claim, and the contradiction of well-settled principles necessary to maintain it, justify the ruling of the judge who tried the cause; and this motion [for a new trial] must be dismissed with costs, and judgment entered [for defendants] upon the verdict."

In Lacy v. Getman, 119 N. Y. 109 (1890), the plaintiff contracted to work for one McMahan upon his farm for a year for $200. In July, after about three months of the service, McMahan died, leaving the farm to his widow for life and making the defendant his executrix. The defendant did not employ plaintiff, but he continued to work on the farm under the direction of the widow until the end of the year contracted for with McMahan and then sued the defendant as executrix for the full year's wages. It was held that he could recover only for services rendered up to the death of McMahan. Finch, J., based the decision on the personal relation, saying, that "it must be conceded that the death of the servant, employed to render personal services under the master's daily direction, dissolves the contract. Babcock v. Goodrich, 3 How. Pr. (N. S.) 53. But if that be so, on what principle shall the master be differently and more closely bound? And why shall not his death also dissolve the contract? There is no logic and no justice in a contrary rule. The same reasoning which relieves the servant's estate relieves also the master's, for the relation constituted is personal on both sides and contemplates no substitution. If the master selects the servant, the servant chooses the master. It is not every one to whom he will bind himself for a year, knowing that he must be obedient and render the services required. Submission to the master's will is the law of the contract which he meditates making. He knows that a promise by the servant to obey the lawful and reasonable orders of his master within the scope of his contract is implied by law, and a breach of this promise in

"$1,000 SPRINGFIELD, ILL., Jan. 26, 1875.

"Received of Thomas Moore one thousand dollars, in consideration of my agreeing hereby to defend his brother, James Moore, who is indicted for having in possession and passing counterfeit money, and secure his acquittal and release from said charge in full, and forever keep him harmless from the same. And I specially agree that he shall be set at full liberty at the June term of the U. S. District Court, A. D. 1875. Six hundred dollars of said amount is paid to me in cash, and the other four hundred paid in a note of the said Thomas Moore, due first day of July, A. D., 1875. I further and specially

a material matter justifies the master in discharging him. King v. St. John, Devizes, 9 B. & C. 896. One does not put himself in such relation for a fixed period without some choice as to whom he will serve. The master's habits, character, and temper enter into the consideration of the servant before he binds himself to the service, just as his own personal characteristics materially affect the choice of the master. The service, the choice, the contract are personal upon both sides, and more or less dependent upon the individuality of the contracting parties, and the rule applicable to one should be the rule which governs the other.

"If now to such a case—that is, to the simple and normal relation of master and servant, involving daily obedience on one side and constant direction on the other—we apply the suggested test of possibility of performance in substantial accord with the contract, the result is not different. It is said that if the master dies his representatives have only to pay, and any one may do that. But under the contract that is by no means all that remains to be done. They must take the place of the master in ordering and directing the work of the farm, and requiring the stipulated obedience. That may prove to effect a radical change in the situation of the servant, as it seems to have done in the present case, leading the plaintiff to the verge of refusing to work further for either widow or executrix, whose views apparently jangled. The new master cannot perform the employer's side of the contract as the deceased would have performed it, and may vary so far from incapacity or fitful temper or selfish greed, as to make the situation of the servant materially and seriously different from that which he contemplated and for which he contracted.

"We are, therefore, of opinion that in the case at bar the contract of service was dissolved by the death of McMahan, and his estate was only liable for the services rendered to the date of his death."

It appears, however, that what was really and properly worrying the court was that the plaintiff performed on the farm for the widow yet was asking the executrix to pay. There being no work to do for the executrix, the plaintiff, to mitigate damages, should have sought other work of the same kind, even if the contract survived and the executrix refused performance, and as he did not do so, and made no showing of inability to get other work at as good wages, as to which, contrary to the usual rule (3 Williston on Contracts, § 1360) the unusual circumstances should be deemed to place the burden of proof on him, he failed to make out a case even on his theory that the contract survived. The actual decision may be supported without adopting the reasoning of the court.

Professor Williston has well said, that "Undoubtedly in many contracts of employment the undertaking of the employer is personal in character. But the assumption frequently made in the cases that because the contract of the

agree that if said James Moore is not released at said time, I will pay back to said Thomas Moore the six hundred dollars paid me in cash, and deliver to him his note for four hundred dollars given this day, with ten per cent. interest from the date hereof.

(Signed) JAMES P. ROBINSON."

James Moore did not appear at the June term, 1875, or at any subsequent term of the United States District Court, to answer to the indictment pending against him, and has not been tried upon or released from the said charge. Neither appellant nor appellee is shown to be in any wise in fault for the nonappearance of James Moore to answer to the indictment. It is very clear that the only contingency upon which appellee was entitled to retain the $600 paid him, and to collect the $400 note, was the legal acquital of James Moore upon a trial in the United States District Court. Appellee, by his contract, stipulated that he should retain the money and the note only upon the happening of that contingency. Both parties manifestly contemplated that James Moore should appear and answer to the charge, and his failure to do so is equally a surprise to both, and there is neither reason nor justice in holding that this shall operate to the prejudice of the appellant. He has not received what he agreed to pay for, and appellee has that which he agreed to refund if applicant did not receive the stipulated consideration. What appellee in good faith did, pursuant to the terms of the agreement, before ascertaining that its performance had become impossible, he is entitled to be compensated for, and this should be deducted from the $600. The balance appellant is entitled to have judgment for.

The judgment is reversed and the cause remanded.

*Judgment reversed.*[199]

employee is personal that of the employer necessary must be, seems wholly unfounded. There is no necessity logical or legal for both the promises in a bilateral contract to be personal in character because one is. The promise of a painter to paint a landscape is discharged by his physical inability to paint, but the death or illness of one who has contracted to buy the painting will not free his estate from liability. Similarly in contracts of employment the nature of the employer's undertaking should be considered in each case. If the character of the employment was such that the employer had free power to delegate the oversight of the work to another and no personal cooperation on his part was needed for the proper fulfilment of the contract, there seems no reason why his death should affect the continued obligation of the contract." 3 Williston on Contracts, § 1941, p. 3299.

[199] See 33 Harv. L. Rev. at pp. 393-4.

## ALBERT HERTER, RESPONDENT, *v.* JEREMIAH J. MULLEN AND THOMAS MULLEN, APPELLANTS.

(Court of Appeals of New York, 1899. 159 N. Y. 28, 53 N. E. 700, 44 L. R. A. 703, 70 Am. St. Rep. 517.)

MARTIN, J.[200] This action was to recover seven months' rent of a dwelling house situated upon Madison Avenue, in the city of New York. There was a lease between the parties by which the defendants rented the premises from May 1, 1894, for the period of one year, the rent payable in monthly instalments in advance. The rent for that term has been paid. By this action the plaintiff seeks to recover rent for a portion of the succeeding year, on the ground that the defendants held over after the expiration of their term, and thus became liable for the rent of the premises for that time.

The facts are undisputed. The defendants alleged as a defence to the action the making of the contract or lease with the plaintiff; that in the month of February, 1895, before the expiration of their term, they notified the plaintiff that they would not retain the premises for another year, and that after such notice the plaintiff and his agents were permitted to show the premises and to place the usual notice "To Let" upon them, which remained during the balance of the term. The defendants then specially alleged that on May 1, 1895, the defendants were prevented from yielding up the possession of the premises by the act of God in afflicting their mother, who was a member of their family, with a disease which, at that time, previously, and subsequently including May fifteenth, confined her to her bed so that it would have endangered her life to take her from the house; that for that reason and no other, of which the plaintiff had full knowledge and notice, the defendants were obliged to and did occupy a small portion of the premises until May fifteenth; that all their property, furniture, and belongings and their family were removed from the premises and every part thereof on May 1, 1895, except from the sick-room in which their mother was confined, and that they were forbidden by the physician in charge to remove her until May fifteenth, when she was at once removed.

Upon the trial it was admitted that upon the first of February, 1895, the defendant notified the plaintiff that on the first of May they would give up and surrender the possession of the premises. That they were occupied under the lease was admitted, also the rate of rent, and the fact that the defendants from necessity held over after the expiration of the lease some fifteen days. The plaintiff then admitted the facts set up in the answer as to the impossibility of the defendants' surrendering possession at the expiration of the year, so that the question presented is whether, notwithstanding the facts alleged in the answer, the plaintiff was entitled as a matter of law to recover rent for the

[200] The opinions of O'Brien, J., and Gray, J., are omitted.

succeeding year, upon the ground that the defendants held over after the expiration of their term.

The admission of the plaintiff amounts to a concession that by reason of the sickness of the defendants' mother it was impossible for them to surrender up the possession of the premises to the plaintiff; that so far as it was possible they did so; and, hence, that their retention was wholly involuntary. If there was any doubt as to the question of impossibility, it should have been submitted to the jury, and the defendants' exception to the direction of a verdict was well taken. Thus, in a word, the question is whether that impossibility justified the defendants' action, or whether, although it was impossible to surrender the entire premises, the holding of a small part for a few days imposed upon them a liability for rent for the succeeding year.

It is well settled that where a tenant voluntarily holds over after the expiration of his term, he may be held as upon an agreement to hold for a year upon the terms of the prior lease. Conway v. Starkweather, 1 Denio, 114; Commissioners of Pilots v. Clark, 33 N. Y. 251; Haynes v. Aldrich, 133 N. Y. 287, 289.

The basis of this liability is often said to be an implied agreement upon the part of the tenant to hold for another year. While I doubt, as I always have, the propriety of calling this class of obligations implied contracts, but think they are to be regarded as duties which the law imposes, yet, whether they be denominated implied contracts or duties created by law, in either case the right arises upon an implication of law and in no sense upon an express or absolute contract.

It is also well settled that where a duty or charge is created by law, and the performance is prevented by inevitable accident or the act of God, without fault of the party sought to be charged, he will be excused, but where a person absolutely and by express contract binds himself to do a particular thing which is not at the time impossible or unlawful, he will not be excused, unless through the fault of the other party. The reason given for the latter portion of this rule is that he might have provided by his contract against inevitable accident or the act of God. Harmony v. Bingham, 12 N. Y. 99; Tompkins v. Dudley, 25 N. Y. 272; Dexter v. Norton, 47 N. Y. 62.

Thus the most that can be said of the obligation that arises from the relation of landlord and tenant and follows by a general lease, is that the tenant is charged with the duty of vacating the premises at the end of his term. If he fails, it is a breach of duty and ordinarily the law implies or creates a liability on his part for another year's rent. This being a duty implied or created by law and not by an express or absolute agreement, it falls within the first part of the foregoing rule, and, hence, it is obvious that if the tenant's removal was rendered impossible by inevitable accident or the act of God, he is excused for his omission to surrender the premises, at least so far as it creates a liability for a year's rent which is implied by law.

The reason for the distinction between the effect of impossibility of performance, occasioned by inevitable accident or the act of God, upon an obligation created by express contract, and upon an obligation which the law implies, has been held to rest "upon the unwillingness of the law to at once create, impose, and exact the performance of an obligation forbidden or rendered impracticable by the interposition of Providence." School District v. Dauchy, 25 Conn. 530. Under the principle of the authorities relating to this subject, I think it is clear that, as the obligation sought to be enforced was one created by law and not by the agreement of the parties, impossibility of performance was a valid excuse, and the defendants cannot be held for the rent for the subsequent year.

Moreover, the same result may be reached upon another ground. There are many cases where the courts have implied a condition in a contract to the effect that a party is relieved from its terms where its performance has, without his fault, become impossible. The principle upon which those cases are based is that, when the contract was made, the parties contemplated that the condition which subsequently existed might arise and render performance impossible, and that the implied condition is to be construed as a part of the existing contract, and thus relieves the party from liability in case that condition arises. Dexter v. Norton, 47 N. Y. 62; Lorillard v. Clyde, 142 N. Y. 456, 462; Stewart v. Stone, 127 N. Y. 507; Spalding v. Rosa, 71 N. Y. 40, 44; Taylor v. Caldwell, 3 Best & S. 826; Robinson v. Davison, L. R. [6 Ex.] 269; Kein v. Tupper, 52 N. Y. 550, 555; Dolan v. Rodgers, 149 N. Y. 489, 492.

To hold in this case that this agreement was made upon an implied condition that the defendants should not be required to vacate the premises at the expiration of their term in the event that it was rendered impossible by inevitable accident or the act of God is quite within the principle of the authorities cited. But, be this as it may, it is manifest that the charge or liability which the plaintiff seeks to enforce was created by law and not by agreement, and that as its performance was prevented without the defendants' fault, they were excused from the onerous liability which the plaintiff now seeks to enforce.

It may well be, and doubtless is, true that the plaintiff may recover for the time the premises were occupied by the defendants, or if by reason of their failure to surrender up the premises additional damages follow, that they may be recovered in a proper action so that all damages caused by the defendants' misfortune would be borne by them, but that he cannot recover the rent for the subsequent year upon the implied contract or duty imposed by law, seems to me clear.

These considerations lead me to the conclusion that the judgment in

this action should be reversed and a new trial ordered, with costs to abide the event.

*Judgment reversed, etc.*[201]

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## HALL *v.* CROOK.

(Supreme Court of Minnesota, 1919. 144 Minn. 82, 174 N. W. 519.)

Action by Whitford M. Hall against Ida M. Crook. Judgment for defendant, and plaintiff appeals. Affirmed.

DIBELL, J.[202] This is an action to cancel a deed made by the plaintiff to the defendant. There was judgment for the defendant adjudging that the defendant was the owner of the premises described in the deed "released and free from any claim, lien, title or interst of the plaintiff." The plaintiff appeals.

The plaintiff is a widower and an uncle of the defendant. On March 26, 1910, he conveyed to her certain premises in Blue Earth county in consideration of his support during life and his burial at a designated place upon his death. The portion of the deed giving the understanding of the parties is as follows:

"It is hereby understood and agreed between the parties to this conveyance that as part of the consideration above mentioned the grantee herein named shall provide at her own cost and expense a home for the said grantor, Whitford M. Hall, upon the premises herein described and conveyed, for and during the term of his natural life, and that during said time she shall provide him with all the necessaries of life, including medical care and treatment in time of sickness or accident, and at his death shall give him a decent burial in the Elm Township Reserve Church burial ground near Diller, Nebraska, and it is further specifically agreed between the parties hereto that the rights of the said grantor, Whitford M. Hall, to a home upon such premises, and to such support, shall be and is hereby constituted a specific lien upon the lands and premises herein described and conveyed, and it is further understood and agreed that if at any time said Whitford M. Hall desires to absent himself from said premises for the purpose of visiting friends living elsewhere or for any other purpose, such absence shall not be deemed an abandonment of any of his rights hereunder, provided, that during the time or times that said Whitford M. Hall may be so absent from the home of said second party, she shall be relieved from furnishing him his living and support until he returns."

Upon the execution of the deed the plaintiff made his home with the defendant until October 1, 1910, when he shot and killed her husband.

[201] But see Mason v. Wierengo's Estate, 113 Mich. 151 (1897).

[202] Parts of the opinion are omitted.

On December 10, 1910, he was convicted therefor of murder in the second degree, and sentenced to imprisonment for life. On July 11, 1916, he was pardoned. * * *

The deed contemplated that the plaintiff should have care and support at the home of the defendant upon the premises conveyed. Fairly construed, it intended something in the way of personal care and attention on her part. When he killed her husband he made impossible the further performance of the contract by her in the spirit in which it was intended. He cannot take advantage of the impossibility of performance which he has created and his right to care and support are gone and with them the lien given therefor by the deed.

The plaintiff desired that his burial be at a church burial ground of his choice in Nebraska. The defendant's agreement to give such burial was a part of the consideration of the deed, and a substantial part. The reasons that forfeit his claim to care and support do not affect her contract obligation to give him burial. * * * [But] it does not affect the land. If ever broken the remedy will be by a personal action. The judgment barring the plaintiff from all claim to the land is therefore right. The obligation to give care and support and a home is gone and the obligation to give burial does not affect the land. * * *

*Judgment affirmed.*

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## ATCHINSON *v.* BAKER.

**(Nisi Prius, 1796. Peake Add. Cas. 103.)**

In this case (which was an action for a breach of promise of marriage) the declaration stated in general terms that in consideration that the plaintiff (being sole and unmarried) had promised to marry the defendant, the defendant (being, etc.) promised to marry the plaintiff.

All the witnesses on the part of the plaintiff proved the promise to be to marry the plaintiff in due time after the death of the defendant's father.

In this case the plaintiff was a widower upwards of forty years of age, and the defendant a widow about the same age; when the promise was made, the plaintiff was apparently in good health but the defendant afterwards discovered that he had an abscess in his breast, and for that reason refused to marry him after her father's death.

Gibbs, for the defendant, objected that this evidence was a fatal variance from the declaration. A promise to marry generally is a promise to marry immediately, but this promise was not to operate until a subsequent event had taken place.

Lord Kenyon (after directing a nonsuit on the objection to the declaration [203]) said, that if the condition of the parties was changed after

[203] The opinion of Lord Kenyon on the point of variance is omitted, and a paragraph of the facts is transposed, the original language being retained.

the time of making the contract, it was a good cause for either party to break off the connection. Lord Mansfield had held that if, after a man had made a contract of marriage, the woman's character turned out to be different from what he had reason to think it was, he might refuse to marry her without being liable to an action, and whether infirmity was bodily or mental, the reason was the same; it would be most mischievous to compel parties to marry who could never live happily together.[204]

[204] In Edmonds v. Hughes, 115 Ky. 561 (1903), in a breach of promise of marriage action defendant set up three defenses, one being that at the time he promised to marry plaintiff "she was a woman in full possession of the power of procreation and was able to bear children; that after the promise was made she voluntarily submitted to and permitted an unnecessary surgical operation to be performed upon her body, by which she was rendered unable to procreate or bear children, and will forever remain so." The court held that each of the three defenses was a valid bar to the cause of action, though it did not discuss this defense.

In Jefferson v. Paskell, [1916] 1 K. B. 57, the defendant set up that plaintiff had contracted tuberculosis, as he discovered before the date fixed for the marriage, and asked leave to raise by way of amendment a further defense that he honestly and on reasonable grounds believed the plaintiff to be in such a condition as to be unfit for marriage. The plaintiff, on special findings by the jury, had a judgment and the Court of Appeal dismissed the defendant's appeal. All the judges read judgments for dismissal. As to the amendment and the general right of recovery, Phillemore, L. J., said:

"I will deal first with the questions 3 and 4, which were put in consequence of an amended defense which the man was allowed to raise at the trial to the effect that he honestly believed her to be unfit for marriage within a reasonable time; and it is best in the first instance to determine upon its validity. I am of opinion that it is not a valid defense. A contract of marriage is in this respect like any other contract. The justification for the refusal to carry it out must be found in the actual facts, and not on belief or opinion, however reasonable or honest, as to what the facts are. If instead of want of health the question had been one of want of chastity, it will be very apparent that the objective truth, and not the subjective belief, would have to be looked for. This being so, it is unnecessary to inquire whether the answers of the jury to the two questions 3 and 4 were or were not justified by the evidence.

"Another point lies *in limine*. It was contended by counsel for the woman that ill-health is not a justification for refusal to perform the promise to marry, and for this the case of Hall v. Wright, E. B. & E. 746, 765, was cited. This case has been much observed upon; but it is unnecessary to consider its weight, because it has no bearing upon the one before us. In Hall v. Wright (*supra*), the man pleaded his supervening ill-health as his justification for refusal. The woman was willing to marry him notwithstanding. Whether the decision was that in no case could a party rely on his or her own ill-health as a justification, or whether, as some have thought, the case turned upon a point of pleading or upon the insufficiency of the degree of ill-health pleaded, it has no bearing upon a case where the ill-health is that of the insisting party. On principle it would seem that there must be some cases of mental or physical infirmity (as it has been decided that there are cases of moral infirmity) which supervening after the promise, or, I would add, first coming to the knowledge of the party after the promise, will justify him or her in refusing to marry. * * *

"Upon the other question the learned judge directed the jury that the burden

## TRAMMELL *v.* VAUGHAN.

(Supreme Court of Missouri, 1900. 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. Rep. 302.)

Actions for breach of promise of marriage. After the contract and before the date for the marriage the defendant without his fault became afflicted with a loathsome venereal and contagious disease, but despite that fact communicated to her the plaintiff insisted upon the marriage taking place, saying that she would marry him as he was and he could then go to St. Louis or some springs for treatment for three weeks or a month and she could stay with her sister, and adding that she did not believe he was sick at all. The defendant, however, refused to go on with the marriage, and this action was brought eight days after the day fixed for the marriage and before the time plaintiff was cured or could reasonably have been cured. Plaintiff recovered a verdict and defendant appealed.

MARSHALL, J.[205] 1. The principal question in this case is whether the defendant had a right to postpone the marriage upon the appearance of the disease between the date of the contract and the date appointed for its performance; in other words, stated broadly, whether the defendant would have been justified in marrying the plaintiff, even with her consent, while he had the disease. The proposition is stated thus broadly because it is incredible that the plaintiff would have been willing to marry him if she knew the nature and character of the disease. This, too, even if the consummation of the marriage was to be postponed until he could be cured. We prefer to believe she either did not know the nature and character of the disease, or else she did not believe he was so afflicted, and thought it was simply an excuse to keep from performing his contract. But there is no room for doubt upon this record that he had the disease, and there is no countervailing evidence that it made its appearance between the date of the contract to marry and the time appointed for the marriage, and without any intervening fault on his

of proof that the woman was unfit for marriage on September 12th, which is the date he takes, was on the man. In this he is in my view wrong. In every contract the party who seeks to recover damages for the breach must prove that he or she was ready and willing to perform it. Now admittedly on the date fixed for the marriage, that was April 9, the woman was not ready; she was not fit. The burden of proof was upon her to show that she would be fit within a reasonable time or that she actually became fit before breach. There was no burden upon the man to show that she was unfit. But when the woman admitted that she was not fit on April 9 she admitted no more. She did not admit that she had a permanent or even a prolonged illness. The man, if he relied on her having tuberculosis or any other permanent or prolonged illness, had to prove it, and the learned judge rightly laid the onus on him so far, and the question was rightly put as to tuberculosis, Are you satisfied that she had it?"

[205] The statement of facts is abbreviated and parts of the opinion are omitted.

part. Fortunately there are few reported precedents for the conditions present in this case. It has been held that if a party to a marriage contract develops a disease which renders it unsafe or improper for him to marry, without intervening fault on his part, between the date of the contract and the date appointed for the marriage, he is entitled to have the ceremony postponed until the result of the disease is known or he is cured. Allen v. Baker, 86 N. C. 91; Sanders v. Coleman, 97 Va. 690, 34 S. E. 621; Shackleford v. Hamilton, 93 Ky. 80, 19 S. W. 5, 15 L. R. A. 531; Mabin v. Webster, 129 Ind. 430, 28 N. E. 863. Of course, if the defendant entered into the contract knowing of such an impediment to its consummation, it would be an aggravation of the plaintiff's damages, and she would be entitled to refuse to marry him, and to treat his condition as a breach of the contract,—a fraud perpetrated upon her. Marriage is a contract, but it is not merely a civil contract, for it can only be entered into in a manner recognized by law, and can only be dissolved in a like manner. The state is the third party to every such contract, and has a direct interest therein. Blank v. Nohl, 112 Mo., loc. cit. 167, 20 S. W. 477, 18 L. R. A. 350; State v. Bittick, 103 Mo. 183, 15 S. W. 325, 11 L. R. A. 587. Certain marriages are prohibited by law because of their detrimental effects upon society and the human species. Every contract of marriage implies that the contracting parties know of no legal or physical impediment to the contractual relation and its consequences. "Wilfully to communicate a venereal disease is clearly cruelty, for it is misconduct tending to impair the health, and tends to render cohabitation unsafe;" and it is, therefore, a ground for divorce, whether specifically enumerated in the statutory causes for divorce or not. 9 Am. & Eng. Enc. Law (2d Ed.), p. 792, and cases cited; and, as specially bearing on this case, Venzke v. Venzke, 94 Cal. 225, 29 Pac. 499, and Boughner v. Boughner (Ky.), 41 S. W. 26. In State v. Marcks, 140 Mo., loc. cit. 677, 43 S. W. 1097, it was said by Sherwood, J., that intercourse with a woman, though she was willing thereto, by a man who was infected with a venereal disease, would constitute the act a common assault, for the fraud vitiated the consent; and in support of the statement he cited the cases of Reg. v. Bennett, 4 Fost. & F. 1105; Reg. v. Sinclair, 13 Cox, C. C. 28; Com. v. Stratton, 114 Mass. 303. If the principles announced in the cases hereinbefore cited be correct, it is also true that it is legally as well as morally wrong for a man, while infected with such a disease, to marry; and a man, for such cause, is entitled to demand a postponement of the marriage until he is cured. If the thing to be performed becomes unlawful, without his intervening fault, after the contract is entered into, the performance is excused by force of law. Sauner v. Insurance Co., 41 Mo. App. 480. The idea that the ceremony should be performed, and the consummation of the marriage postponed until he is cured, is not only intolerable, but obnoxious to a proper subservience of the public interests and morals. This, too, whether the woman knows his condition, and consents to such an arrangement, or

not; for, though she may be willing to waive the defect, or be indifferent to the condition or its consequences to her and her children, the third party to the contract, the state, has a right to and does object. If the disease is of a temporary character,—such as was the case here,—and could be easily cured, the defendant is entitled to postpone the marriage until he is cured; [206] and, if the disease is of a permanent character,—such as was the fact in the North Carolina, Kentucky, and Virginia cases cited,—the defendant is not only entitled to refuse to carry out the contract, but it is his duty to do so.

2. The instruction given by the court of its own motion was to the effect that, if the disease was of a temporary character, and could ordinarily be cured in a reasonable time, and if the plaintiff knew its character, and consented to marry him, and that he should afterwards subject himself to proper treatment, then the disease constituted no defense in this case; otherwise if the disease was permanent, or rendered the defendant unfit for the discharge of marital duties. For the reasons given, this instruction is erroneous. The fifth and eighth instructions asked by the defendant and refused by the court, to the effect that under the circumstances of this case the defendant had a right to postpone the marriage temporarily,—that is, until he was cured,—whether the plaintiff consented to it or not, correctly state the law, and should have been given. * * *

4. This action was begun eight days after the day fixed for the marriage, and before the time plaintiff was cured, or could reasonably have been cured. The evidence is conflicting as to whether the plaintiff consented to the postponement, but the defendant was entitled to postpone it until he was cured, whether she consented or not. Ordinarily, this would lead to the conclusion that the action was prematurely brought. But in this case the defendant's acts and declarations after the date set for the marriage afford sufficient basis for the charge that he did not intend to fulfil his contract, even after he was cured. The plaintiff was, therefore, excused from going through the formality of waiting until he was well, and then demanding a performance of the contract, before instituting her suit; for his conduct subsequent to the postponement was a renunciation of the contract, and constituted a present and immediate breach of his contract, and her cause of action accrued then. Gabriel v. Brick Co., 57 Mo. App. 520; Manufacturing Co. v. McCord, 65 Mo. App. 507; Lawson, Cont. § 442. For the reasons given, the judgment is reversed, and the cause remanded for trial anew upon the principles herein announced.[207]

[206] See Travis v. Schnebly, 68 Wash. 1 (1912).

[207] The general rule is that if defendant's ill-health, occurring subsequent to the engagement without his fault, would be aggravated by the marriage and his death hastened, he has the defense of impossibility. *In re* Estate of Oldfield, 175 Ia. 118 (1916). Indeed the Iowa court seems to regard the certainty of approaching death, because of an incurable disease as an excuse for refusal

## THE RICHLAND QUEEN.

## RICHLAND S. S. CO. *v.* BUFFALO DRY DOCK CO.

(United States Circuit Court of Appeals, Second Circuit, 1918. 254 Fed. 668, 166 C. C. A. 166.)

Libel by the Buffalo Dry Dock Company against the steamship Richland Queen, her engines, etc., claimed by the Richland Steamship Company, together with a libel by the Richland Steamship Company against the Buffalo Dry Dock Company. From decrees for the Dry Dock Company, the Steamship Company appeals. Affirmed.

to marry. *Id.* A federal Circuit Court of Appeals, however, in the latter kind of a case has held that the disease only affects the *quantum* of damages. Parsons v. Trowbridge, 226 Fed. 15 (1915).

In Smith v. Compton, 67 N. J. L. 548 (1902), the trial court refused the defendant's request to charge the jury that if after the making of the promise to marry the plaintiff, but before the day named for the consummation of the marriage, the defendant, without his fault, contracted or developed a urinary or other disease, which kept him under the treatment of a physician, and which would be aggravated by sexual intercourse and hazardous to his health, such malady was a complete defense to the plaintiff's cause of action, and yet a judgment for the plaintiff was affirmed. Van Syckel, J., said (pp. 553-554): "The contract is an unconditional one, into which the defendant cannot read a condition which will defeat it. I agree with the declaration of the majority of the judges in Hall v. Wright [E. B. & E., 746], that it is not enough to show, in answer to an action upon the contract after breach, that its performance is inconvenient or may be dangerous; impossibility to perform will alone constitute an absolute bar. Ill-health is the defendant's misfortune, not to be visited, beyond what is inevitable, upon the plaintiff. If the plaintiff was willing, in view of his social position, or that which she might acquire by reason of his wealth, to marry him, and await his restoration to health, she had the right to insist upon the benefit of the unconditional contract. If he was apprehensive of danger to his health or life, he could break the engagement, but was subject to such damages as a jury would award against him for the breach. That would, in effect, be a substituted performance in discharge of the obligation incurred. This is in accordance with the well-established rule which governs contracts, and, unless it is adhered to, the loss falls upon the party to whom no fault can be imputed." Smith v. Compton seems to be the only case agreeing with the majority judges in Hall v. Wright, E. B. & E., 746, and on that case, see Phillemore, L. J., as quoted in note 204, *ante*.

In Smith v. Compton, *supra*, is to be found, however, a satisfactory *dictum* to the effect that if after the engagement one of the parties acquires a loathesome disease by an immoral act his condition is not a defense to an action for breach of promise of marriage. But see Sanders v. Coleman, 97 Va. 690 (1899); Allen v. Baker, 86 No. Car. 91 (1882).

In Grover v. Zook, 44 Wash. 489 (1906), where one party was seriously affected with pulmonary tuberculosis and the other had an hereditary taint of the same disease, their contract to marry was held void as against public policy, though the parties were aware of these facts prior to the engagement.

On disease as a defense to an action for breach of promise of marriage, see 12 Ann. Cas. 197, note; Ann. Cas. 1913 E, 916, note; Ann. Cas. 1917 D, 1084, note; 7 L. R. A. (N. S.) 582, note; 40 L. R. A. (N. S.) 585, note; L. R. A. 1916 D, 1276, note.

WARD, J. This is an appeal from a decree of Judge Hazel in favor of the Buffalo Dry Dock Company for the reasonable cost of repairs to the steamer Richland Queen, and dismissing the cross-libel of the Richland Steamship Company for damages for loss of the use of the vessel due to unreasonable delay in making the repairs.

September 5, 1916, the steamer was sent to the Dry Dock Company's yard, and remained there until December 5th. No express contract for the repairs was made, but the reasonable value of the use of the dry dock and of the repairs is admitted to have been $39,984.08. The Steamship Company, in order to get possession of its vessel, paid $30,000 to the Dry Dock Company without prejudice, and gave a stipulation for the balance, and in its cross-libel alleged that the repairs should have been completed by October 9, 1916, and that it was deprived of the use of its steamer during the remainder of the season to November 13th, or 37 days, at the reasonable rate of $500 a day, aggregating $18,500.

The Dry Dock Company kept an open shop, and justified the delay by the fact that a strike of its workmen began October 14, 1916, without grievance or warning, which prevented by intimidation and violence old hands and new hands from working.

At the trial the only contention was as to the damages for delay, viz., whether the steamship company was entitled to a decree for $18,500, less the unpaid balance of the Dry Dock Company's bill of $9,984.08.

The working day in the Buffalo shipyards at the time in question was nine hours, with a half holiday on Saturday during the summer months, while some competing yards on the Lakes required a nine-hour, and some a ten-hour day.

October 14, 1916, a committee of workmen demanded of the Dry Dock Company an eight-hour day without reduction of pay, which the company refused, and notified the men that thereafter they must work straight nine-hour day for six days in the week. As a consequence 80 to 90 per cent. of the men left the yard, and although the company did its best to secure an adequate force of workmen, it was not able to do so. The strike involved no violence, although picketing was kept up in the neighborhood of the yard, and there was much persuasion of both old and new hands. The men gradually came back between November 15th and December 2d, without any change in the hours of labor, and there has been no labor trouble since that time.

Judge Hazel was of opinion that the Dry Dock Company, in view of all the circumstances, made the repairs to the steamer in a reasonable time, and was not liable under the decision of the Court of Appeals of the state of New York in D., L. & W. R. R. Co. v. Bowns, 58 N. Y. 573. In that case, however, there was an agreement to deliver coal within a fixed time, with an express exception of interference by strikes. No time was fixed in the case under consideration for making

the repairs, so that the obligation of the Dry Dock Company was to make them within a reasonable time, and there was no exception of strikes. The question, therefore, is simply whether the delay complained of was reasonable or unreasonable, not in view of the circumstances existing at the time the contract was made, but in view of the circumstances existing when the contract was being performed. Empire Transportation Co. v. P. & R. R. Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623; Hick v. Rodoconachi, 2 Q. B. D. 626.

The Court of Appeals of the state of New York, has held that a peaceable strike of the employer's servants is no defense to a claim for delay (Blackstock v. New York & Erie R. R. Co., 20 N. Y. 48, 75 Am. Dec. 372), while a strike with violence is a defense (Geismer v. Lake Shore & M. S. Ry. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837). The employer in each of these cases was a common carrier, but, as the recovery sought was for damages caused by delay in delivery, the decisions are applicable to the situation under consideration, because common carriers are not insurers of prompt delivery, but only liable for ordinary care and diligence. The duty is the same as in the present case, viz., the performance in a reasonable time in view of all the circumstances.

We do not appreciate the distinction made in these cases, thinking that the difference between a peaceable and a violent strike as a defense is one of degree only, a strike with violence being more likely to be a good defense than a peaceable strike. The question, however, in each case is the same, whether the conduct of the employer was reasonable. A peaceable strike upon frivolous grounds, which the employer did all he could to prevent, should be a defense against a claim for delay. On the other hand, a violent strike on justifiable grounds, which the employer either fomented or unreasonably resisted, ought to be no defense. Of course, the employer in either case could end the strike by surrendering. We are not disposed to differ with Judge Hazel's finding that the Dry Dock Company's performance was reasonable in view of the strike.

Decree affirmed.

MANTON, J.† I dissent. * * * The testimony indicates plainly that, prior to the time of the acceptance of the Richland Queen for repairs, labor troubles were brewing in the Dry Dock Company's yard, which were unknown to the owners of the Richland Queen, but which were known to the officers of the appellee. No mention of this fact, however, was made to the vessel's owners.

During the time of this cessation of work, there was no violence of any character. The month's delay in making the repairs caused a loss of about $500 a day to the owners of the vessel. Judge Rogers, in Frankfurt-Barnett Co. v. Prym Co., Ltd., 237 Fed. 21, 150 C. C. A.

† Parts of the dissenting opinion are omitted.

223, L. R. A. 1918A, 602, quoting and accepting the language of the New York Court of Appeals in Eppens, Smith & Wiemann Co. v. Littlejohn, used this language:

"If a contract fails to fix the exact time for delivery, the law fixes it for the parties, by presuming that a reasonable time was intended. The law was so declared in the Court of Appeals of New York in Eppens, Smith & Wiemann Co. v. Littlejohn, 164 N. Y. 187 [58 N. E. 19, 52 L. R. A. 811]."

And what is a reasonable time must be determined by what the parties had in mind when the contract was made, and this must be judged by the circumstances which surrounded the parties at the time the contract was made, rather than by the circumstances and conditions which subsequently arose, and in this connection knowledge which the appellee had as to its unsettled condition of labor, or the prospect of a strike, could not be locked up in the mind of the appellee, and should have been disclosed to the owners of the vessel; for it is true that the owner of the vessel, without knowledge, could reasonably have in mind that the work would be done within a reasonable time, such as normal conditions in the yard would permit. It was within the power of the appellee to disclose such information, and, indeed, to make it one of the conditions of accepting the work. Even where labor trouble is not anticipated, such provisions are frequently put in contracts. D. L. & W. v. Bowns, 58 N. Y. 573. * * *

I concede that there is no legal obligation for an employer to yield to the strikers on a matter of rate of wages and hours of labor, but here the contract was undertaken to be performed within a reasonable time, and the strike cannot be taken into consideration in determining what was a reasonable time. * * *

The case of D., L. & W. v. Bowns, 58 N. Y. 573, cited by the district judge, does not help the appellee. It contained a provision which relieved the company from responsibility in the event of strike or lockout, and is not a useful authority here.

In Smith, etc., v. Littlejohn, *supra,* the contract for the sale of goods to be shipped from a foreign port fixed no time for the shipment. It was held that it must be made within a reasonable time, and what that is depends upon the circumstances of the particular case, such as the parties may be supposed to have contemplated in a general way in making the contract, and the burden was fixed upon the seller to show compliance, where an action was instituted to recover damages for the buyer's refusal to accept and pay for the goods. There the court said:

"Thus the jury could find that although the plaintiff made every reasonable effort to ship the coffee promptly, and did ship it at the first opportunity it could command, nevertheless the delay in the shipment was prolonged, not because of the conditions and circumstances of the shipping facilities themselves, but because of the plaintiff's personal

inability to avail itself of them. The delay was therefore unreasonable as to the defendant, because uncommonly long, and made so by the conditions peculiar to the plaintiff, and not to the transportation facilities. This personal disadvantage was not within the contemplation of the contract, and is not available to the plaintiff either to disprove unreasonable delay or to excuse it."

In Blackstone v. N. Y. & Erie R. R. Co., 20 N. Y. 46, 75 Am. Dec. 372, in a suit for damages on account of nonfulfillment of a contract of transportation by a common carrier, it was held that a railroad corporation was responsible for damages resulting from a delay to transport freight in the usual way, which was caused by a great number of its servants suddenly and wrongfully refusing to work.

Nor do I consider the rule of the state courts different from that of the federal court. This subject was treated in an able opinion by Judge Sanborn in Empire Transportation Co. v. Phila. & R. Coal & Iron Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623, but there the defendant was excused because there was violence and interference by illegal methods. Here such was not the case.

In Brown v. Certain Tons of Coal, 34 Fed. 914, Judge Severens, speaking for the Circuit Court of Appeals, said:

"It was therefore a part of this contract that this unloading should be done within a reasonable time. It being the duty of the consignee to unload this freight, it was his duty to provide the facilities for doing so. He was bound to promptitude and diligence. The measure of that diligence is to be estimated by the urgency of the case, by the circumstances surrounding the parties, by the loss and damage which would accrue to the owner of valuable vessels by detention during the earning season of the year; and the circumstances in this case required that the consignee should exercise promptitude and a high degree of diligence in unloading these vessels."

Hardship, expense, or loss to the party performing his contract, or anything short of impossibility of performance, will not excuse a breach of the contract. In my opinion there has been a breach here to the damage of the libelant, and it should have a decree on the cross-libel.

*Decree affirmed.*[208]

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## BAILY *v.* DE CRESPIGNY.

(Court of Queen's Bench, 1869. L. R., 4 Q. B., 180.)

HANNEN, J.‡ This was an action on a covenant contained in a lease

[208] On strikes as an excuse for nonperformance of contract in the absence of a special stipulation relating thereto, see 12 Ann. Cas. 313, note. See also 17 Ann. Cas. 240, note.

‡ The statement of the pleadings, which preceded the opinion in the report, and parts of the opinion are omitted.

of certain premises granted by the defendant to the plaintiff in 1840, for a term of eighty-nine years, whereby the defendant covenanted that "neither he nor his assigns should or would, during the term, permit to be built any messuage, etc., on a paddock fronting the demised premises." The breaches alleged are: 1. That the defendant during the term permitted a railway station to be built on the paddock. 2. That the defendant assigned the paddock to the London and Brighton Railway Company, who erected the railway station on the paddock.

To this declaration the defendant pleaded that, after the making of the deed, the railway company required to take the paddock under powers given them by act of Parliament, 1862, for purposes for which they were by the act empowered to take the same; that the paddock was land which the company were empowered to take compulsorily for the purpose of the undertaking authorized by the act; and that the company under the powers so conferred, did compulsorily purchase and take the paddock; and that the assignment by defendant to the company was the assignment in completion of such compulsory purchase; that the company afterwards built on the paddock the erections complained of, which were erections reasonably required for the purposes of the undertaking authorized by the act, and that, except as aforesaid, the defendant did not permit the said erections to be built. The plaintiff demurred to this plea; and also replied that the erections, though reasonable, were not necessary or compulsory for the company to build. To this replication there was a demurrer.

It must be taken on these pleadings that the assignment by the defendant to the railway company was altogether made under the requirements of the act of Parliament, and without any stipulation introduced into the conveyance of the vendor or the purchaser, which would alter its character as an act done by the defendant in obedience to the command of the legislature. The 75th section of the Lands Clauses Consolidation Act, 1845, is imperative that the owner of lands shall, on the performance of the conditions imposed on the company, when required so to do, duly convey the lands to the promoters, or as they shall direct, and in default thereof it shall be lawful for the promoters to execute a deed poll, declaring the fact of such default having been made, and thereupon all the estate and interest in such lands, capable of being sold and conveyed by such owner, shall vest absolutely in the promoters of the undertaking.

We think that no distinction can be drawn between the case of an owner of lands who does that which it is his duty to do—namely, conveys to the company—and one who, by refusing to convey, obliges the company to obtain a title to the lands by the execution of a deed poll. In the one case, as in the other, the transfer of the title is compelled by the legislature, and it cannot be supposed that it was intended that the landowner who acts solely in obedience to the law should be in a worse position than one who refuses compliance. In either case the railway

company must be regarded as the assignee of the land, not by the voluntary act of the former owner, but by compulsion of law.

The substantial question, therefore, raised on this record is whether the defendant is discharged from his covenant by the subsequent act of Parliament, which put it out of his power to perform it.

We are of opinion that he is so discharged on the principle expressed in the maxim, "*Lex non cogit ad impossibilia.*"

We have first to consider what is the meaning of the covenant which the parties have entered into. There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor.

But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterward happens. It is on this principle that the act of God is in some cases said to excuse the breach of a contract. This is in fact an inaccurate expression, because, where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract; for, as is observed by Maule, J., in Canham v. Barry, 15 C. B. at p. 169, a man might by apt words bind himself that it shall rain tomorrow or that he will pay damages. * * * This is the principle of that which was laid down in Brewster v. Kitchell, 1 Salk. 198, that "where H. covenants not to do an act or thing which was lawful to do, and an act of Parliament comes after and compels him to do it, the statute repeals the covenant. So if H. covenants to do a thing which is lawful, and an act of Parliament comes in and hinders him from doing it, the covenant is repealed." [209]

To apply the foregoing observations to the present case: The defendant has covenanted that his "assigns" shall not build. The word "assigns" is a term of well-known signification, comprehending all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law. Spencer's Case, 5 Rep. 16. The defendant when he contracted used the general word "assigns," knowing that it had a definite meaning, and he was able to foresee and guard against the liabilities which might arise from his contract so interpreted. The legislature by compelling him to part with

[209] On the effect of the passage, before the expiration of the time for performance, of a statute rendering performance impossible, see 10 L. R. A. (N. S.) 415, note; 41 L. R. A. (N. S.) 559, note.

his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties. On the other hand, to confine the word "assigns" to those who take by the voluntary act of the assignor would not, as was suggested in argument, limit the operation of the covenant to his immediate grantee, because all those who take from the first assignee do so in consequence of the original voluntary act of the assignor, and it was his own fault that he assigned at all, or that he did not in the original conveyance guard against the acts of subsequent assignees. To exempt him from liability for such acts would be contrary to the intention of the parties, to be collected from their words, interpreted according to their known ordinary signification.

It was, indeed, conceded on the argument by the plaintiff's counsel, that the defendant would not be liable for all acts of the railway company, as he would have been for the acts of any other assignee; but it was contended that the defendant was relieved from liability on his covenant as to those acts only which the company was required by the act of Parliament to do, and not as to those which the company was merely empowered to do.

We do not think that this distinction is well founded. The rule laid down in Brewster v. Kitchell, 1 Salk. 198, rests upon this ground, that it is not reasonable to suppose that the legislature, while altering the condition of things with reference to which the covenantor contracted, intended that he should remain liable on a covenant which the legislature itself prevented his fulfilling; but the covenantor in this case is equally disabled from preventing the railway company from doing those things which it is empowered to do, as those which it is required to do; why then should there be a difference in the liability of the covenantor with respect to the one and the other? * * *

*Judgment for the defendant.*[210]

[210] In Tweedie Trading Co. v. James P. McDonald Co., 114 Fed. 985 (1902), a contract to transport laborers from Barbadoes to Colon for so much per trip, which contract was made at New York City and was valid by the law of New York and also by the law of Barbadoes at the time the contract was entered into, was made impossible of performance by a regulation of the colonial government of Barbadoes, made after part performance, forbidding the future embarkation of laborers. The Tweedie Trading Company was a New Jersey corporation with an office in New York City, and the James P. McDonald Company was a West Virginia corporation with an office in New York City. While admitting that the law of the place of performance "ordinarily governs the incidents of a performance," Adams, J., treated it as foreign law, so far as impossibility was concerned, saying (p. 988): "The question really is, do the legal acts of the agent of a foreign government, which prevent the full performance of a contract of this character, control the rights of the parties?

## HEART *v.* EAST TENNESSEE BREWING CO.

(Supreme Court of Tennessee, 1908. 121 Tenn. 69, 113 S. W. 364, 19 L. R. A. (N. S.) 964, 130 Am. St. Rep. 753.)

SHIELDS, J.[211] Complainant, on August 31, 1902, leased a certain house and lot situated in Knoxville, Tenn., and owned by him, to the

Contracting parties are subject to the contingencies of changes in their own law, and liable to have the execution of their contracts prevented thereby; but it is on the ground of illegality, not of impossibility. Prevention by the law of a foreign county is not usually deemed an excuse, when the act which was contemplated by the contract was valid in view of the law of the place where it was made [citations], and *a fortiori* when it was also then valid at the place of performance."

But on the court's assumption as to the law ordinarily governing performance, is its conclusion sound? Impossibility by local law does not rest wholly on illegality, as Baily v. De Crespigny, *supra*, shows, but, any way, did not impossibility in the case before the court arise because of illegality under that local law which was recognized by the court as the local law to govern performance?

A reasonably frequent situation where the courts distinguish between local law and "foreign" law is that of bail bonds. If the person bailed fails to appear when he is to be produced and that failure is due to his arrest and confinement in the state, the sureties have a good defense. State v. Funk, 20 N. Dak. 145 (1910); State v. Heber (Okla.), 173 Pac. 651 (1918). So where the United States Court sitting in the state has the principal arrested and confined. Com. v. Overby, 80 Ky. 208 (1882). But they have no defense where arrest and confinement in another state is the cause of the failure to appear. Yarbrough v. Com., 89 Ky. 151 (1889); Taylor v. Taintor, 16 Wall. (U. S.) 366 (1872). So where the principal is confined in an insane asylum in another state. Adler v. State, 35 Ark. 517 (1880). But there the bail sent him out of the state for treatment, though, also, in the other cases, they are deemed to blame for letting him go out of the state. That the blameworthiness of the person bailed may play its part is shown in Hargis v. Begley, 129 Ky. 477 (1908), where the court protected sureties because the bailed person's failure to appear was due to his being accidentally shot while out of the state on a visit. In referring to previous cases where the sureties were held for the default of a principal, who went out of the state, the court said: "If it had been made to appear in those cases that the defendants had been prevented from appearing in answer to their recognizance, not on account of any wrongful act or dereliction on their part, but on account of unavoidable accident or sickness, over which they had no control, the results would have been different" (p. 480).

On liability of bail where principal fails to appear for no fault of his own, see 23 L. R. A. (N. S.) 136, note; 30 L. R. A. (N. S.) 211, note; 50 L. R. A. (N. S.) 252, note.

"It is altogether probable that a contract the performance of which would require a breach of the law of some friendly nation would now be held to be illegal and void. If this is true, and possibly even if it is not, a change in some foreign law making the performance of a previously made contract illegal (or impossible) ought to be given the same effect as would a like change in the domestic law. See Ford v. Cotesworth (1870), L. R., 5 Q. B. 544; Cunningham v. Dunn (1878), 3 C. P. D. 443." A. L. C. [Arthur L. Corbin] in 28 Yale L. J., at p. 402.

[211] Part of the opinion is omitted.

defendant for a term of eight years, to be used as a saloon or place for the sale of intoxicating liquors, as expressed in the written lease that day made and executed by both parties. The defendant entered into possession of the property, and paid the rent contracted for to November, 1907, but after that declined to further use it, or to pay any rent. Complainant sues to collect rent accruing since November 1, 1907. The contract of lease was exhibited with and made a part of the bill, and therein the terms of the contract and the purposes for which the property was to be used are fully set forth.

The chancellor sustained a demurrer to the bill upon the ground that by chapters 17, 206, 207, pp. 81, 752, 755, Acts Gen. Assem. 1907, the sale of intoxicating liquors was made unlawful and prohibited in the city of Knoxville from and after November 1, 1907, and therefore the purpose for which the lease was made was from that time illegal, and the contract void and unenforceable, and the complainant has brought the case to this court for review.

There is no error in the action of the chancellor. When the contract was made, the purpose for which the property was leased—the sale of intoxicating liquors in Knoxville—was lawful, and the lease valid and enforceable. Afterwards, November 1, 1907, that purpose was made unlawful by the acts of the General Assembly above referred to, and thus by operation of law the lease became and is void and unenforceable at the instance of either party.

It is a principle of general application that all contracts are void which provide for doing a thing which is contrary to law, morality and public policy. * * *

The rule is the same when the purpose of the contract, although lawful when made, becomes unlawful by statute enacted before the full performance of its terms. * * *

The case of Gray v. Sims, Fed. Cas. No. 5729, is directly in point. This was a suit upon a policy of marine insurance. The vessel insured was to be employed in importing goods from Calcutta or Madras into the United States, and the contract of insurance specified this as one of the purposes of the voyage. After the policy was written, and before the return of the vessel, it became by act of Congress illegal to import goods into the United States from those points. The master undertook to do so, and the ship was seized and confiscated. The loss was within the terms of the policy. A recovery was denied. The court said:

"But if the contract be legal when it is made, and the performance of it rendered illegal by a subsequent law, the parties are both of them discharged from its obligation. The insured loses his indemnity and the insurer his premium."

Other cases in accord are: Sauner v. Phoenix Insurance Co., 41 Mo. App. 480; Corrigan v. Chicago, 144 Ill. 537, 33 N. E. 746, 21

L. R. A. 212; Jamieson v. Gas & Oil Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; Presb. Church v. New York, 5 Cow. (N. Y.) 538.

It is not necessary in this case to determine whether or not the contract contained in the lease restricts the use of the property for the sale of intoxicating liquors.[212] It was the purpose of both lessor and lessee, as clearly expressed in the instrument, that it should be used as a saloon, and, this being made unlawful by law, the contract is no longer enforceable.

The decree of the chancellor is affirmed, with costs.

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## CLARKSVILLE LAND CO. *v.* HARRIMAN.

(Supreme Court of New Hampshire, 1895. 68 N. H. 374, 44 Atl. 527.)

Assumpsit to recover price of driving logs. The defendant claims to recoup damages arising from the nonperformance of the contract. Facts found by a referee. Judgment for plaintiff.

[212] But the great majority of the cases are *contra* on this point. If the premises may be used for other purposes, as, for instance, the sale of nonintoxicating drinks, the contract is enforceable even though the rent is higher than it would have been if saloon purposes had not been contemplated. Hyatt v. Grand Rapids Brewing Co., 168 Mich. 360 (1912); Hayton v. Seattle Brewing & Malting Co., 66 Wash. 248 (1911); Hecht v. Acme Coal Co., 19 Wyo. 18 (1910). If, however, the premises may be used for saloon purposes only, meaning thereby the sale of intoxicating liquors, a law prohibiting the sale of such liquors is a defense to the lessee on his covenant to pay rent. Greil Bros. Co. v. Mabson, 179 Ala. 444 (1912); Stratford, Inc. v. Seattle Brewing, Etc., Co., 94 Wash. 125 (1916). But see Houston Ice & Brewing Co. v. Keenan, 99 Tex. 79 (1905), where the lessee claimed that the stipulation in the lease that the demised premises should be used for the saloon business constituted an express covenant that said premises should be used for no other purpose, and where the court, by Brown, J., said: "Assuming that the stipulation * * * 'constitutes a covenant' nevertheless, the contract of lease was not 'rendered illegal' nor was appellant [the lessee] absolved from liability for rents 'by the adoption of local option in Ellis County.'"

On impossibility by law in these saloon cases, see 19 L. R. A. (N. S.) 964, note; 23 L. R. A. (N. S.) 497, note; 34 L. R. A. (N. S.) 773; L. R. A. 1917 C, 935, note.

In McCullough Realty Co. v. Laemmle Film Service, 181 Ia. 594 (1917), the obligation to pay rent under a lease of premises, the building on which was not fire-proof, "for Film Exchange and film and theater supplies purposes only," the handling of films being 99 per cent of the business of a film exchange and the sale of supplies being not a source of direct profit, was held terminated by the passage of a city ordinance which forbade the handling of inflammable films in buildings not fire-proof and thereby forbade the further conduct of the lessee's film exchange business on the premises leased.

A case of the discharge of a contract obligation to give passes over the railroad because of a statute rendering performance impossible is Cowley v. Northern Pac. R. Co., 68 Wash. 558 (1911). See note on the point in 49 L. R. A. (N. S.) 848.

WALLACE, J. In the spring of 1881 the defendant had a large quantity of logs on the branches of Hall stream, a tributary of the Connecticut river, ready to be driven down the stream. At this time the plaintiffs entered into an agreement with him to drive the logs down the stream to the Connecticut river. Although it is not found in express terms that the contract was to be performed that spring, yet such appears to have been the understanding of the parties. Shortly afterwards, and before the plaintiffs had a reasonable time in which to complete their contract, notwithstanding the fact that they used due diligence, the water in the stream suddenly fell, and remained so low that the further performance of the contract that spring was rendered impossible. The question is whether this is an excuse for the non-performance of the contract on the part of the plaintiff. The plaintiffs did not undertake to transport the logs in any event, regardless of the way in which they should move them, whether by the stream or in some other way. They only undertook to transport them by driving them down the stream. If the parties contemplated the failure of the water in the stream, and contracted with reference to it, and it was agreed that the plaintiffs were to guaranty its sufficiency for driving the logs, then they were not excused from the performance of the contract by the failure of the water, and are answerable in damages. But if they contracted on the basis of the continued existence of sufficient water to transport the logs, and it was the understanding that the plaintiffs were only bound to drive them in case the water was adequate for that purpose, they were excused from the further performance of the contract. Taylor v. Caldwell, 3 Best & S. 826; The Tornado, 108 U. S. 342, 2 Sup. Ct. 746; Railway Co. v. Hoyt, 149 U. S. 1, 14, 13 Sup. Ct. 779; Dexter v. Norton, 47 N. Y. 62; Lord v. Wheeler, 1 Gray, 282; Wells v. Calnan, 107 Mass. 514. It is a question of fact what the terms of the contract were. The referee does not find that the plaintiffs agreed to warrant the sufficiency of the water in the stream. It is so unreasonable and improbable to suppose that they would so contract that it will not be inferred from a mere finding that the plaintiffs agreed to drive the logs for the defendant that spring. The referee finds that emergencies arose to prevent the performance of the contract that cannot reasonably be supposed to have been contemplated by the plaintiffs, and which would not have been anticipated by a man of experience, and a practical river driver, when the contract was made. This shows that the parties did not contemplate the failure of the water in the stream, nor undertake to contract that the logs were to be driven in any event, or that the plaintiffs should warrant the sufficiency of the stream for that purpose, and be answerable in damages for its failure. The contract was made on the basis of the continued existence of sufficient water to render its performance possible. The plaintiffs, being without fault, and having exercised due diligence in the performance of their con

tract, were excused from its further performance by the failure of the water.

*Judgment on the report for plaintiffs.*

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## KINZER CONSTRUCTION CO. *v.* STATE.

(Court of Claims of New York, 1910. 125 N. Y. Supp. 46.)

Action by the Kinzer Construction Company against the State of New York. Judgment for plaintiff.

RODENBECK, J.[213] The claimant made a contract with the state of New York to construct 3.76 miles of the improved Champlain Canal which is a part of the so-called Barge Canal system of the state now in progress of construction; and while the work was in progress, and claimant was excavating for one of the locks, an extensive cave-in occurred, which revealed the fact that for the balance of the contract the earth was of a "slippery, greasy clay," with not sufficient resistency to permit of the construction according to the contract, plans, and specifications of the lock and substantially the remainder of the work. The state issued a stop order while it was investigating and determining what to do under these unexpected conditions, and this order remained in force for six months, when an alteration order which involved extensive changes in the construction of the remainder of the work was submitted by the state to the claimant for the completion of the contract. The claimant refused to accept these alterations, insisting that they constituted a fundamental change in the contract and amounted to a breach of the contract by the state, and thereupon the state proceeded to advertise for bids for the completion of the work, and let it to other contractors, and the claimant filed this claim for the work done and not paid for, and for damages including loss of profits on the portion of the work uncompleted, amounting, in all, to $370,525.41. The total amount of the contract, including previous alteration orders, was $968,296.11, and there was uncompleted at the time that the stop order was issued $521,954.42, and of this amount $398,612 was eliminated and new work was added, aggregating $153,584.50, so that the work to be done there was a reduction of $245,027.50 or a decrease of about 25 per cent. of the contract price, and upon these facts, and upon the terms of its contract, the claimant insists that the state violated its contract and justified its course in refusing to complete the contract; while the state claims that the construction of the work when the cave-in occurred revealed the fact that the subsoil was so treacherous that the lock could not be constructed in that section of claimant's contract at all, and made necessary the other

[213] Parts of the opinion are omitted.

changes in the plans and specifications, and also that the alterations were authorized by the contract, and that claimant was guilty of a breach of its contract in refusing to complete it as directed by the alteration order. The claimant had agreed in its contract that it had satisfied itself by its own investigation and research regarding "all the conditions affecting the work," and that its conclusion to execute the contract was based upon such investigation and research, and not upon any information prepared by the state engineer.

If the contention of the claimant is sustained, the state will be obliged, not only to pay to the claimant the amount of work done and not paid for under the contract and profits which claimant estimates at $210,490.84 besides other damages, but to other contractors the profits, if any, which they will make upon the completion of the work under the reletting; while, if the position of the state is upheld that under the clause in the contract reserving to it the right to make necessary alterations in the plans it was authorized to make the changes which it did, the claimant not only loses the profits which it claims, but it must pay the state any damages caused by its failure to perform the contract including the increased cost, if any, of completing the work. The contention of the claimant is based upon the interpretation that it places upon the clause in the contract relating to alterations in the plans and specifications, and it insists that the changes proposed by the state were fundamental alterations of the contract, and were not contemplated when the contract was made, and constituted a breach thereof. This claim [clause?] provides that the state may make such alterations in the plans and specifications as may be "necessary."

The case, however, does not turn upon the construction of this clause in the contract, but rests upon another proposition growing out of the conditions that were found when the attempt was made to construct lock No. 7. When this part of the work was reached, a condition of the soil was found which made it impossible to construct the lock as planned, and made it impracticable to build it within the limits of the remainder of the contract. When the excavation for the foundation of the lock had been carried to a depth of 10 or 12 feet, it was found that the underlying stratum was a greasy slippery clay with no grit in it—"just like axle grease," as one witness put it. Claimant's expert said that he had never seen any soil like it, and that it would not be good engineering to build a lock in such material at all. Under this condition of things, the case falls within that line of decisions where the contract is regarded as at an end and performance is excused because of the failure of conditions the existence of which are necessary to the performance of the contract. The early rule upon impossibility as an excuse for the performance of a contract was that inability to execute an absolute executory contract due to subsequent unforeseen accident or misfortune without the fault of either party will not excuse performance. Paradine v. Jane, Aleyn, 26. This rule

which was promulgated in English Jurisprudence as early as the year 1178 was based upon the ground as stated in this case that:

"Where the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

By the language of the Constitution of the state of New York, this rule with the remainder of the common law of England and Great Britain became operative in this state subject to such alterations as might be made from time to time. State Const. 1777, art. 35. There are many illustrations of the adoption and application of the rule in this state (Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Tompkins v. Dudley, 25 N. Y. 272, 82 Am. Dec. 349; Wheeler v. Conn. Mut. Life Ins. Co., 82 N. Y. 543, 37 Am. Rep. 594; Booth v. Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487), but exceptions began to creep in as a strict enforcement of the rule seemed to work out an inequitable result.

In England the rule prevailed in all its severity down to the middle of the last century (Hall v. Wright, E. B. & E. [1857]), but since then the courts both here and in England have modified it to a large extent upon the theory that the event which rendered the performance impossible should be implied as a matter of law as one of the conditions of the contract (Taylor v. Caldwell, 3 B. & S. 8249 [1863]; Bailey v. De Crespigny, L. R. 4 Q. B. 185), thus carrying out the supposed intention of the parties, and placing such contingencies as excuse performance upon the same basis as an act of God which Pollock defines as:

"An event which as between the parties and for the purposes of the matter in hand cannot be definitely foreseen or controlled." Pollock on Contracts (3d Ed.) p. 535.

These exceptions have been growing so that now there are at least four well-recognized modifications of the early rule, while the courts seem to be groping for a rule broad enough to include all of the exceptions. Three of these exceptions have long since been firmly established in the jurisprudence, not only of this country, but of England, and the fourth has been adopted in many cases of recent date in this state where the existing rules did not equitably meet the peculiar facts. The rule that performance is excused where legal impossibility arises from a change in the law or where the specific thing which is essential to performance is destroyed, or where there is an incapacity by sickness or death in the case of a contract for personal services, are of long standing, but quite recently a fourth and broader rule has grown up which is applicable to the case at bar.

One writer in the Columbia Law Review, in discussing the tendency toward a broader rule to meet cases of impossibility in the performance of contracts, says:

"If the contingency which makes the contract impossible of performance is such that the parties to the contract, had they actually contemplated it, would probably have regarded it as so obviously terminating the obligation as not to require expression, failure of performance should be excused." Volume 1, p. 533.

Another writer in the Harvard Law Review, criticising the proposed rule, suggests another:

"A proper rule, it is suggested, is that impossibility should be recognized as a defence wherever it seems reasonable that, had the contingency which renders performance impossible been contemplated by the parties, they would have both agreed that its introduction into the contract as a condition terminating the obligation would be just." Volume 15, p. 419.

A third writer in the same Review, after referring to the general rule and its exceptions, says:

"The New York court, however, has of late been more liberal and in a somewhat indefinite way has laid down the doctrine that impossibility is an excuse when caused by the noncontinuance either of the subject-matter of the contract or of the conditions essential to its performance." Volume 15, p. 63.

There is abundant warrant in the decided cases in this state for these attempts to state the broad rule that the courts are now following in relation to this subject and to justify the statement that the "modern tendency seems to be toward a more lenient construction. More regard is paid to what must have been the intention of the parties." American Law Register 1909, p. 570. * * *

From these cases, it will be seen that a fourth exception must be made to the general rule that accident or an unforeseen contingency arising without the fault of either party will not excuse performance of an absolute executory contract, and the four exceptions may now be stated broadly as follows: First, where the legal impossibility arises from a change in the law (Jones v. Judd, 4 N. Y. 411; Heine v. Meyer, 61 N. Y. 171; Larabee Co. v. Crossman, 100 App. Div. 499, 92 N. Y. Supp. 565; People v. Bartlett, 3 Hill, 570; Hildreth v. Buell, 18 Barb. 107); second, where the specific thing which is essential to the performance of the contract is destroyed (Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415; People v. Globe Mut. L. Ins. Co., 91 N. Y. 174; Lorillard v. Clyde, 142 N. Y. 456, 37 N. E. 489, 24 L. R. A. 113; Hayes v. Gross, 9 App. Div. 12, 40 N. Y. Supp. 1098); third, where by sickness or death personal services become impossible (Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388; Clark v. Gilbert, 26 N. Y. 279, 84 Am. Dec. 189; Spalding v. Rosa, 71 N. Y. 40, 27 Am. Rep. 7; Gaynor v. Jonas, 104 App. Div. 35, 93 N. Y. Supp. 287; Matter of Daly, 58 App. Div. 49, 68 N. Y. Supp. 596); and fourth, where conditions essential to performance do not exist (Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; Dolan v. Rodgers, 149

N. Y. 489, 44 N. E. 167; Buffalo & Lancaster Land Co. v. Bellevue L. & I. Co., 165 N. Y. 247, 59 N. E. 5, 51 L. R. A. 951; Whipple v. Lyons Beet Sugar Refining Co., 64 Misc. Rep. 363, 118 N. Y. Supp. 338). From these considerations the rule may be deduced fairly in the present case that where in the course of the construction of a canal natural conditions of soil unexpectedly appear which contingency the contract does not in express terms cover, and which render the performance of the contract as planned impossible, and make necessary substantial changes in the nature and cost of the contract and substantially affect the work remaining under the contract, the law will read into the contract an implied condition when it was made that such a contingency will terminate the entire contract.

These terms are implied in the contract by force of the law itself, and not because the parties had them in mind. Whether we approve of their insertion upon the theory that had the attention of the parties been called to the conditions giving rise to the application of the rule, they would have omitted any reference to them because obviously covered by the law (1 Columbia Law Review, p. 533), or upon the theory that they would have regarded them as just provisions to have inserted (15 Harvard Law Review, p. 419).

In the eyes of the law being a part of the terms of the contract, the conditions that rendered performance impossible do not terminate the contract *ab initio,* and vitiate what has been done and what remains to be done that is capable of execution. The conditions may be of such an extent as to amount to a substantial abrogation of the entire contract, or they may relate to an insignificant part of the contract, but they excuse performance only to the extent to which performance is impossible, and leave what has been done valid permitting a recovery therefor, and may not excuse performance of the remaining work. No general rule can be laid down which will apply to all cases, but each case must be decided upon its own facts, and that this course can be taken and justice done according to the facts in each case unhampered by written rules is due to the great flexibility of the common law which is its chief merit. Applying this rule to the case at bar, it will be seen to work out an equitable result. The state was not in a position to compel performance of an impossibility, and likewise the claimant could not ask the state to proceed with the contract. It would not have been fair of the state to insist upon the literal performance of its contract, and place the loss upon the claimant for the failure to perform, nor would it have been just for the claimant to insist that the state must carry out its contract as planned or suffer the penalty of paying damages, including prospective profits for the breach of the contract. It is better to regard the contract as at an end, and treat both parties as having been excused from further performance, allowing the claimant to recover for work done and for benefits received by the state under the contract down to the time of the discovery of

the conditions which rendered performance impossible, and for such damages as may have resulted to it from the stop order issued by the state. Both of the parties were in the same situation at the time that the conditions were discovered, and the rule applied leaves both of them to share the responsibilities for these conditions which were not anticipated when the contract was made thus carrying out the spirit of the state Constitution, which provides that, if for any unforeseen cause the terms of any contract prove to be unjust and oppressive, the canal board may, upon the application of the contractor, cancel the contract. State Const. art. 7, § 9. The state, therefore, had the right to relet the completion of the work, but must bear the increased expense resulting therefrom, while the claimant is not entitled to recover for any prospective profits on the work remaining to be done. Rhodes v. Hinds, 79 App. Div. 379, 79 N. Y. Supp. 437; Snyder v. City of New York, 74 App. Div. 421, 77 N. Y. Supp. 637; Sickels v. United States, 1 Ct. Cl. 214. * * *

The claimant should have judgment for $70,679.25, with interest on $61,144.16 from December 15, 1908.

*Judgment entered accordingly.*

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## PIERSON & CO. *v.* MITSUI & CO., LIMITED.

(Supreme Court, Trial Term, New York County, 1920. 111 Misc. 388, 181 N. Y. Supp. 273.)

Action by Pierson & Co. against Mitsui & Co., Limited. On motion by defendant to set aside verdict, directed by the court in favor of plaintiff, and for a new trial. Motion denied.

SEARS, J.[214] The contracts upon which this action is based were for the sale by the plaintiff to the defendant, f. o. b. Pittsburgh, of steel plates thereafter to be rolled. The defendant intended to export the plates to Japan, and this intention was known to the plaintiff. After the first contract was entered into, and before the second contract was agreed upon, a statute of the United States was enacted, under the provisions of which an executive order was issued, after the date of both contracts, making the export of such articles to Japan invalid, except under license from the Export and Administrative Board established by the executive order. The defendant endeavored to obtain such a license, but was unable to secure one, except a license which was entirely ineffective because of the dates of performance specified in the contract. The statute and the embargo declared thereunder did not prevent the plaintiff from delivering, or the defendant from receiving, the plates at Pittsburgh. It was the export of the plates which

[214] A small portion of the opinion is omitted.

was prevented, unless a license could be obtained. In other words, the defendant was prevented from devoting the goods to the purpose for which they were intended; but this is far from rendering the contract incapable of performance within the rule laid down in the authorities:

"It is a well settled rule of law that a party must fulfill his contractual obligations. Fraud or mutual mistake, or the fraud of one party and the mistake of the other, or an inadvertence induced by the one party and not negligence on the part of the other, may relieve from an expressed agreement, and an act of God or the law, or the interfering or preventive act of the other party, may free one from the performance of it; but, if what is agreed to be done is possible and lawful, the obligation of performance must be met. Difficulty or improbability of accomplishing the stipulated undertaking will not avail the obligor. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse nonperformance. The courts will not consider the hardship or the expense or the loss to the one party, or the meagerness or the uselessness of the result to the other. They will neither make nor modify contracts, nor dispense with their performance. When a party by his own contract creates a duty or charge upon himself, he is bound to a possible performance of it, because he promised it, and did not shield himself by proper conditions or qualifications." Cameron-Hawn Realty Co. v. City of Albany, 207 N. Y. 377, 101 N. E. 162, 49 L. R. A. (N. S.) 922.

The statements of the defendant in the long correspondence between the parties justified the plaintiff in not having the plates rolled. The defendant, having expressed an intention not to take the goods, cannot complain of plaintiff's failure to tender the goods. At all times plaintiff expressed its readiness and willingness to proceed with the rolling of the plates, if the defendant would change its position that it would receive and accept the same only on condition that it obtained a license. There was no breach of the contract on plaintiff's part. The clause in relation to tests was clearly waived. * * *

The defendant's motion is therefore denied.

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## BIGGS ET AL. *v.* STEINWAY & SONS.

(Court of Appeals of New York, 1920. 229 N. Y. 320, 128 N. E. 211.)

ANDREWS, J. This action is brought by the vendors to compel the specific performance of a contract made on June 29, 1916, for the purchase of Nos. 109, 111, and 113 West Fifty-seventh Street, New York. The price fixed was $280,000, of which $28,000 was paid down. The premises were to be conveyed in fee, free of all incumbrances except certain covenants against nuisances. On August 1st the plaintiffs tendered such a deed as the contract required. It was refused.

The parties understood that the land described in the contract was but a part of a larger purchase and that upon the whole of it the defendant desired to erect a business building. The remainder of the plot, 114 West Fifty-eighth Street, belonged to a Mrs. Flagg. The contract recited a simultaneous contract with her, and stated that the covenants contained in it were dependent upon the simultaneous delivery of the two deeds. If upon examination the title to the Flagg premises was found unmarketable then the purchaser was not obliged to complete its contract with the plaintiffs and was entitled to be repaid its $28,000.

After the execution of this contract and on July 25th a so-called "zoning ordinance" was adopted by the city of New York under statutes then in force which prohibited the erection of a business building on the Flagg property. As to it, the ordinance was repealed on July 12, 1918, and before the trial. It was because of this fact that the defendant refused to complete its bargain with the plaintiffs.

We have held that the zoning ordinance is a valid exercise of the police power, and that it did not constitute an incumbrance upon the Flagg property or render it unmarketable. Lincoln Trust Co. v. Williams Building Corporation, 128 N. E. 209, handed down herewith. Yet it is possible that had this action been brought by Mrs. Flagg upon her contract, a refusal to decree specific performance might be upheld. Anderson v. Steinway, 178 App. Div. 507, 165 N. Y. 608, affirmed 221 N. Y. 639, 117 N. E. 575. But the question here is somewhat different. The plaintiffs offered a perfect title. The circumstance mentioned in the contract, that the title to 114 West Fifty-eighth Street should be found unmarketable, under which the defendant might refuse to complete its bargain, had not arisen. Does then the fact that two separate parcels are brought from separate owners for a common purpose and that because that purpose may so fail as to one that a court of equity may refuse to enforce specific performance as to it and remit the parties to their legal rights, justify a refusal of specific performance as to the other?

As we have said, we assume that the purpose of the defendant, known to all the parties, was to erect a building covering both the Biggs and the Flagg lots. We assume that purpose has failed because of the zoning ordinance which affects only the latter. We assume that Mrs. Flagg offered a marketable title. Yet we cannot hold that as between these plaintiffs and this defendant circumstances have so changed as to make the enforcement of the contract unfair. These circumstances affect other land with which the plaintiffs have no connection. Upon it the defendant might not build as it had planned. Its purpose in making the entire purchase, therefore, failed. But in balancing the equities between the parties, the expense of this failure should not be charged to the plaintiffs who have entered in good faith into a contract of sale, absolute except in one contingency which has not occurred.

It may be said that the plaintiff in the Anderson Case was as inno-

cent as are the plaintiffs here. Yet, there, the failure was caused by a regulation which affected her own land. It was not because of some collateral matter. Neither party being at fault, the change of circumstances which justified the refusal of specific performance directly affected the subject of the contract itself. We have found no well-considered case where specific performance has been refused except under such circumstances. The discretion to be exercised by courts of equity is a judicial discretion within defined limits.

The judgments appealed from must be reversed, and judgment directed for the plaintiffs for the relief demanded in the complaint, with costs in all courts.

*Judgments [for defendant] reversed, etc.*[215]

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## WESTERN DRUG SUPPLY & SPECIALTY CO. OF KANSAS CITY, MO., FOR USE OF LOWENSTEIN, v. BOARD OF ADMINISTRATION OF KANSAS ET AL.

(Supreme Court of Kansas, 1920. 106 Kans. 256, 187 Pac. 701.)

Mandamus by the Western Drug Supply & Specialty Company of Kansas City, Mo., for the use of Lewis Lowenstein, against the Board of Administration of the State of Kansas, composed of E. W. Hoch and others, and J. H. Pritchett and others, sureties on the bonds of plaintiff. Writ denied.

WEST, J.[216] This action involves the one question, the right of the plaintiff to compel the defendant to issue a voucher for the amount claimed to be due. By the agreed statement of facts it appears that in the fall of 1917 the board contracted in writing with the plaintiff for certain supplies for the state institutions, and the plaintiff made a bond to faithfully perform its obligations. The supplies were furnished until January 24, 1918, since which time no more have been furnished, for the sole reason that an action was filed against the plaintiff in Jackson county, Mo., and a receiver appointed for all its effects, who also took charge of all its assets and sold them in bulk to Lewis Lowenstein,

215 "In any event, however, it seems clear that a promise would not be discharged because the performance promised in return had lost value because of supervening fortuitous circumstances, unless these circumstances nearly or quite completely destroyed the purpose of the bargain." 3 Williston on Contracts, § 1955, p. 3322, with the following footnote: "In Abbaye v. United States Motor Cab Co., 71 N. Y. Misc. 454, 128 N. Y. Supp. 697, the loss of an 'all night license' was held not to discharge a contract to make a monthly payment for a hack-stand in front of the plaintiff's restaurant. See also Standard Brewing Co. v. Weil, 129 Md. 489, 99 Atl. 661, L. R. A. 1917 C 929, Ann. Cas., 1918 D, 1143."

216 Parts of the opinion are omitted.

for whose benefit this action is brought. The damages suffered by the defendant on account of the failure to supply the goods amount to the precise sum claimed to be due by the plaintiff.

The plaintiff invokes the doctrine of *vis major*, and contends that, as its failure was no fault of its own, but was caused by the receivership, it should be unburdened with any liability thereof. The cases of Kansas Union Life Ins. Co. v. Burman, 141 Fed. 835, 73 C. C. A. 69, Malcomson v. Wappoo (C. C.) 88 Fed. 680, In re Inman & Co. (D. C.) 175 Fed. 312, In re Inman & Co. (D. C.) 171 Fed. 185, and South Memphis Land Co. v. McLean Hardwood L. Co., 179 Fed. 417, 421, 102 C. C. A. 563, are cited.

The defendant asserts that, having contracted to furnish the goods, the plaintiff is not absolved from liability for failure on account of the receivership, and cites as authorities Roehm v. Horst, 178 U. S. 19, 20 Sup. Ct. 780, 44 L. Ed. 953, and Central Trust Co. v. Chicago Auditorium, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917 B 580. * * *

One would suppose that, if he enters into a contract to do a thing which he knows may become impossible, he should be bound thereby; for otherwise to sign such a contract would be an idle thing, and any probable or foreseen contingency could be guarded against "while yet it is day." And the law, which is said to be common sense, also reasons on this wise. Chitty on Contracts (15th Ed.) uses these words:

"As a general proposition of law, if a man contract to do a thing which is absolutely impossible, such contract will not bind him, because no man can be obliged to perform an impossibility. * * * But where the contract is to do a thing which is possible in itself, or where it is conditioned on an event which happens, the promisor, will be liable for a breach thereof, notwithstanding that the occurrence of an accident or other contingency which, although it was not foreseen by or within the control of the party, might have been provided against by his contract, has put it beyond his power to perform it." Pages 707, 708.

The authority regarded by many as almost the father of law of contracts—Parsons—says:

"It has been somewhat questioned how far the impossibility of doing what a contract requires is a good defense against an action for the breach of it. If the performance of a contract could not possibly be attributed to the promisor, and this impossibility was not among the probable contingencies which a prudent man should have foreseen and provided for, it should seem that this would be a sufficient defense. But to make the act of God a defense it must amount to an impossibility of performance by the promisor; mere hardship or difficulty will not suffice. * * * So if it becomes impossible by contingencies which should have been foreseen and provided against in the contract, and still more if they might have been prevented, the promisor should be held answerable." 2 Parsons on Contracts (9th Ed.) 673. * * *

It appears, therefore, both by reason and by authority, that the party contracting to furnish goods for a certain length of time, and making such contract doubly sure by giving bond for its performance, could not be relieved because some one brought a lawsuit and by a receivership impounded and sold its assets. This might have reasonably been foreseen and guarded against, and, having taken its chances, the drug company and the purchaser at the bankrupt sale must abide by the consequences.

*The writ is denied.*

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## FRANKLIN S. DEWEY *v.* THE UNION SCHOOL DISTRICT OF THE CITY OF ALPENA.

**(Supreme Court of Michigan, 1880. 43 Mich. 480, 5 N. W. 646, 38 Am. Rep. 206.)**

Assumpsit. Plaintiff brings error.

GRAVES, J. The plaintiff was regularly hired by the district to serve as teacher in its public schools for ten months for $130 per month. He entered on his duties on the 2d of September, and continued up to the 10th of December, at which time the district officers closed the schools on account of the prevalence of small-pox in the city, and kept them closed thereafter for the same reason until the 17th of March. They were then reopened and the plaintiff resumed his duties. He was subsequently hired for the next school year, and his compensation was increased $100. The district refused to pay him for the period of suspension, and he brought this action to recover it.

The claim was resisted on two grounds: first, that on the second hiring it was mutually agreed that the addition of $100 to his compensation for incoming service should stand and be allowed and accepted in full satisfaction of all claim for pay during the time in question; and, second, that the suspension was the effect of an overruling necessity, or, in other

**[17] The failure to perform, which the plaintiff in the principal case said was no fault of the plaintiff, but was caused by the receivership, was really the plaintiff's fault because in legal theory financial incapacity, the cause of the receivership, does not constitute impossibility and was, therefore, the legal fault of the plaintiff.**

**Where the corporation undergoes involuntary dissolution, it is normally legally at fault and should not have the defense of impossibility. Spader v. Mural Decoration Co., 47 N. J. Eq. 18 (1890). But it was given that defense in People v. Globe Mut. Life Ins. Co., 91 N. Y. 174 (1883).**

**On bankruptcy, see Central Trust Co. v. Chicago Auditorium Association, reported *ante*, p. 991. But see Lenoir v. Linville Improvement Co., 126 No. Car. 922 (1900).**

**On appointment of a receiver as excuse for nonperformance of contract, see 3 A. L. R. 627, note.**

words, the act of God, and that all parts of the contract were suspended for the time being.

The circuit judge submitted to the jury both questions in a very clear manner, and instructed them to find against the plaintiff in case they were satisfied the alleged compromise was in fact entered into; or in case they should find that the small-pox was so prevalent that it became obligatory on the board to close the schools as a necessary step to prevent the spread of the disease and save human life.

The jury returned a verdict in favor of the district. But we cannot know with legal certainty whether they determined only one of these questions in favor of the district, or whether they so determined both; and of course if one only was so decided, it is impossible to say which one. The evidence on the compromise was conflicting, and as it appears in the record the advantage was with the plaintiff. Still, if no other ground of defence had been laid, the verdict must have been conclusive; as just explained, it is not so now.

The second objection must be briefly considered. Beyond controversy the closing of the schools was a wise and timely expedient, but the defence interposed cannot rest on that. It must appear that observance of the contract by the district was caused to be impossible by act of God. It is not enough that great difficulties were encountered, or that there existed urgent and satisfactory reasons for stopping the schools. But this is all the evidence tended to show. The contract between the parties was positive and for lawful objects. On one side school buildings and pupils were to be provided, and on the other personal service as teacher. The plaintiff continued ready to perform, but the district refused to open its houses and allow the attendance of pupils, and it thereby prevented performance by the plaintiff. Admitting that the circumstances justified the officers, and yet there is no rule of justice which will entitle the district to visit its own misfortune upon the plaintiff. He was not at fault. He had no agency in bringing about the state of things which rendered it eminently prudent to dismiss the schools. It was the misfortune of the district, and the district and not the plaintiff ought to bear it.

The occasion which was presented to the district was not within the principle contended for. It was not one of absolute necessity, but of strong expediency. To let in the defence that the suspension precluded recovery, the agreement must have provided for it. But the district did not stipulate for the right to discontinue the plaintiff's pay on the judgment of its officers, however discreet and fair, that a stoppage of the schools is found a needful measure to prevent their invasion by disease, or to stay or oppose its spread or progress in the community; and the contract cannot be regarded as tacitly subject to such a condition.

The judgment must be reversed, with costs, and a new trial granted.[218]

[218] It would seem to be wrong on principle to distinguish between the case where the Board of Health closes the school and that where the school board,

## GEIPEL AND OTHERS *v.* SMITH AND ANOTHER.

(Court of Queen's Bench, 1872. L. R. 7 Q. B. 404.)

On demurrer to defendants' fifth, sixth and seventh pleas.

COCKBURN, C. J.[219] I am of opinion that our judgment must be for the defendants. I will not say that all and each of the pleas are good, but on the admitted facts sufficient is shown to constitute a defence to

acting reasonably in the emergency closes the school, though some cases do so distinguish. School District v. Howard, 5 Neb. (Unoff.) 340, 98 N. W. 666 (1904); McKay v. Barnett, 21 Utah 239 (1900). Professor Williston's suggestion that the true distinction is between the case where the teacher must remain in readiness to resume teaching, in which event he should be paid during the waiting period, and the case where the probable duration of the closing is so great that it is not proper to require the teacher to remain in readiness to resume work or to ignore the defense of impossibility, in which event the teacher should not be paid, seems sound. See 3 Williston on Contracts, § 1958.

In Crane v. School Dist. No. 14 (Ore.) 188 Pac. 712 (1920), a contract with plaintiff to transport the pupils of the defendant school district for nine months was enforced for the period from Oct. 1, 1918, to Feb. 10, 1919, during which the school was closed because of a dangerous epidemic of influenza, and there were no pupils to transport. The state board of health had issued orders for the closing, but the court found that it was without authority to act, and while the school district had power to act it did act only in obedience to the order of the health officer. Accordingly the court held the closing no defense to the contract and said that even if the school board on exercising its own authorized discretion, had closed the school that might not have suspended the contract.

Bearing on this question are certain related cases. See Hanford v. Conn. Fair Assoc., Inc., 92 Conn. 621 (1918), where performance of a contract to hold a baby show was held excused because of an epidemic of infantile paralysis which rendered the show highly dangerous to public health. The decision was based on public policy.

The impossibility by illness does not have to be absolute, but may be only practical impossibility. If a singer is so sick that it is unreasonable to ask him to sing, he is excused. Even the apprehended illness of one party has been held to excuse the other party from the performance of a contract to buy an interest as partner in the business of the one whose illness was apprehended. Powel v. Cash, 54 N. J. Eq. 218 (1896). And it has been held that an employee is excused from performing his contract of service if a cholera epidemic breaks out "so dangerous in its character that a man of ordinary care and prudence, in the exercise of those qualities" is justified in leaving, and the employee, in fear of the epidemic, actually does leave. Lakeman v. Pollard, 43 Me. 463 (1857). Compare the case of an employee compelled by strikers to quit work. Walsh v. Fisher, 102 Wis. 172 (1899). But an employer who had contracted to run his mill "steadily save when prevented from doing so by unavoidable accident" was held to have no defense when his employees, because of the prevalence of smallpox, quit his employment in such numbers as greatly to diminish the output of his mill, in Vale v. Suiter, 58 W. Va. 353 (1905). See also, Standard Ice Co. v. Lynchburg Diamond Ice Factory (Va.), 106 S. E. 390 (1921).

[219] The statement of facts and the opinions of Blackburn, J., and Lush, J., are omitted.

the action. The declaration is upon a charter party, whereby the defendants, the shipowners, engage to load a cargo of coals at a spout, as directed by the plaintiffs, and having loaded to proceed, as soon as wind and weather would permit, to Hamburg, and there deliver the coals. To that contract, however, there are qualifications, and on one of these the defendants rely—"the restraints of princes and rulers excepted." The pleas show that, after the making of the charter party, and before anything had been done by either party in furtherance of the contract, war broke out between France and Germany, and the French Government proceeded to declare, among other ports, that of Hamburg to be blockaded, and it must be taken that an effective blockade was established and maintained. The question is, whether this was such a state of things as justified the defendants in throwing up the charter party, and refusing to perform either part of it, first in going to a spout to load, and then in taking the cargo to Hamburg. It is perfectly true, that they might have gone to the spout and loaded the cargo; there was no obstacle to their doing that; but they say there was an obstacle to their carrying the cargo to Hamburg, viz., the effective blockade of that port; and that as, in consequence of it, they could not carry out their contract, they were excused from taking the initial step; and I think that the terms of the contract justified this course. I do not think it necessary to consider the larger proposition put forward by Mr. Williams based on Continental Codes—that in the absence of a stipulation as to unforeseen circumstances, we should imply such a term—because I base my judgment on an exception which is contained in the terms of the charter party, viz., of restraints of princes, etc. Does that afford the defendants a justification? I think it does. First, is a blockade a restraint of princes? I think it is. It is an act of a sovereign state or prince; and it is a restraint, provided the blockade is effective: and in the eye of the law a blockade is effective if the enemies' ships are in such numbers and position as to render the running of the blockade a matter of danger, although some vessels may succeed in getting through. In such a case, the obstacle arises from an act of state of one of the belligerent sovereigns, and consequently constitutes a restraint of princes. The case, therefore, is brought within the exception of the charter party. But then it is said that the exception must be taken to apply to the whole contract, and that, inasmuch as the defendants were bound to sail as soon as wind and weather would permit, that must mean, if there be no such restraint; and if there be, then as soon as wind and weather permit after the restraint is removed. But it would be monstrous to say that in such a case the parties must wait—for the obligation must be mutual—till the restraint be taken off—the shipper with cargo, which might be perishable, or its market value destroyed—the shipowner with his ship lying idle, possibly rotting—the result of which might be to make the contract ruinous. At all events it must be taken that the restraint must cease within a reasonable time, and that the duty of the defendants was to

wait only a reasonable time prepared to carry out their contract should the restraint be removed; but the defendants rest their defence on the ground that it was here impossible to expect, from the nature of the circumstances, that the obstacle of the blockade would be removed within a reasonable time. It is a sufficient answer on the defendants' part that it was not likely to be removed within a reasonable time; and assuming that either party was bound to wait a reasonable time to ascertain whether the obstacle would be removed, in point of fact it was not so removed, and the defendants were then justified in not attempting to perform their contract. But then it is contended by the plaintiffs that the contract is divisible into two parts, and that the defendants ought to have performed the first part, which was practicable, in order to be in a position to perform the second, which was not. But the answer of the defendants is that the contract is one entire contract, and that the impossibility of performing the whole within a reasonable time dispensed with the necessity of taking any steps towards its performance. And it is perfectly obvious that it is so; for what good would it have been to the shipper that the shipowner should go to the spout and take in the coals, if he could not proceed with the cargo to Hamburg? None whatever. It is an entire contract, and anything that applies to make the performance of one part impossible must be taken to apply to the whole; and it is admitted that the defendants could not have got to their port of destination. The true way of looking at this case, as it appears to me, is this: it was an entire contract, and there was an insuperable obstacle to the performance of it *in toto;* and the defendants were, therefore, justified in not performing that part of it which was possible, but which, without the possibility of performing the other part of it, was useless.

PER CURIAM.

*Judgment for the defendants on all the pleas.*

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## WATTS, WATTS & COMPANY, LTD., APPELLANTS, *v.* MITSUI & COMPANY, LTD., RESPONDENTS.

(House of Lords. [1917] A. C. 227.)

LORD DUNEDIN.[290] * * * The first question that arises is whether there was a breach of contract. The non-fulfillment is admitted, but the appellants say that under the circumstances that is excused under one of the exceptions in the charterparty, namely, restraint of princes. On August 1st, 1914, Germany had declared war against Russia and had begun hostile action against France, and on the night of the 4th Great Britain declared war against Germany. There was, however, at this time no activity on Germany's part in the Black Sea, or the passage from

[290] The statement of facts, the opinions of Lord Finlay, L. C., Earl Loreburn and Lord Sumner, and parts of the opinion of Lord Dunedin are omitted.

the Black Sea to the Mediterranean or in the Levant. Turkey was a neutral. Restraint of princes, to fall within the words of the exception, must be an existing fact, and not a mere apprehension. This was held long ago by Lord Ellenborough in Atkinson, 10 East. 530. The more recent cases cited by the appellants, such as Geipel, L. R. 7 Q. B. 404 and Nobel's Explosives, [1896] 2 Q. B. 326, do not in any way touch that proposition. They only show that it may be possible to invoke the exception when a reasonable man in face of an existing restraint may consider that the restraint, though it does not affect him at the moment, will do so if he continue the adventure. It would be useless to try to fix by definition the precise imminence of peril which would make the restraint a present fact as contrasted with a future fear. The circumstances in each particular case must be considered. In the present case, while there was natural and great apprehension on September 1st, and while the decision of the British Government immediately after to exclude Black Sea voyages from the benefits of the government insurance scheme might well deter British subjects from sending their ships to the Black Sea, yet it is clearly proved by the production of lists of ships which after that date and up to September 26th passed inwards and outwards through the Dardanelles that there was no such restraint as would have actually prevented the appellants presenting a ship at Marioupol before or by the appointed date of September 20. I agree on this matter with the conclusion arrived at by the court below.

Breach of contract being ascertained, damages are due. * * * I am therefore of opinion that the appeal should be allowed and that the respondent should be found entitled to the sum of £800, being the sum allowed by Bailhache, J., minus the premium calculated at 6 per cent. * * *

Order of the Court of Appeal set aside, and judgment of Bailhache, J., varied by reducing the amount of damages awarded thereunder to £800 [221] and, subject to such variation, restored.

[221] At p. 237, Earl Loreburn stated the damages found as follows: "In short I think the plaintiffs are entitled to say to the defendants 'You broke your contract in not sending your ship to the point of loading. If you had sent her we could have loaded her with a cargo which we had ready. True, it would never have reached its destination by reason of the war, but we should have insured against war risks, as any practical man would do, and we could have done so at 6 per cent premium. Pay us what we have lost by your default. It is the avowed value at port of destination less the actual price we paid at port of loading and the expenses, and less also the premium we had to pay for insuring against war risks.' That sum leaves £800 as the damages."

But in the Kronprinzessin Cecilie (North German Lloyd v. Guaranty Trust Co.), 244 U. S. 12 (1917), though the exception in the bills of lading of gold shipped from New York to Europe by the vessel, of "arrest and restraint of princes, rulers or people" was not held to include in its "literal intent" the reasonable and justifiable precaution of the master of the vessel in turning back to the United States on learning of the outbreak of war, it was held that "other exceptions are necessarily to be implied" (p. 22) and that in the words

## NAYLOR, BENZON & CO., LTD., v. KRAINISCHE INDUSTRIE GESELLSCHAFT.

(High Court of Justice, King's Bench Division. [1918] 1 K. B. 331.)

McCARDIE, J.[222] The plaintiffs seek a declaration that a written contract made between the defendants and themselves was dissolved by the outbreak of the war with Austria on August 12, 1914.

The plaintiffs are an English company registered under the Companies Act; their office is in London. The defendants are an Austrian corporation; their office is in Austria. The contract, dated February 20, 1912, was a sale by the plaintiffs to the defendants of 40,000 tons of iron ore. The price was 16s. per ton c. i. f. Servola. Servola is a port adjacent to Trieste. The bargain provided that about 20,000 tons should be delivered during 1914 and about 20,000 tons during 1915. Shipments were to be made at regular intervals as should be arranged. Up to August 12, 1914, the plaintiffs had duly delivered about 10,000 tons to the defendants. Upon the outbreak of war a balance of about 30,000 tons was therefore outstanding.

Several points of general importance were argued before me by Mr. Bevan for the plaintiffs and by Mr. La Quesne for the defendants. Their arguments were full and able.

The contract was made in London. It is in English form, and it must, therefore, be construed according to English law: see Jacobs, Marcus & Co. v. Credit Lyonnais, (1884) 12 Q. B. D. 589, 600, per Bowen, L. J. But for the fact that the agreement contained a suspension clause the case would present no difficulty, for, apart from such a clause, the contract, if carried out, would clearly have involved a trading with the enemy, and would therefore have been avoided by the war. Esposito v. Bowden, 7 E. & B. 763. It matters not whether the contract be beneficial or not to the English subject. Dissolution takes place irrespective of business loss or gain. The question to be asked in such cases is this: What dealings or communications would or might in the ordinary course of contractual performance have taken place between the parties but for the intervention of war and a consequent prohibition of intercourse. That, as far as I can see, was the test applied in Esposito v. Bowden, *supra*, and is perhaps the only test applicable to the matter. It has been assumed in many decisions. It has been most recently stated by Pickford, L. J., in Rio Tinto Co. v. Ertel Beiber & Co. (1917), 16 L. T. 810, 814.

It therefore becomes necessary to consider the suspension clause before me and to ascertain its true scope, intent and effect. It is as follows:

of the syllabus, paragraph 2: "In an ordinary contract of carriage, not made in the expectation that war may intervene before delivery, peril of belligerent capture affords an implied exception to the carrier's undertaking, the contract being silent on the subject."

[222] The statement of facts and parts of the opinion are omitted.

"In cases of stoppage of mines or works, or of loss or delay during transit, owing to accidents, strikes, lockouts, wars, civil commotions, epidemics, quarantine, dangers of the sea, or of any other cause beyond the control of sellers or buyers, the deliveries now contracted for may be wholly or partially suspended by sellers or buyers during the continuance of same without liability, buyers, however, undertake to receive any quantities for which sellers may have engaged freight before receiving advice of such stoppage." But the contract also contained an arbitration clause, as follows: "Any dispute arising out of this contract shall be referred to two arbitrators in London in the usual manner." The suspension clause cannot, I think, be considered apart from the provision as to arbitration. The consideration of this suspension clause involves several points. The relevant authorities are numerous. The majority have sprung into existence since the occurrence of the present war. The older decisions have been much considered and frequently restated within the last two years. Some of the principles at issue are now, in my opinion, settled with reasonable clearness; but they are not yet finally developed. Their application is ofttimes difficult. In the course of this judgment, I shall formulate rather than fully examine the relevant authorities. In view of the weight of opinion and the divergence of dicta this task is one of delicacy and difficulty to a judge of first instance. But diffidence must not prevent the performance of duty. I will deal with the points involved under separate heads.

First, what is the true effect of the suspension clause in the present contract? * * * I am satisfied that it does not extend to a direct war between Austria and the United Kingdom. * * *

The above observations suffice to dispose of the present case, but as further points were discussed before me it is better that I should briefly deal with them. I will therefore assume that the suspension clause contemplated an outbreak of war between the United Kingdom and Austria, and that it operated also to suspend not deliveries only but all intercourse between the parties. The question, I think, still arises, even on that assumption, as to whether the contract has been dissolved or not. For the events which have taken place may be such as to be outside of the clause, even though construed in the manner most favorable to the defendants. The principle applicable, is, I think, clearly stated in the judgment of Lord Haldane in Tamplin Steamship Co. v. Anglo-Mexican Petroleum Co., [1916] 2 A. C. 397, 406, as follows: "Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation." The opinions of the members of the House of Lords in Tamplin's Case, [1916] 2 A. C. 397 show an agreement in the principle, but a difference as to its application to the facts of that case: see per Lord Cozens-Hardy, M. R., in Metro-

politan Water Board v. Dick, Kerr & Co., [1917] 2 K. B. 1, 20. The principle is one of great value. If applied, it may solve many cases. It was, I think, the principle on which the Court of Appeal decided the case of Scottish Navigation Co. v. Souter & Co., [1917] 1 K. B. 222. It was also the principle which governed the decision of the Court of Appeal in Metropolitan Water Board v. Dick, Kerr & Co., [1917] 2 K. B. 1, and the affirmation of that decision by the House of Lords, [1918] A. C. 119. A clause, though broad in its meaning, may not cover a set of facts so fundamental and far-reaching in extent and operation and so prolonged in duration as to change the whole circumstances of the contract and the character of its performance. The war has involved vast change. It has now lasted several years. The end is not in sight. During the whole period of the war, as I have already pointed out, supreme administrative intervention has prevented any communication between the parties. The position of shipping has wholly changed. Trade rests on a different basis. Prices and freights are already uniquely high. At the conclusion of the war new conditions of trade and transport will spring into being. The day of peace will not restore old conditions. Imperial policy may operate in unexpected ways. Can such a set of circumstances have been in the minds of the parties when they made the bargain of February 20, 1912? In my opinion the answer is No. My view in the present case is strengthened by the fact that here the period of normal performance of the contract ended in December, 1915. Two years have elapsed since then. The contract contemplated a temporary suspension only and not the prolonged intermission and changes which have actually taken place. If the circumstances are wholly outside the contemplation of the parties, then a term should be implied that in such a case the contract should cease: Tamplin's Case, *supra*, per Lord Loreburn. It was upon this principle, I feel, that the case of Horelock v. Beal, [1916] A. C. 486 was decided: Tamplin's Case, [1916] 2 A. C. 397, 403, per Lord Loreburn. I have considered the decision of Rowlatt, J., in Distington Hematite Iron Co. v. Passehl & Co., [1916] 1 K. B. 811. In spite of the suspension clause there existing he held that the war had dissolved the contract. His decision has been approved by Lord Finaly in Metropolitan Water Board v. Dick, Kerr & Co., [1918] A. C. 119. In my opinion, the decision of Rowlatt, J., substantially rests on the principle I have stated, namely, that a revolution of circumstances may effect a dissolution of contract. As Rowlatt, J., said ([1916] 1 K. B. 814): "To affirm such a contract as standing generally, although at the present time and for an indefinite period it cannot be acted upon, is not to maintain the original contract, but to substitute a different contract for it." I have also considered the decision of Rowlatt, J., in Clapham Steamship Co. v. Handels-en Transport-Maatschappij Vulcan of Rotterdam, [1917] 2 K. B. 639. A suspension clause existed in that case also. The learned judge there held the view that the contract was dissolved upon the ground of public

policy. I venture to think, however, that his decision may also be supported on the principle I have stated. I will hereafter say a few words on the question of public policy.

In the course of the arguments before me the decision of Bray, J., in the case of Naylor, Benzon & Co. v. Hirsch (1917), 33 T. L. R. 432 was cited. In that case there was also a suspension clause. But the learned judge held that it did not cover the circumstances which had arisen, and that the contract had become "commercially impracticable," and was therefore dissolved. In my view he merely applied the principle I have already stated. The juristic meaning of the phrase "commercially impracticable" can only be this, I think, that the contract cannot be applied to circumstances which could not have been within the contemplation of the parties when the contract was made. Jackson v. Union Marine Insurance Co. (1873), L. R. 8 C. P. 572, 581, per Brett, J., and Bush v. Whitehaven Trustees (1888), 52 J. P. 392, 393, per Lord Coleridge, C. J.

A final point was argued before me, namely, that a suspension clause operating in such a contract as the present to postpone deliveries until after the conclusion of war was against public policy and therefore void. The question is a grave one. It involves considerations which are not confined to the present contract or the present war. I ought perhaps to state that by s.2 of the Trading with the Enemy Amendment Act, 1916 (5 & 6 Geo. 5 c. 105), the Board of Trade may cancel any contract with an enemy if it appears to the Board that such contract is injurious to the public interest. In my view this provision is of vital importance. The time has perhaps come when the Board of Trade should review the range of existing contracts with enemies and should decide the questions of great economic urgency which obviously arise upon the section. But the existence of the Act of Parliament does not absolve the court from deciding the questions which arise in pending actions.

In the present case, I point out that there is no express restriction of sales by the plaintiffs during the period of suspension. In Zinc Corporation v. Hirsch, [1916] 1 K. B. 541, such an express restriction existed. But upon the question of public policy, I see no distinction between an express restriction and the business restriction which necessarily results where a vendor is embarrassed and fettered by forward contracts. In the case before me the plaintiff's managing director, Mr. Hay, pointed out the effect upon the plaintiffs' business if this contract remains operative at the close of the war. The plaintiffs must, if the bargain be binding, provide for the fulfillment of the contract. Freights are already vastly higher than before the war. Tonnage is ever more difficult to get. The price of ore is already 50 per cent higher f. o. b. than before the war. The plaintiffs' ore is largely used for steel wherewith to make munitions of war for the British Government. In the view of Mr. Hay, the value of the ore and the cost of tonnage will be equally as high at the conclusion of the war. The result is that the plaintiffs are

and will be hampered if the contract holds, whilst the enemy defendants will possess an asset of great value in their rights against the plaintiffs. In these circumstances, I am asked by the plaintiffs to say that public policy would invalidate the clause, assuming that it applied to the present war and operated in entire suspension of the whole of the respective rights and obligations of the parties.

The question of public policy may well give rise to a difference of judicial opinion. Public policy, it was said by Burroughs, J., in Richardson v. Mellish (1824), 2 Bing. 229, 252, "is a very unruly horse, and when once you get astride it you never know where it will carry you." But the courts have not hesitated in the past to apply the doctrine whenever the facts demanded its application. In Janson v. Dreifontein Consolidated Mines, [1902] A. C. 484, 491 Lord Halsbury, L. C., said: "I deny that any court can invent a new head of public policy." I very respectfully doubt if this *dictum* be consistent with the history of our law or with many modern decisions. In Wilson v. Carnley, [1908] 1 K. B. 729, the Court of Appeal held that a promise of marriage made by a man who, to the knowledge of the promisee, was at the time of making the promise married, is void as being against public policy. This decision marked a new application or head of public policy. In Neville v. Dominion of Canada News Co., [1915] 3 K. B. 556, the Court of Appeal held, affirming Atkin, J., that an agreement by a journalist not to comment upon the plaintiff's company or its directors or business was void as against public policy. This decision created, I think, a wholly new head of public policy. In Horwood v. Millar's Timber Trading Co., [1917] 1 K. B. 305, the Court of Appeal held that an agreement which unduly fettered a man's liberty of action and the free disposal of his property was void as against public policy. This decision also, I think, created in substance, a new head of public policy. The truth of the matter seems to be that public policy is a variable thing. It must fluctuate with the circumstance of the time. This view is exemplified by the decisions which were discussed in the House of Lords in Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., [1894] A. C. 535. The general economic considerations to which the courts will have regard were indicated by Lord Parker in delivering the judgment of the Privy Council in Attorney-General of the Commonwealth of Australia v. Adelaide Steamship Co., [1913] A. C. 781, 809, 810; see also the judgment of Lord Ha'dane in North-western Salt Co. v. Electrolytic Alkali Co., [1914] A. C. 461, 469, 471. The principles of public policy remain the same, though the application of them may be applied in novel ways. The ground does not vary. As it was put by Tindal, C. J., in Horner v. Graves, (1831) 7 Bing. 735, 743, "Whatever is injurious to the interests of the public is void, on the grounds of public policy." Now on looking at the famous judgment of Lord Stowell in The Hoop (1799), 1 C. Rob. 196, it will be seen that the prohibition of intercourse with enemies is based in his view on public policy. I think,

too, that the decision in Esposito v. Bowden (8 E. & B. 763), substantially rests on the same basis. Upon turning to the judgment of Lord Davey in Janson v. Driefontein Consolidated Mines [1902] A. C. 484, 499, it will be seen that he states expressly that the rule first established in The Hoop (*supra*), rests "on distinct grounds of public policy." Hence I see no ground for omitting to consider the question of public policy in respect of a suspension clause contained in an ante-war contract with one who is now an enemy, even though public policy sometimes be an unsafe ground for decisions: see per Lord Davey in Janson's Case [1902], A. C. 500. Indeed in the passage from Lord Halsbury's opinion in Janson's case (ibid. 491), already referred to, that great lawyer expressly refers to the rule against "assisting the King's enemies," as a recognized head of public policy. How, then, do the most recent authorities stand with respect to the validity of a suspension clause in such a contract as the present? They may be briefly mentioned. In Zinc Corporation v. Hirsch [1916], 1 K. B. 541 Swinfen Eady and Pickford, L. JJ., both expressed their view that the suspension clause in the contract there in question was, when taken in conjunction with the restriction clause, against public policy. As I have already said, I feel that it is not material whether there be an express restriction clause if there be the implied but necessary restriction of business arrangements resulting from a binding forward contract. In Rio Tinto Co. v. Ertel Bieber & Co. (116 L. T. 810), Pickford, L. J., apparently, and Scrutton, L. J., certainly, approved the view of Swinfen Eady, L. J., in Zinc Corporation v. Hirsch, *supra*. The judgment of Scrutton, L. J., is emphatic. In the Clapham Steamship Case, [1917] 2 K. B. 639, Rowlatt, J., clearly followed the view of Swinfen Eady, L. J., although no restriction clause existed in that case. The learned judge pointed out that the effect of the suspension clause would be to fortify the present commercial position of the enemy apart from the question of his strengthened position at the conclusion of the war. * * *

I have considered the circumstances of this case with care, and I have also considered the general questions and considerations which arise in connection with it. As a result I have come to the conclusion, though not without doubt, that a suspension clause in such a contract as the present is, having regard to all the relevant circumstances, void as against public policy. I thus follow the view expressed by Rowlatt, J., in the Clapham Steamship Company Case, *supra*. To maintain the contract during the war will support the enemy during the war. I venture to add the further reason that it will strengthen the enemy greatly after the war. Upon the circumstances before me in this case I feel that the words of Lord Parker in Daimler Co. v. Continental Tyre & Rubber Co. [1916], 2 A. C. 307 do not impugn the views that I have expressed. Nothing that I have said weakens the rule that any debt or cause of action which accrued to the enemy before the war will remain to him, subject to the effect of the Trading with the Enemy Acts, and the

vesting of such a chose of action in the Public Trustee. The dissolution of the contract leaves such debts and causes of action as they existed at the outbreak of the war. Ex parte Boussmaker (1806), 13 Ves. 71; Civil Service Co-operative Society v. General Steam Navigation Co., [1903] 2 K. B. 756, 764, per Lord Halsbury, L. C.; Chandler v. Webster, [1904] 1 K. B. 493, 501, per Romer, L. J.

For the reasons given I therefore declare that the contract between the parties was dissolved by the outbreak of the war with Austria on August 12, 1914. The defendants must pay the costs of this action.

*Judgment for the plaintiffs.*[223]

[223] See Ertel Bieber & Co. v. Rio Tinto Co., [1918] A. C. 260.

In The Claveresk (Earn Line S. S. Co., Limited, v. Sutherland S. S. Co., Ltd.), 264 Fed. 276 (1920), the action was for breach of a charter-party of the steamship Claveresk entered into in 1913, to expire in April, 1918. While the Claveresk was on a voyage under the charter, and on January 25, 1917, the British Government notified its owner that the boat was required for government service and the owner honored that notice and the formal requisitioning letter which followed it. On Feb. 10, 1917, the Claveresk passed under control of the British Admiralty and the court expressly found that "in January-February, 1917, having regard to the then violence of German submarine warfare on merchant vessels, and the success thereof, no reasonable man would have expected or even dared hope that the Claveresk, once taken into government service, would be released for any use contemplated by the charter of 1913, before the expiring of the term of that charter" (p. 279). In affirming a decree dismissing the libel because the requisition by the government was within the "restraint of princes" clause and because of the impossibility of performance created by the requisition, Hough, J., said in reference to the second reason:

"How does the contract stand *eo instanti* the ship is taken away? Is the private contract living or dead, and, if dead, what killed it? This question cannot be answered by reference to the restraint clause, or any other expressed term of the written contract; therefore another legal creation, and one underlying the words chosen by the parties, is appealed to, and we find that this charter party ended or died, and its obligations were forever dissolved, on February 10, 1917, because the commercial adventure was then frustrated.

"This phrase is said to have been born in the judgment in Jackson v. Union Marine Ins. Co., L. R. 10 C. P. 125 (Bank Line v. Capel [1919] 1 A. C. 457); it has been the subject of recent exhaustive discussion in the House of Lords (Horlock v. Beal [1916] 1 A. C. 486, and the Tamplin & Bank Line Cases, *supra*), and the doctrine was recently applied in The Allanwilde, 248 U. S. 377, 39 Sup. Ct. 147, 63 L. Ed. 312, 3 A. L. R. 15, and Lewis v. Mowinckel, 215 Fed. 710, 132 C. C. A. 88. It is so authoritatively held in the cases cited, and those on which they rely, that the doctrine of frustration applies to a variety of maritime contracts including time charters, that more than mention of the fact scarcely seems necessary. In our judgment the justification for the holdings is best expressed by Lord Sumner (Bank Line Case, at page 454), in saying:

" 'Rights ought not to be left in suspense or to hang on the chances of subsequent events. The contract binds or it does not bind, and the law ought to be that the parties can gather their fate then and there.'

"But since parties almost never agree about it, courts must ascertain fate for them, by (says Lord Loreburn, in Tamplin Case at page 404) inferring,

## BLACKBURN BOBBIN CO., LTD., *v.* T. W. ALLEN & SONS, LTD.

(High Court of Justice, King's Bench Division. [1918] 1 K. B. 540.)

Action in the commercial list tried by McCardie, J., without a jury.

The following statement of the facts is taken from the written judgment:—

"The claim is for damages for breach of contract. The plaintiffs are manufacturers of bobbins for spinning. Their office is at Blackburn. The defendants are timber merchants at Hull. In the early part of 1914 the defendants sold to the plaintiffs seventy standards of Finland birch timber at the price of 10*l.* 15*s.* per standard free on rail at Hull. Deliveries were to commence about June or July, 1914,

'from the nature of the contract and the surrounding circumstances, that a condition not expressed was a foundation on which the parties contracted.' It follows naturally that, when the foundation is removed the superincumbent contract falls and dies; it is killed by that malignant disease—a change of circumstances. It may also be accepted on authority that frustration of adventure and termination of contract may be the instant result of an act which may be properly described as 'restraint of princes,' etc. Bank Line Case, at page 442.

"Applying these rules to the facts before us, it being true that government on February 10, 1917, made it impossible for either Sutherland, Earn Line, or any other private individual to use the Claveresk, and did this under circumstances clearly showing to any sensible man that such indefinite taking would almost certainly outlast the life of the charter, it further appearing that the boat was so retained far beyond the charter period, and indeed (by admission at bar) still is kept by government (cf. Bank Line Case, at page 454), it follows as a conclusion of law that the charter party was terminated by frustration on February 10, 1917.

"Although this result has been worked out in the highest British court with an enormous expenditure of writing, an examination of the case law relied on shows that the doctrine of frustration as applied to time charters is regarded as a logical outcome of the Union Marine Insurance Case, *supra*, and Geipel v. Smith, L. R. 7 Q. B. 404, which are likewise the precedents forming the foundations of The Styria, [186 U. S. 1] *supra*, and kindred decisions.

"Indeed, we cannot think the doctrine new except in phraseology and application; for it is elementary that among the ways in which any contract ends and is dissolved is the cessation of existence of some thing, condition, or state of things, upon the continued existence of which the contract was known to depend, provided such cessation of existence arises without fault in either contracting party. Jenks, Dig. English Civil Law, bk. 2, part 1, § 297, citing cases.

"In the present instance, what ceased to exist was Sutherland's control of the Claveresk; that swept away the foundation of contract, as thoroughly as might a fire or shipwreck. All arguments leading to an opposite result, all suggestions that such charter as this survived February 10, 1917, make of the superior force that removed every reasonable chance of doing what both parties expected to do when they agreed together, no more than an option to cancel, to be exercised after a nice calculation of possible loss or gain, by owner or charterer as the case may be. Indeed, there seems nothing left to cancel but a chance of loss; for never is it admitted that any portion of the charter

and to continue during the season which would expire about November in that year. The contracts were not formal; they were created by correspondence. They contained no war or *force majeure* or suspension provisions. They were simple bargains of sale and purchase. Finland produces birch timber of a clean and pliable character. It is particularly useful for the purpose (*inter alia*) of manufacturing bobbins. The contract required that the timber to be supplied to the plaintiffs should come from Finland. Prior to the war the unvarying practice was to load the timber into vessels at ports in Finland for direct sea carriage to English ports. No timber was railed across Scandinavia for shipment from a Scandinavian port to England.

"Up to August, 1914, the defendants had made no deliveries to the plaintiffs. Then war broke out. Imports of timber from Finland stopped at once. German war vessels traversed the Baltic. Transport was paralyzed. No vessels left Finland for Sweden. Swedish vessels ceased to sail for Finland. The vast disorganizing effect of the war on trade and transport need not be further indicated. It undoubtedly effected a revolution of circumstances, and rendered it impossible for the defendants to deliver the timber in accordance with their bargain. The English timber merchants who deal in Finish timber do not

survived seizure except the chance of gain. No suggestion of sharing loss is admitted.

"But a charter party is not a partnership agreement, nor is it primarily an agreement for money payments; it is a promise to serve with and by a named ship, and when the ship is gone the charter is ended; and all the law can do is to apportion blame for the loss, guiding inquiry, first, by the words of the agreement; and, second, by the implications of underlying inherent conditions presumed to be common to sensible and honest men. It is impossible to imagine such men even wishing to agree that if government pays a high price, the advance goes all to one, while if a low price is paid, the burden falls only on the other. 'Heads I win, tails you lose,' as a bargain, is beyond the pale of implication.

"For these reasons, libelant can take nothing by this libel. That pleading rests solely on a breach, called a 'repudiation' by the pleader; this is another of the ways in which a contract ends or dies, in which case the breach gives rise to damages. A breach is a wrong, but there was no breach, therefore there can be no damages."

Where because of impossibility a contractor cannot perform all of his contracts affected by the impossibility in full, but can in part, he may prorate his performances and escape liability by performing to that extent. Herrmann v. Bowen Chemical Mfg. Co., 242 Fed. 59 (1917). That is, of course, providing he has acted reasonably and has not recklessly made new contracts. As was said by Morton, J., in Metropolitan Coal Co. v. Billings, 202 Mass. 457, 460-461 (1909):

"The judge also instructed the jury that as against the defendant the plaintiff would have no right to sell to new customers, and that any inability to fulfill its contract resulting from a desire to sell to others at higher prices or to relieve the necessities of others would not excuse the plaintiff from the obligation imposed on it by the contract. These instructions * * * were well warranted by the decision in Oakman v. Boyce, 100 Mass. 477 * * * We see no reason to doubt the correction of the rules there laid down."

hold stocks. Their timber as it arrived before the outbreak of the war had gone to the customers to whom it had been already sold.

"Following upon the outbreak of the war the defendants did not supply the plaintiffs with any portion of the timber to which the plaintiffs were entitled during the season of 1914. Correspondence took place between the parties up to November, 1914. Thenceforward no letter or communication passed between them until July, 1916. In that month the plaintiffs asked for delivery. The defendants then asserted for the first time that the contract had been dissolved by the outbreak of the war in 1914. The plaintiffs disputed this assertion; hence their claim to damages. The defence contains no plea that the contract was mutually abandoned, nor was any such point raised in argument."

McCARDIE, J.[224] * * * The above brief statement of facts suffices for the purpose of considering the main point raised by the defendants, namely, that the contract between the parties was dissolved by the outbreak of the war. * * * It is obvious that the principle raised by the case is one of vital and general importance.

The question at issue is this: When will a change of circumstances (not due to the default of either party) cause a dissolution of contract? The law upon the matter is undoubtedly in process of evolution; see per Atkin, J., in Lloyd Royal Belge Societe Anonyme v. Stathatos (1917) 33 Times L. R. 390 and per Pickford, L. J., in Hulton & Co. v. Chadwick & Taylor, (1918) 34 Times L. R. 230. The point must presumably be solved upon broad existing principles of contract law. Those principles, I conceive, should be the same whether the case be one of charterparty, building contract, or sale of goods; see per Lord Loreburn in the Tamplin case, [1916] 2 A. C. 397, 404. But the application of the principles may vary with the terms and subject matter of the contract. Is there a conflict at the present time between the rules which are relevant to the present case? The original rule of English law was clear in its insistence that where a party by his own contract creates a duty or charge upon himself he is bound to make it good notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; see *per curiam*, Paradine v. Jane, (1647) Aleyn, 26. That principle was applied with full severity during the eighteenth century. I need not discuss the decisions in detail; many are referred to in Leake on Contracts, 6th ed., pp. 494-498. In some of those cases there was clearly a grave change of circumstance not within the contemplation of the parties at the time of the contract, yet it was held that no dissolution of contractual obligation took place. I mention the decisions referred to in Leake because it is, I think, essential to remember them if the pending evolution of principle proceeds. The original rule has again and again been

[224] Parts of the opinion are omitted.

restated. I only refer to Spence v. Chodwick, (1847) 10 Q. B. 517, 530, per Wightman, J., and to Ford v. Cotesworth, (1868) L. R. 4 Q. B. 127, per Blackburn, J. To what extent has the original rule been modified by later decision? I do not think that the decision in Exposito v. Bowden, (1857) 7 E. & B. 763, is relevant to the question for the contract was there dissolved by reason of the absolute prohibition of commercial intercourse with an enemy. I doubt, moreover, if Baily v. De Crespigny, (1869) L. R. 4 Q. B. 180, is a true modification of the doctrine. For there an Act of Parliament took away from both parties the subject matter of the contract. The rights of each were destroyed and nothing was left upon which the contract could operate. There was more than a change of circumstance; there was a statutory seizure of the contract property. But the judgment of the court undoubtedly rested to some extent on the principle of dissolution by a complete change of circumstance, and this view has apparently been approved by Lord Parmoor in Metropolitan Water Board v. Dick, Kerr & Co. [1918] A. C. 119, 140.

The first true modification of the original rule was created, I think, by the doctrine of commercial frustration. I need not review the decisions on this doctrine; they are fully and historically considered in the judgments, both in the Common Pleas and the Exchequer Chamber, in Jackson v. Union Marine Insurance Co. (1873) L. R. 8 C. P. 572, (1874) L. R. 10 C. P. 125. The effect of that decision is best stated by Brett, J. (L. R. 8 C. P. 581) as follows: "Where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable to or impossible of application to any such circumstances, it ceases to have any application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made." If these words of Brett, J., are to be applied to their widest extent they may well effect a revolution of contract law. It has been pointed out by Lord Loreburn that the rule stated in Jackson v. Union Marine Insurance Co. (L. R. 10 C. P. 125), is a mere application to commercial adventures of a broad contractual principle; see the Tamplin Case, [1914] 2 A. C. 404.

The next true modification of the original rule was finally affected by the decision in Taylor v. Caldwell, (1863) 3 B. & S. 826. There the contract was held dissolved by the destruction of its subject-matter. The doctrine of Taylor v. Caldwell, (*supra*) was extended by Nicholl & Knight v. Ashton, Eldridge & Co., [1901] 2 K. B. 126, and still more strikingly enlarged by the Coronation cases, of which Krell v. Henry, [1903] 2 K. B. 740 is the most vivid example, for in Krell v. Henry, (*supra*) the court held that a collateral, though important, circumstance was the basis of the contract between the parties, and that when the basis ceased it followed that the contract was dissolved. Krell v.

Henry, (*supra*) has been frequently cited and adopted in the highest tribunal.

So stood the decisions at the outbreak of the present war. Since that event judgments have been delivered as to the true effect of the decisions I have stated. On the one hand the original rule has been stated to exist in its integrity, whilst on the other hand the modification of the rule is deemed to be clearly settled: see per Lord Wrenbury in Horlock v. Beal, [1916] 1 A. C. 486, 525. The explanation of the lines of cases represented (a) by Jackson v. Marine Union Insurance Co., L. R. 10 C. P. 125, and (b) by Krell v. Henry, [1903] 2 K. B. 740, has been finally and authoritatively stated. It was put with clearness by Lord Shaw in Horlock v. Beal, [1916] 1 A. C. 512, where he said: "The underlying *ratio* is the failure of something which was at the basis of the contract in the mind and intention of the contracting parties." It was stated with equal clearness by Lord Haldane in the Tamplin Case, [1916] 2 A. C. 406, 407, where he said: "The occurrence itself may * * * be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation." In every case it is now necessary "to examine the contract and the circumstances in which it was made not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist and if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract:" per Lord Loreburn in the Tamplin case (*supra*). It is obvious that what I will call the Krell v. Henry rule as now formulated is theoretically capable of application to all contracts, whether as between shipowner and seamen, as in Horlock v. Beal, [1916] 1 A. C. 486, or to building contracts, as in Metropolitan Water Board v. Dick, Kerr & Co., [1918] A. C. 119.

But by what tests and subject to what limitation is the Krell v. Henry rule to be applied? No indication has yet been given as to the extent of its operation. At the outbreak of war a vast body of commercial contracts existed which contained no clauses whatever providing for that event. No one can doubt that such contracts had been made upon the assumption that peace would continue. Neither side contemplated the occurrence of war. But it cannot be that all such contracts were dissolved by the events of August, 1914. The mere continuance of peace was not a condition of the contract: see per Lord Loreburn in the Tamplin case, *supra*. The destruction of a state of peace is not of itself a destruction of any specific set of facts within the Krell v. Henry rule. Nor can it be that grave difficulty on the part of a vendor in procuring the contract articles will excuse him from the performance of his bargain. If such were the case, then the deci-

sion of the House of Lords in Tennants (Lancashire) v. Wilson & Co., [1917] A. C. 495 with respect to the *force majeure* clause there in question would have been unnecessary for the contract would have been dissolved by a basic change of circumstances and the principle of Metropolitan Water Board v. Dick, Kerr & Co. *supra* would have applied.

What, then, are the limits of the Krell v. Henry rule, as most recently exemplified by the last-named case, Metropolitan Water Board v. Dick, Kerr & Co., *supra*? At the same time I deem it well to ask this further question: Have the recent decisions in the House of Lords impliedly overruled the judgment of the Court of Appeal in Jacobs, Marcus & Co. v. Crédit Lyonnais, 12 Q. B. D. 589? There the defendants, a London firm, sold to the plaintiffs, London merchants, 20,000 tons of Algerian esparto to be shipped by a French company at an Algerian port on vessels to be provided by the plaintiffs. The defendants pleaded that performance of their contract had become impossible by reason of an insurrection in Algeria, and a consequent prohibition by the territorial government of the collection and transport of esparto. It was held by the Court of Appeal (Brett, M. R. and Bowen, L. J.,) affirming Manisty and Denman, JJ., that such plea afforded no answer to the plaintiff's claim for damages. The pith of the case was put by Bowen, L. J. (at p. 603): "Now, one of the incidents which the English law attaches to a contract is that (except in certain excepted cases, as that of common carriers and bailees, of which this is not one,) a person who expressly contracts absolutely to do a thing not naturally impossible, is not excused for nonperformance because of being prevented by *vis major*. 'The rule laid down in the case of Paradine v. Jane, (Aleyn, 26, 27) has,' says Lord Ellenborough, 'been often recognized in courts of law as a sound one; i. e., that 'when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.' (Atkinson v. Ritchie (1809), 10 East, 530, 533.) See also Spence v. Chodwick, 10 Q. B. 517, 530; Loyd v. Guilbert (1865), L. R. 1 Q. B. 115, 121. If inevitable necessity occurring in this country would not excuse nonperformance, why should nonperformance be excused on account of the inevitable necessity arising abroad? So to hold would be to alter the liability which English law attaches to contracts, and would, in the absence of an express or implied intention to that effect, be contrary to authority as well as principle, see Barker v. Hodgson (1814), 3 M. & S. 267; Sjoerds v. Luscombe (1812), 16 East, 201." The change of circumstances in Jacobs Case (12 Q. B. D. 589), was serious and clearly was not foreseen by the parties. See also Ashmore v. Cox, per Lord Russell of Killowen, C. J., [1899] 1 Q. B. 436.

To supply an answer to the above questions is a task of great difficulty in the absence of any authoritative guidance, for it calls not only for a reconciliation of apparently conflicting lines of cases, but it calls

also for the ever-embarrassing duty of deciding whether an implied term shall be read into a given contract to the effect that dissolution shall take place if an uncontemplated and serious change of circumstances occurs. The decisions with respect to personal services throw, I feel, but little light on the matter, for it seems just and reasonable to imply a condition in such agreements that the contracts shall be dissolved upon the death or physical incapacity of the person who has agreed to give his personal services: see Robinson v. Davison (1871), L. R. 6 Ex. 269. Death and illness are unceasing features of human society. I think, however, that assistance is derived from considering broadly the nature of the cases in which the Krell v. Henry rule has been applied, whether before or after that decision in 1903. It will be observed that they apparently fall into several classes: First, where British legislation or government intervention has removed the specific subject-matter of the construction from the scope of private obligation (Baily v. De Crespigny, L. R. 4 Q. B. 180, is a good example of this class: see also In re Shipton, Anderson & Co., and Harrison Brothers & Co., [1915] 3 K. B. 676, the case of specific goods. I myself, venture to think that this is an independent class of case, though, for the purpose of clearness, I classify it as falling within Krell v. Henry); secondly, where the actual and specific subject-matter of the contract has ceased to exist, apart from British legislation or administrative intervention (Taylor v. Caldwell, 3 B. & S. 826 is the best example of this class); thirdly, where a specific set of facts directly affecting a specific subject-matter has ceased to exist, (see Jackson v. Union Marine Insurance Co. (L. R. 10 C. P. 125), the case of a ship, and Scottish Navigation Co. v. Souter & Co., [1917] 1 K. B. 222, also the case of a ship); fourthly, where a specific set of facts collaterally only affecting a specific subject-matter, but yet constituting the basis of contract, has ceased to exist (see Nicholl & Knight v. Ashton, Eldridge & Co., [1901] 2 K. B. 126, the case of a ship and Krell v. Henry, [1903] 2 K. B. 740, the letting of specific premises); and, fifthly, where British administrative intervention has so directly operated upon the fulfilment of a contract for a specific work as to transform the contemplated conditions of performance (Metropolitan Water Board v. Dick, Kerr & Co., [1918] A. C. 119). I need not, of course, classify or illustrate the cases in which British legislation has directly prohibited the performance of a contract. In such cases the doctrine of illegality dissolves the bargains: see Brewster v. Kitchell (1697), 1 Salk. 198. In none of the cases in the above classes has it been stated or substantially suggested that the principle of Krell v. Henry applies to the case of a bare sale of unascertained goods. The illuminating judgment of Scrutton, L. J., in Metropolitan Water Board v. Dick, Kerr & Co., *supra,* seems throughout to be dealing with specific subject-matters.

But the above classification, imperfect as I fear it is, does not exhaust the decisions which call for consideration and here I must point out

that in not a few of the decisions since the outbreak of the war the question of trading with the enemy has crept directly or indirectly into the determination of the matters in dispute. The doctrine of prohibition against any intercourse whether commercial or otherwise, with an enemy subject, is severe and far-reaching. I need only refer to Esposito v. Bowden, 7 E. & B. 763; Zinc Corporation v. Hirsch, [1916] 1 K. B. 541; Robson v. Premier Oil & Pipe Line Co., [1915] 2 Ch. 124; and Ertel Bieber & Co. v. Rio Tinto Co., [1918] A. C. 260 in the House of Lords. It is important to remember this point in approaching the cases which I next mention. Such cases apparently deal with a sale of unascertained goods. They are as follows: (a) Jager v. Tolme & Runge, [1916] 1 K. B. 930 (Court of Appeal). The facts of this case were complicated, but the substance of the matter was that the vendors had agreed to deliver sugar f. o. b. Hamburg in August, 1914. The parties were British. The courts held that the contract was dissolved by the outbreak of the war. In my opinion, however, it is clear that the *ratio* of the decision was that performance of the contract would be illegal inasmuch as it would involve commercial intercourse with the enemy. The Court of Appeal ignore the expressly-raised contention that the contracts had been dissolved on the principle of Krell v. Henry. The case of Grey & Co. v. Tolme (1915), 31 Times L. R. 551 was decided by Bailhache, J., on the same *ratio*. (b) Smith, Coney & Barrett v. Becker, Gray & Co., [1916] 2 Ch. 86. Here again the facts were complicated. The parties were British firms. The vendors had agreed on August 1st, 1914, to sell sugar f. o. b. or into warehouse Hamburg. In view of the special provision in the contract the court held that the contract was not dissolved. Had it held otherwise, I venture to think that the true *ratio* would again have been that performance would have involved trading with the enemy. But it is right to say that although the majority of the court (Lord Cozens-Hardy, M. R. and Swinfen Eady, L. J.) did not apparently favour the application of the Krell v. Henry rule, yet Phillimore, L. J., seems to have thought that it might apply under certain circumstances—for instance, if the sugar had been wholly destroyed by fire. The point does not seem to have been fully argued, and such cases as Jacobs, Marcus & Co. v. Credit Lyonais 12 Q. B. D. 589 were not brought to the attention of the court. (c) Hulton & Co. v. Chadwick & Taylor, 34 Times L. R. 230. The facts in this decision more closely approach the facts of the present case. It was recognized by Pickford, L. J., that the principle of dissolution of contract by change of circumstances had been largely extended in operation. But I respectfully suggest that the true *ratio* of the decision of the Court of Appeal is to be found not so much in the change of circumstance, though serious in extent, as in the fact that administrative intervention of the British Government had in substance prevented the fulfilment of the contract by the vendor in accordance with his obligations. Hulton & Co. v. Chadwick & Taylor

represents, in my view, an extension of the principle of Brewster v. Kitchell, 1 Salk. 198, or Baily v. De Crespigny, L. R. 4 Q. B. 180, rather than a true extension of the broader principle of Krell v. Henry. The former principle is one which admits of many applications in these days of administrative intervention, and in some cases the facts may be covered as much by Krell v. Henry as by Baily v. De Crespigny, *supra*. The principles may overlap. The rule contended for by Mr. MacKinnon [of counsel for the defendants] must have applied, if at all, as much to that case as to the present, for there had been in Hulton's case (34 Times L. R. 230) a revolution of circumstance, yet it is clear that Pickford, L. J., rested his judgment on administrative intervention, that is to say, on Baily v. De Crespigny, *supra*, rather than on the application of the Krell v. Henry rule.

My conclusion upon the matter is that in the absence of any question as to trading with the enemy, and in the absence also of any administrative intervention by the British Government authorities, a bare and unqualified contract for the sale of unascertained goods will not (unless most special facts compel an opposite implication) be dissolved by the operation of the principle of Krell v. Henry even though there has been so grave and unforeseen a change of circumstance as to render it impossible for the vendor to fulfill his bargain. If I were to hold otherwise, I should create a rule the results of which no man can foresee, and to the operation of which no judge can satisfactorily fix the limits.

By stating the above conclusion I maintain the original rule of English law whereby a man is bound by his contract whilst I leave a field as yet undefined for the operation and extension of the Krell v. Henry principle. I am fortified in the view I express by the fact that Jacobs, Marcus & Co. v. Crédit Lyonnais, *supra*, has remained unchallenged amidst the testing breadth of recent decisions. I can see no sound distinction between impossibility of foreign law and impossibility created by an outbreak of war involving a complete cessation of transport facilities. Just as it seems clear that a vendor is not absolved from the duty to deliver unascertained goods by reason of the destruction of his factory or warehouse, so a vendor is not relieved from his obligation in such a case as the present. An ordinary and bare contract for the sale of unascertained goods gives no scope for the operation of the Krell v. Henry rule, unless the special facts show that the parties have clearly (though impliedly) agreed upon a set of circumstances as constituting the contractual basis. Here no such agreement exists. In the present case I ask the question put by Denman, J., in Jacobs, Marcus & Co. v. Credit Lyonais, 12 Q. B. D. 597: "Looking at the nature of this contract, what is there to show that the intention of the parties was that the defendants should be relieved from the performance of their contract by reason of difficulties arising out of circumstances which were unforeseen?" My answer in the present case is that there is nothing

to show such an intention. There is here no question of illegality or public policy, of actual prohibition or of intervention by the government. There is merely an unforeseen event which has rendered it practically impossible for the vendor to deliver. That event the defendants could easily have provided for in their contracts. If I approve the defendants' contention, I should be holding in substance that a contract which did not contain a war clause was as beneficial to the vendor as a contract which contained such a provision.

In my view the rule in Jacobs, Marcus & Co. v. Credit Lyonais, 12 Q. B. D. 589, holds good today, and I think that it covers the present case. I desire respectfully to add that in my opinion the Krell v. Henry rule should not be unduly extended. It is only in exceptional cases that it can be safely applied. The difficulties of its application are amply indicated by the judgment of the Court of Appeal in Herne Bay Steam Boat Co. v. Hutton, [1903] 2 K. B. 683 and by the actual decision of the majority of the Law Lords in the Tamplin case [1916], a A. C. 397. The perils of the rule may appear in later years. If it be extended too far, it may tend to sap the foundations of contract law as they now exist. It is, I venture to say, of the utmost importance to a commercial nation that vendors should be held to their business contracts. When a change of circumstances is to absolve from liability, provision to that effect should be inserted in the bargain. If I pronounced in favor of the defendants I should be giving a decision of a legislative rather than judicial character, and I might well be rendering superfluous in many cases the provisions contained in the courts (Emergency Powers) Act, 1917 (7 & 8 Geo. 5 c. 25).

I may mention that in the present case I am satisfied that the plaintiffs were unaware at the time of the contract of the circumstance that the timber from Finland was shipped direct from a Finnish Port to Hull. They did not know whether the transport was or was not partly by rail across Scandinavia, nor did they know that the timber merchants in this country did not hold stocks of Finnish larch.

I decide against the first contention of the defendants. * * *

*Judgment for the plaintiffs.*[225]

[225] Affirmed by the Court of Appeal in [1918] 2 K. B. 467.

On impossibility caused by war conditions or acts of the government in the prosecution of war, see 3 A. L. R. 21, note; 9 A. L. R. 1509, note; 11 A. L. R. 1429, note; 8 B. R. C. 507, note. See also A. D. McNair, War Time Impossibility of Performance of Contract, 35 Law Quar. Rev. 84; E. Merrick Dodd, Impossibility of Performance of Contracts Due to War Time Regulations, 32 Harv. L. Rev. 789.

## CHAPTER VIII.

## ILLEGAL CONTRACTS.[1]

### THORSTEN NORDENFELT, APPELLANT, *v.* THE MAXIM-NORDENFELT GUNS AND AMMUNITION COMPANY, LIMITED, RESPONDENTS.

(House of Lords. [1894.] A. C. 535.)

LORD HERSCHELL, L. C.[2] My Lords, the question raised by this appeal is, whether a covenant entered into between the parties can be

[1] "It is not every contract, which may be remotely connected with some illegal transaction, which can be said to be against public policy. While public policy forbids the enforcement of an illegal or immoral contract, it is as equally insistent that those which are lawful and contravene none of its rules shall be enforced, and not held invalid on a bare suspicion of illegality. Those contracts alone are against public policy which tend clearly to injure public health, public morals, or public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liability or of private property, which any citizen ought to feel." Sampson, J., in Owens v. Henderson Brewing Co., 185 Ky. 477, 480 (1919).

"There is no precise definition of public policy and consequently no absolute rule by which a contract can be measured or tested to determine whether or not it is contrary to public policy. Each case, as it arises, must be judged and determined according to its own peculiar circumstances. The public policy of the state or of the nation is to be found in its constitution and its statutes, and when cases arise concerning matters upon which they are silent, then in its judicial decisions and the constant practice of the government officials * * * As was said in Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. Paul R. R. Co., *supra* [70 Fed. 20]: 'The public policy of a state or nation must be determined by its constitution, laws and judicial decisions—not by the varying opinions of laymen, lawyers or judges as to the demands of the interests of the public.'" Cooke, J., in Zeigler v. Illinois Trust & Savings Bank, 245 Ill. 180, 193 (1910).

"A correct definition, at once concise and comprehensive, of the words 'public policy' has not yet been formulated by our courts. Indeed, the term is as difficult to define with accuracy as the words 'fraud,' 'equity,' 'welfare.' In substance, it may be generally said to be the community common sense and common conscience extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow man, that has due regard to all circumstances of each particular situation.

"Our written public policies are put into our Constitutions, our statutes,

[2] The statement of facts, the opinions of Lord Ashbourne, Lord Macnaghten, Lord Morris and Lord Watson and part of the opinion of the Lord Chancellor are omitted.

enforced against the appellant, or whether it is void as being in restraint of trade.

The covenant in question was contained in an agreement of the 12th of September, 1888, and was in these terms "(2) The said Thorsten Nordenfelt shall not, during the term of 25 years from the date of the incorporation of the company, if the company shall so long continue to carry on business, engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns, gun-mountings, or carriages, gunpowder explosives, or ammunition or in any business competing or liable to compete in any way with that for the time being carried on by the company: provided that such restriction shall not apply to explosives other than gunpowder or to subaqueous or submarine boats or torpedoes or castings or forgings of steel or iron or alloys of iron or of copper. Provided also that the said Thorsten Nordenfelt shall not be released from this restriction by the company ceasing to carry on business merely for the purpose of reconstitution or with a view to the transfer of the business thereof to another company so long as such other company taking a transfer thereof shall continue to carry on the same." The agreement also provided that the appellant should, for seven years from the incorporation of the respondent company, retain the share qualification of a director, and should act as managing director of the company, at a remuneration of £2000 a year, together with a commission upon the net profit of the company.

Before directing attention to the particular terms of the covenant, and to the considerations to which it gives rise, it is necessary to advert to the position of the parties at the time the agreement was entered into.

The appellant had, prior to March, 1886, obtained patents for improvements in quick-firing guns, and carried on, amongst other things, the business of the manufacture of such guns and of ammunition. In that month he procured the registration of a limited liability company, which was to take over his business, with the business assets and liabilities. On the 5th of March, 1886, an agreement was made between the appellant and the Nordenfelt Guns and Ammunition Company by

and ordinances, but our unwritten public policies rest largely in judicial judgment and public opinion. Manifestly, when the Constitution of the state declares and defines certain public policies, such public policies must be paramount, though a score of statutes conflict and a multitude of judicial decisions be to the contrary. No General Assembly is above the plain potential provisions of the Constitution, and no court, however sacred or powerful, has the right to declare any public policy that clearly contravenes or nullifies the rights declared in the Constitution." Wanamaker, J., in Kintz v. Harriger, 99 Oh. St. 240, 246-247 (1919).

"What the law recognizes as contrary to public policy turns out to vary greatly from time to time." Viscount Haldane in Rodrigues v. Speyer Bros., [1919] 1 A. C. 59, 79.

On public policy, see Naylor, Benzon & Co., Ltd., v. Krainische Industrie Gesellschaft, reported *ante*, p. 1091.

which the company was to purchase the good-will of the appellant's business, and all the stock, plant, and patents connected therewith, he covenanting to act as managing director for a period of five years, and so long as the Nordenfelt Company should continue to carry on business "not to engage, except on behalf of such company, either directly or indirectly in the trade or business of a manufacturer of guns or ammunition, or in any business competing or liable to compete in any way with that carried on by such company."

The agreement for purchase was duly carried into effect, and the price paid to the appellant, namely, £237,000 in cash, and £50,000 in paid-up shares of the company. In July, 1888, negotiations were entered into for the amalgamation of the Nordenfelt Company and the Maxim Gun Company, and for the transfer of their business and assets to a new company, to be called the Maxim-Nordenfelt Guns and Ammunition Company.

By an agreement for the amalgamation of the two companies, dated the 3d of July, 1888, and made between the Maxim Company, the Nordenfelt Company, and P. Thaine, on behalf of the new company, the Nordenfelt Company agreed that they would procure the appellant to enter into the agreement which was afterwards embodied in the instrument of the 12th of September, 1888.

The respondents were incorporated on the 17th of July, 1888, and on the 8th of August the agreement of the 3d of July was adopted by the company. It is to be noted that at the time when this agreement was entered into, to which the Nordenfelt Company was a party, the appellant was managing director of that company, and that, in the memorandum of association of the amalgamated company which was signed by the appellant, the objects of the company were stated to be, *inter alia*, not only the adoption of the agreement of the 3d of July, but also "to acquire, undertake, and carry on as successors to the Maxim Gun Company and the Nordenfelt Guns and Ammunition Company, the good-will of the trade and businesses heretofore carried on by such companies and each of them, and the property and rights belonging to or held in connection therewith respectively."

This is of importance, because the appellant in a forcible argument pointed out that the judgment of the Court of Appeal was largely founded on the fact that the covenant in question was entered into in connection with the sale of the good-will of the appellant's business, and was designed for the protection of the good-will so sold, and he contended that this was an error, inasmuch as there was no sale by him of the good-will on that occasion, he having already parted with it to the Nordenfelt Company, the later sale being by that company and not by him.

I think it is impossible to accede to this contention. Upon the sale by the appellant to the Nordenfelt Company, the good-will was conveyed to them, and was protected by a covenant in some respects larger

than the one he entered into in September, 1888, but it was limited to the time during which that company should carry on business; it therefore necessarily ceased when the Nordenfelt Company and the Maxim Company were absorbed by the new company. But in the agreement for the amalgamation (to the making of which, as I said, the appellant was a party) the covenant which the Nordenfelt Company undertook to obtain from the appellant was to be in addition to the transfer by the Nordenfelt Company of the full benefit of any obligations which Mr. Nordenfelt was then under to that company, and by the terms of the memorandum of association of the new company the object was, as I have shown, stated to the world to be the acquisition of the good-will of the Nordenfelt Company.

My Lords, in view of these facts, I think the case must be treated on precisely the same footing as if the obligations of the covenant under consideration had been undertaken in connection with the direct transfer to the respondents of the good-will of the appellant's business and with the object of protecting it.

The appellant mainly relied upon the fact that the covenant was general, that is to say, unlimited in respect of area, and argued that it was therefore void. I think it was long regarded as established, as part of the common law of England, that such a general covenant could not be supported.

In early times all agreements in restraint of trade, whether general or restricted to a particular area, would probably have been held bad; but a distinction came to be taken between covenants in general restraint of trade and those where the restraint was only partial. The distinction was recognized and given effect to by Lord Macclesfield in his celebrated judgment in Mitchell v. Reynolds, 1 P. Wms. 181. That was a case of particular restraint [not to exercise the trade of a baker in a particular parish during the five year term of the lease of a bake-house assigned by defendant to plaintiff] and the covenant was held good * * *

But I respectfully differ from the view which appears to be indicated [in cases cited] that there was not at any time a rule of the common law distinguishing particular from general restraints, and treating the former only as exceptions from the general principle that contracts in restraint of trade are invalid.

The discussion on which I have been engaged is, it must be admitted, somewhat academic. For, in considering the application of the rule, and the limitations, if any, to be placed on it, I think that regard must be had to the changed conditions of commerce and of the means of communication which have been developed in recent years. To disregard these would be to miss the substance of the rule in a blind adherence to its letter. Newcastle-upon-Tyne is for all practical purposes as near to London to-day as towns which are now regarded as suburbs of the metropolis were a century ago. An order can be sent

to Newcastle more quickly than it could then have been transmitted from one end of London to the other, and goods can be conveyed between the two cities in a few hours and at comparatively small cost. Competition has assumed altogether different proportions in these altered circumstances, and that which would have been once merely a burden on the covenantor may now be essential if there is to be reasonable protection to the covenantee.

When Lord Macclesfield emphasized the distinction between a general restraint not to exercise a trade throughout the kingdom and one which was limited to a particular place, the reason which he gave for the distinction was that "the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by-and-by." He returns to the subject later on, when giving the reasons why all voluntary restraints are regarded with disfavor by the law, in these terms: "Thirdly, because in a great many instances they can be of no use to the obligee; which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London what another does at Newcastle? And surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other. The Roman Law would not enforce such contracts by an action (see Puffendorff, lib. 5, c. 2, s. 3, 21 H. 7, 20)" There are other passages in the judgment where this view is enforced.

There is no doubt that, with regard to some professions and commercial occupations, it is as true to-day as it was formerly, that it is hardly conceivable that it should be necessary, in order to secure reasonable protection to a covenantee, that the covenantor should preclude himself from carrying on such profession or occupation anywhere in England. But it cannot be doubted that in other cases the altered circumstances to which I have alluded have rendered it essential, if the requisite protection is to be obtained, that the same territorial limitations should not be insisted upon which would in former days have been only reasonable. I think, then, that the same reasons which led to the adoption of the rule require that it should be frankly recognized that it cannot be rigidly adhered to in all cases.

My Lords, it appears to me that a study of Lord Macclesfield's judgment will show that if the conditions which prevail at the present day had existed in his time he would not have laid down a hard-and-fast distinction between general and particular restraints, for the reasons by which he justified that distinction would have been unfounded in point of fact.

Whether the cases in which a general covenant can not be supported are to be regarded as exceptions from the rule which I think was long recognized as established, or whether the rule is itself to be treated as inapplicable to the altered conditions which now prevail, is probably a matter of words rather than of substance. The latter is perhaps the sounder view. When once it is admitted that whether the

covenant be general or particular the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, the distinction between general and particular restraints ceases to be a distinction in point of law.

I think that a covenant entered into in connection with the sale of the good-will of a business must be valid where the full benefit of the purchase cannot be otherwise secured to the purchaser. It has been recognized in more than one case that it is to the advantage of the public that there should be free scope for the sale of the good-will of a business or calling. These were cases of partial restraint. But it seems to me that if there be occupations where a sale of the good-will would be greatly impeded, if not prevented, unless a general covenant could be obtained by the purchaser, there are no grounds of public policy which countervail the disadvantage which would arise if the good-will were in such cases rendered unsaleable.

I would adopt in these cases the test which in a case of partial restraint was applied by the Court of Common Pleas in Horner v. Graves, 7 Bing. 735, 743, in considering whether the agreement was reasonable. Tindal, C. J., said: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable." The tendency in later cases has certainly been to allow a restriction in point of space which formerly would have been thought unreasonable, manifestly because of the improved means of communication. A radius of 150 or even 200 miles has not been held too much in some cases. For the same reason I think a restriction applying to the entire kingdom may in other cases be requisite and justifiable.

I must, however, guard myself against being supposed to lay down that if this can be shown the covenant will in all cases be held to be valid. It may be, as pointed out by Lord Bowen, that in particular circumstances the covenant might nevertheless be held void on the ground that it was injurious to the public interest.

My Lords, I turn now to the application of the law to the facts of the present case. It seems to be impossible to doubt that it is shown that the covenant is not wider than is necessary for the protection of the respondents. The facts speak for themselves. If the covenant embraced anything less than the whole of the United Kingdom it is obvious that it would be nugatory. The only customers of the respondents must be found amongst the governments of this and other countries, and it would not practically be material to them whether the business were carried on in one part of the United Kingdom or another.

So far I have dealt only with the covenant in relation to the United Kingdom. The appellant appeared willing to concede that it might be good if limited to the United Kingdom; but he contended that it ought not to be world-wide in its operation. I think that in laying down the rule that a covenant in restraint of trade unlimited in regard to space was bad, the courts had reference only to this country. They would, in my opinion, in the days when the rule was adopted, have scouted the notion that if for the protection of the vendees of a business in this country it were necessary to obtain a restrictive covenant embracing foreign countries, that covenant would be bad. They certainly would not have regarded it as against public policy to prevent the person whose business had been purchased and was being carried on here from setting up or assisting rival businesses in other countries; and for my own part I see nothing injurious to the public interests of this country in upholding such a covenant.

When the nature of the business and the limited number of customers is considered, I do not think the covenant can be held to exceed what is necessary for the protection of the covenantees.

I move your Lordships, therefore, that the judgment appealed from [enjoining appellant] be affirmed, and the appeal dismissed.

*Order appealed from affirmed and appeal dismissed.*[3]

[3] Local statutes should be consulted. In the absence of statutes, most American courts follow the principal case. See Anchor Electric Co. v. Hawkes, 171 Mass. 101 (1898), reversing earlier Massachusetts cases; Hall Mfg. Co. v. Western Steel & Iron Works, 227 Fed. 588 (1915). But in some states, as, for instance, Illinois, public policy is held, in any contract restraining the carrying on of a business by a seller, to call for the reservation of the privilege of carrying it on somewhere in Illinois. In Union Strawboard Co. v. Bonfield, 193 Ill. 420, 427 (1901), Cartwright, J., said: "It is against the policy of the state that its citizens should not have the privilege of pursuing their lawful occupations at some place within its borders and that a citizen should be compelled to leave the state to engage in his business and to support himself and family. It is true that a contract may be valid which embraces portions of more than one state. Trade and business are not affected by state lines, and a contract might be good in restraint of trade which embraced, within reasonable limits, parts of different states, but an agreement which applies to the whole state is void and cannot be enforced." See also Andrews v. Kingsbury, 212 Ill. 97 (1904). On validity of contract in restraint of trade covering whole state or country, see 20 Ann. Cas. 661, note.

In favor of the rule in the Nordenfelt case, Baker, J., said, in Hall Mfg. Co. v. Western Steel & Iron Works, 227 Fed. 588, 591-593 (1915):

"In the first reported case, that of John Dier, decided in 1415, Year Book 2 Hen. V, 5, covenants were held to be unenforceable, no matter how limited in time and place. Hull, J., said:

"'In my opinion you might have demurred upon him, that the obligation is void, inasmuch as the condition is against the common law; and (*per Dieu*) if the plaintiff were here he should go to prison till he paid a fine to the king.'

"During the generations when an artisan had to pass through apprenticeship into a guild, when he was tied to his trade and place by statutes forbidding him

## THE SAMUEL STORES, INC., *v.* ABRAMS.

(Supreme Court of Errors of Connecticut, 1919. 94 Conn. 248, 108 Atl. 541, 9 A. L. R. 1450.)

Action by the Samuel Stores, Incorporated, against Aaron H. Abrams. Demurrer to complaint sustained, and plaintiff appeals. No error.

Action for an injunction to restrain the defendant from conducting a clothing business in Bridgeport and from soliciting former and present customers of the plaintiff to trade with him, in alleged violation of a contract.

The defendant filed a demurrer, pleading, among other grounds of demurrer, the following:

to leave his parish under pain of pillory or prison, when if he could not stand where he was rooted he would become a public charge, it may have been right enough for the king's courts to see no public interest but the artisan's ability to pay taxes and serve the king. * * * It took the courts a long time to get beyond testing the validity of a restrictive covenant purely by the presence or absence of limitations. * * * But beginning about 1830, the advent of the factory system, multifold new machines, railroads, steamships, fast mail and express service, telegraphs, telephones, wireless, trolleys, automobiles, aeroplanes, lessening space, shortening time, offering continually new and widening avenues for both labor and capital, emphasized a point of view that had been suggested in somewhat earlier times; and that is that the validity of a restrictive covenant should be tested by determining whether in the facts of the particular case the restraint is greater than is reasonably necessary for the protection of the purchaser of the business and good will. * * *

"Tested by the rule of reason, a restrictive covenant is not necessarily valid because it is limited in time and place. Logically the corollary follows that by the same rule of reason a restrictive covenant is not necessarily invalid because it is unlimited in time and place. A restraint of 500 miles and 50 years on a village doctor, who had only a local practice, would be unreasonable, because not reasonably necessary to the protection of his successor, while a general covenant by the Pears' Soap Company should be enforced (at least to the extent of the decreeing court's reach) because the good will of the business is world-wide and of expected indefinite continuance. * * *

"In this case, and in all of the kind, two public interests are to be balanced against the one that is opposed to restrictive covenants: honesty and fidelity among our business men; and the interest of everyone, and so of all, in being able to sell on the most advantageous terms whatever property he owns or has produced, whether tangible or intangible. Unless injury to the public manifestly outweighs the public policies of honesty and of freedom of alienation, restrictive covenants should be enforced."

But even in England an occasional protest is heard against the rule in the Nordenfelt case. See Goldsoll v. Goldman, [1914] 2 Ch. 603. And in S. V. Nevanas & Co. v. Walker, [1914] 1 Ch. 413, 425, Sargant, J., said: "To preclude a former servant from carrying on his natural business in any part whatever of the United Kingdom is a very strong step and requires exceptional justification."

On contract to keep out of a particular business as an unlawful restraint of trade when independent of any other contract, see 3 A. L. R. 250, note.

On the severability of the illegal provisions in a contract in restraint of trade, see Attwood v. Lamont, [1920] 3 K. B. 571. See also 117 Am. St. Rep. 499, note.

"An injunction against the defendant as prayed for would be mischievous and against public policy."

This demurrer the court of common pleas sustained; the plaintiff appealed.

CURTIS, J.[4] By the complaint and the contract, Exhibit A, attached thereto, the following facts are disclosed:

The plaintiff is a corporation of the state of New York engaged in conducting branch clothing stores in various cities.

It employed the defendant as manager of one of its branch stores for the period of one year from September 5, 1918, under the written contract attached to the complaint.

The contract contains the following stipulation on the part of the defendant:

"And, whereas, in the course of such employment, Aaron H. Abrams may be assigned to duties that may give him knowledge and information of confidential matters relating to the conduct and details of the business of the Samuel Stores, Incorporated, as to result in the opinion of the Samuel Stores, Incorporated, irremediable injury to it, for which no money damages could adequately compensate, if the said party of the second part should enter the employment of rival concern while this contract was still in effect, the said Aaron H. Abrams agrees not to engage in any other occupation during the life of this contract, and further agrees not to either directly or indirectly connect himself with any firm engaged in business similar to that of the party of the first part, which would compete with the business of the party of the first part, nor will he himself engage in any business that will compete with the business of the party of the first part, for five years after the date of his connection with the party of the first part being severed. The said Aaron H. Abrams agrees to use his best endeavors and his entire time to promote the business and business interests of the Samuel Stores, Incorporated."

The defendant in November, 1918, left the employ of the plaintiff, and on December 9, 1918, opened a store in Bridgeport, and engaged in the business of selling clothing for men, women, and children, and engaged in the same line of business conducted by the plaintiff in Bridgeport, and has advertised himself as formerly with the People's Store, the same being the trade-name under which the plaintiff has been conducting business in Bridgeport and the defendant has been and is soliciting the customers of the plaintiff to trade with him.

This case presents the question whether or not the restrictive stipulation in the contract between the parties is void as against public policy.

The public policy to be applied is the public policy of the present time. The changing conditions of life modify from time to time the reasons for determining whether the public interest requires that a

[4] The statement of facts is abbreviated.

restrictive stipulation shall be deemed void as against public policy. The following statement of the law found in the leading case of Nordenfelt v. Maxim-Nordenfelt Gun & Ammunition Co., (1895) 11 The Reports, 1, 27, is generally recognized as fundamental:

"The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and, indeed, it is the only justification if the restriction is reasonable,—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public,—so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public."

Under this principle, that the reasonableness of a restriction in view of all the circumstances and the interests of the public and the parties is the test of its validity, certain basic considerations have developed as guides to covenantors and the courts. Some of these we will now consider.

The cases in relation to restraints of trade soon disclosed two leading classes of contracts, contracts between the vendor and vendee of a business and its good will, and, on the other hand, contracts between an employer and an employé.

Under the law, restrictive stipulations in agreements between employer and employé are not viewed with the same indulgence as such stipulations between a vendor and vendee of a business and its good will.

In the latter case, the restrictions add to the value of what the vendor wishes to sell, and also add to the value of what the vendee purchases. In such cases also the parties are presumably more nearly on a parity in ability to negotiate than is the case in the negotiation of agreements between employer and employé.

In a restrictive covenant between a vendor of a business and the vendee, "a large scope for freedom of contract and a correspondingly large restraint of trade" is allowable. In a restrictive covenant between employer and employé on the other hand, there is "small scope for the restraint of the right to labor and trade and a correspondingly small freedom of contract."

In dealing with a restrictive stipulation between an employer and an employé, as in this case, in order that the court may uphold and enforce the restriction, if it is not otherwise contrary to public policy, the court must find that the facts alleged disclose a restriction on the employé "reasonably necessary for the fair protection of the employer's business or rights, and not unreasonably restricting the rights of the employé,

due regard being had to the interests of the public and the circumstances and conditions under which the contract is to be performed." Wm. Rogers Mfg. Co. v. Rogers, 58 Conn. 356, 20 Atl. 467, 7 L. R. A. 779, 18 Am. St. Rep. 278; Eureka Laundry Co. v. Long, 35 L. R. A. (N. S.) 119, note; Simms v. Burnette, 16 L. R. A. (N. S.) 389, note; Herbert Morris, Limited v. Saxelby, [1916] 1 A. C. 688; Mason v. Provident C. & S. Co., [1913] A. C. 724; Nordenfeldt v. Maxim H. G. & A. Co., [1894] A. C. 565; Id., 11 Reports, 27; Konski v. Peet, [1915] 1 Ch. 530; Herreshoff v. Boutineau, 17 R. I. 3, 19 Atl. 712, 8 L. R. A. 469, 33 Am. St. Rep. 850.

We are then to determine whether the facts set up in this complaint make it reasonably necessary for the fair protection of the plaintiff's business to hold that the restrictive stipulation in the contract should be enforced.

This stipulation provides, in effect, that the defendant, for five years after he leaves the employ of the plaintiff, shall not either directly or indirectly connect himself with any firm engaged in business similar to that of the plaintiff, which would compete with the business of the plaintiff in any city where the plaintiff conducts one of its branch stores.

It appears from the complaint that the services of the defendant contracted for by the plaintiff are not peculiar or individual in their character, nor purely intellectual, nor are they special or extraordinary services or acts.

The defendant's services and the plaintiff's business are not of a character to involve the acquisition of special business secrets of the plaintiff by the defendant. The agreement relates merely to services in a local retail business, and primarily aims to restrict competition.

The plaintiff conducts a local retail clothing business in which the defendant was employed as manager. The situation of manager could have been filled by any person of sufficient business capacity.

The clothing business may be entered upon by any one who desires to enter it, and whether the defendant opened a competitive store or another did so was immaterial to the plaintiff, except that the defendant having acquaintance and knowledge of the plaintiff's customers might solicit their trade.

The restriction in question provides, in substance, that in any city where the plaintiff carries on its business the defendant shall not directly or indirectly connect himself with any firm engaged in business similar to that of the plaintiff, which would compete with the business of the plaintiff, for five years after his employment with the plaintiff ceases.

This restriction, binding for that period and relating to every city in which the plaintiff has established a branch store, is not reasonably necessary for the fair protection of the plaintiff's business. It covers a number of cities in which the defendant, from his employment in one city, could have had no acquaintance with the local customers.

A restrictive agreement, providing that the defendant, while connected

with a competing business, should not solicit trade from persons who were customers of the plaintiff at the branch store where the defendant was employed during his employment, might reasonably be claimed to be such a restriction as is reasonably necessary for the fair protection of the plaintiff's business. Konski v. Peet, [1915] 1 Ch. 530.

Such a restriction obviously would not unduly restrict the rights of the defendant, since it would not otherwise restrict the field of his employment than by prohibiting the solicitation of the clothing trade of a limited number of people in one city.

By the sweeping terms of the restrictive stipulation in question, it is true that the solicitation of such customers of the plaintiff is indirectly prevented. But at what cost to the defendant? He is prohibited from entering or being employed in the clothing business in various cities, the number of which may be large, and the area in which he may exercise such experience in and aptitude for that business as he may possess is greatly limited.

The reasonable and fair protection of the plaintiff's business does not require such an extended restriction of the defendant's field of employment. Public policy requires that the defendant's liberty of action in trading or employment shall not be unduly restricted. To enforce the sweeping terms of this restriction would be a useless, unnecessary, and undue curtailment of the defendant's liberty of trading and employment, and an unjustified restraint on competition.

The case at bar illustrates the following comment found in Herreshoff v. Boutineau, 17 R. I. 7, 19 Atl. 713, 8 L. R. A. 469, 33 Am. St. Rep. 850:

"Covenantees [in contracts in restraint of trade between employer and employé] desiring the maximum protection have, no doubt, a difficult task. When they fail, it is commonly because, like the dog in the fable, they grasp too much, and so lose all."

There is no error.[5]

[5] On restrictive covenants in contracts of employment, see 9 A. L. R. 1456, note. As to validity of agreement by employee not to engage in a competing business, as affected by its scope in time and territorial extent, see 24 L. R. A. (N. S.) 933, note; 40 L. R. A. (N. S.) 473, note. On validity of contract restraining practice of one's profession after expiration of term of service with another, see 26 L. R. A. (N. S.) 961, note; 8 Ann. Cas. 155, note.

In Dewes v. Fitch, [1920] 2 Ch. 159, the Court of Appeal upheld a covenant by a managing clerk of a solicitor not in his lifetime to engage in such work within a radius of seven miles from the town hall of the town where the solicitor practiced after the contract of service should terminate.

"Covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant or agent, not to compete with his

## GEORGE W. COLLAMER *v.* IRA DAY.

(Supreme Court of Vermont, 1829. 2 Vt. 144.)

This was an action of trover, brought up from the county court for the revision of their decision presented in the following case, agreed to by the parties, to wit:

"In this action, plaintiff offered to prove, at the trial, that, on the day mentioned in the declaration, the plaintiff and defendant were together in the office of Jacob Collamer, at Royalton—that while there, a gentleman passed in a chaise: when defendant asked, whose chaise is that? Plaintiff answered, Dr. Denison's. Defendant said no, it is not Denison's chaise: I will bet my watch against yours that it is not Denison's chaise—That to this proposal plaintiff agreed—That each of the parties then took out his watch, and laid it upon the table: and it was then mutually agreed by the parties, that they would go together, and ascertain whether the said chaise was the said Denison's chaise; and that, if it was, plaintiff should take both watches; and, if not, defendant should take both, as and for his own—That they did proceed and examine, and found it to be said Denison's chaise—That the parties then returned to the said office, and the defendant immediately took up his watch, and carried it away—That, on the same day, plaintiff demanded said watch of defendant, who refused to deliver it, but converted it to his own use. This evidence was objected to by the defendant's counsel, and excluded

master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2 and 3) to the enjoyment by the buyer of the property, good will or interest in the partnership bought; or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employee of the confidential knowledge acquired in such business. * * * It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all those upheld as valid at the common law." Taft, J., in U. S. v. Addyston Pipe & Steel Co., 85 Fed. 271, 281-282 (1898).

In Hepworth Mfg. Co., Ltd. v. Ryott, [1920] 1 Ch. 1, it was held to be an unreasonable restraint to require a "movie" actor who became known by his stage name while working for the producing company to refrain from using that stage name after the employment ceased.

In Thorn v. Dinsmoor, 104 Kans. 275 (1919), it was held that a law student not yet admitted to practice might lawfully buy the library and business of a practicing lawyer under a contract whereby the latter agreed to refrain from practicing in the town, and further, that the student's failure to be admitted upon his first examination did not impair his rights, since he succeeded in being admitted on a later examination.

Decisions under the Sherman Anti-Trust Act of July 2, 1890, 26 Stat. 209, c. 647, the Clayton Act of Oct. 15, 1914, 38 Stat. 730, c. 323, and the Federal Trade Commission Act of Sept. 26, 1914, 38 Stat. 719, and under the federal Patent and Copyright statutes, are not included in this collection. They are dealt with in Kales' Cases on Contracts and Combinations in Restraint of Trade.

by the court. To which decision the plaintiff excepted, and the exception was allowed, and the cause ordered to pass to the Supreme Court."

HUTCHINSON, J. Nothing appears in this case, but that the action would be maintainable by the common law of England. The common law is adopted by our statute, so far, and so far only, as the same is applicable to our local situation and circumstances, and is not repugnant to the constitution, or to any act of the legislature, of this state. Whether applicable, or not, must necessarily be a question of judicial decision: and this is, probably, the first action, that has ever called upon a court in this state to sanction such a contract of betting. The judges of the courts in England have expressed their regret, of late years, that such transactions ever received the sanction of a court of justice: but, they yield to the force of the law, which they consider settled by a train of decisions, extending down from remote antiquity. We feel no such embarrassment, nor are we willing to transmit any such embarrassment to our successors; nor diffuse into society the influence of a rule so demoralizing, as would be the sanction of such a contract. It is honorable to this state, that the industrious and moral habits of our citizens have furnished no occasion to litigate questions of this nature. It is honorable to the legislature, that they have interposed checks to such games and sports as they supposed were creeping into use. By the Statute of 1821, page 268, penalties are affixed to the winning or losing, or betting, in money, goods or chattels, on any game, or on any horse-race, or other sport, within this state. And said statute makes void any contracts and securities made and given for money won on such games. The species of betting now in question may not come within that statute, giving it the strict construction of a penal statute: yet the good morals of society require, that no encouragement should be afforded to the acquisition of property, otherwise than by honest industry. Time might be occupied in seeking occasions to take advantage of the unwary, and acquiring a skill to take such advantage, which ought to be devoted to better purposes.

In this case, according to the terms of the bet, the plaintiff had acquired a right to the possession of the watch, which the defendant had laid down in the bet, but the plaintiff had not acquired the actual possession, when the defendant resumed his possession. The plaintiff, therefore, had no complete right to the watch, without the sanction of such a contract of betting. That sanction is now withheld.

The judgment of the County Court is affirmed.[6]

[6] "At common law, all wagers were recoverable but such as were prohibited by statute; such as were against sound policy; and such as tended to a breach of the peace, to immorality, or indecency, or injuriously affected the rights of third persons." Treat, J., in Morgan v. Pettit, 4 Ill. (3 Scam.) 529, 530 (1842). But now either by statute, as in England, or by statute or common law in the

## THACKER *v.* HARDY.

(High Court of Justice, Queen's Bench Division, 1878. 4 Q. B. D. 685.)

LINDLEY, J.[7] This action is brought by a broker [who had become defaulter upon the Stock Exchange] against his principal for indemnity against liabilities incurred by the broker, in buying and selling shares upon the Stock Exchange for the defendant by his authority. The main defence is that the claim is founded upon gaming and wagering transactions, in respect of which no action can be brought. In order to decide the point thus raised, it is necessary to consider, first, the real nature of the agreement between the plaintiff and the defendant, and, secondly, how the law stands with respect to gaming and wagering transactions in stocks and shares. As regards the true nature of the agreement between the plaintiff and the defendant, the conclusions at which I have arrived are as follows: first, that the defendant was a speculator, and the plaintiff knew him to be so; secondly, that the defendant employed the plaintiff to speculate for him on the Stock Exchange; thirdly, that the defendant knew, or must be taken to have known, that, in order to carry out the transactions, the plaintiff would have to enter into contracts to buy or sell, as the case might be, and in order to protect himself and the defendant, to enter into other contracts to sell or buy respectively; fourthly, that there was, in fact, no other way in which the plaintiff could speculate for the defendant as he desired; fifthly, that the plaintiff did buy and sell

United States, wagers are at least unenforcible and in general are illegal. On wagers and their validity, see 37 Am. St. Rep. 697, note.

As a stakeholder of money put up on a bet has only an agency to pay over not coupled with an interest, his authority to pay can be revoked at any time before it is exercised, though in a few early cases (see Yates v. Foot, 12 Johns 1 (1814) ), it was held that revocation comes too late if it comes after the event bet about has been decided against the one seeking to revoke, even if it does come before the stakeholder has paid over the money. The matter is often regulated by statute. There are statutes in Illinois and other states allowing the loser of a specified amount at betting, gambling, etc., to recover back his money, even though it has been paid over by himself and, therefore, presumably if paid over by the stakeholder. Local statutes should be consulted.

On the liability of a stakeholder in an illegal transaction, see L. R. A. 1918 F, 972, note.

"A friendly reviewer of the second volume of the Digest [of English Civil Law] expended a certain amount of genial 'chaff' upon a sentence in the preface of that volume, which spoke of Gaming Contracts as 'social relationships regulated by law'; but the writer of the preface is wholly unrepentant, for he believes that the primitive and deep-seated gambling instinct of the English race has played no small part in the evolution of the peculiarly English institution of the simple contract, and that the hundreds of lost and forgotten dice recovered from the ancient floor of the Middle Temple Hall may have had a closer connection with the theory of contract than has hitherto been guessed." Edward Jenks, English Civil Law, 30 Harv. L. Rev. 1, 3.

[7] The statement of facts is omitted as are also the opinions of the Justices in the Court of Appeal, who affirmed the judgment for plaintiff.

accordingly; sixthly, that the defendant never expected, nor intended, to accept actual delivery of what the plaintiff might buy for him, nor actually deliver what he might sell for him, and that the plaintiff knew that the defendant never expected or intended so to do; seventhly, that the defendant, nevertheless, knew that he incurred the risk of having to accept or deliver, as the case might be but was content to run that risk, in the expectation and hope that the plaintiff would be able so to arrange matters as to render nothing but differences actually payable to or by him, as the case might be; eighthly, that unless the plaintiff could arrange matters as expected, the defendant would be unable to pay for what was bought from him or deliver what was sold for him, and that the plaintiff knew perfectly well that the defendant would be unable so to do.

I proceed next to examine the law applicable to transactions of this kind. The only statute in force and material to be noticed is 8 & 9 Vict. c. 109, s. 18, which, in effect, declares all contracts by way of gaming and wagering null and void, and renders actions for the recovery of money won on any wager unsustainable. This act does not expressly mention or allude to Stock Exchange transactions; but it has been decided that agreements between buyers and sellers of shares and stocks, to pay or receive the differences between their prices on one day and their prices on another day, are gaming and wagering transactions within the meaning of the statute. Grizewood v. Blane, 11 C. B. 526; Barry v. Croskey, 2 J. & H. 1; and Cooper v. Neil, W. N. 1 June, 1878, all decide that. But the plaintiff did not agree to buy or sell from or to the defendant; and I have the authority of Brett, L. J., for saying that the statute only affects the contract which makes the bet or wager. The agreement between the plaintiff and the defendant rendered it necessary that the plaintiff should himself, as principal, enter into real contracts of purchase and sale with jobbers, and the plaintiff accordingly did so, and in respect of these contracts he incurred obligations, for the nonperformance of which actions could and can now be brought against him. It is against the liability so incurred that he seeks to be indemnified.

Upon general principles an agent is entitled to indemnity from his principal against liabilities incurred by the agent in executing the orders of his principal, unless those orders are illegal, or unless the liabilities are incurred in respect of some illegal conduct of the agent himself, or by reason of his default. What the plaintiff was employed to do was to buy and sell on the Stock Exchange, and this he did; and everything he did was perfectly legal, unless it was rendered illegal as between the defendant and himself by reason of the illegality of the object they had in view, or of the transactions in which they were engaged. Now, if gaming and wagering were illegal, I should be of opinion that the illegality of the transactions in which the plaintiff and the defendant were engaged would have tainted, as between themselves, whatever

the plaintiff had done in furtherance of their illegal designs, and would have precluded him from claiming, in a court of law, any indemnity from the defendant in respect of the liabilities he had incurred. Cannan v. Bryce, 3 B. & Ald. 179; McKinnell v. Robinson, 3 M. & W. 434; Lyne v. Siesfeld, 1 H. & N. 278. But it has been held that although gaming and wagering contracts cannot be enforced, they are not illegal. Fitch v. Jones, 5 E. & B. 238, is plain to that effect. Money paid in discharge of a bet is a good consideration for a bill of exchange; Oulds v. Harrison, 10 Ex. 572; and if money be so paid by plaintiff at the request of a defendant, it can be recovered by action against him. Knight v. Camber, 15 C. B. 562; Jessopp v. Lutwyche, 10 Ex. 614; Rosewarne v. Billing, 15 C. B. (N. S.) 316; and it has been held that a request to pay may be inferred from an authority to bet. Oldham v. Ramsden, 44 L. J. (C. P.) 309. Having regard to these decisions, I cannot hold that the statute above referred to precludes the plaintiff from maintaining this action.

It was, however, suggested that, independently of that statute, the gambling here was of so pernicious a nature as to be illegal on grounds of public policy. That the defendant was a reckless speculator, and that the plaintiff knew it, I consider to be beyond all doubt; but it does not follow that what they did or aimed at was illegal. In one sense they were both gamblers; but care must be taken not to be misled by an epithet, and, in order to avoid ambiguity, I have already pointed out exactly what the real nature of their transactions was. Such gambling as this, however demoralizing and reprehensible, does not appear to me to be illegal, and my reasons for this opinion are as follows:

It required a statute (7 Geo. 2, c. 8), to prevent gambling in the public funds; and notwithstanding the strong condemnation in the preamble of such gambling, the act itself was repealed in 1860 by 23 and 24 Vict. c. 28. Moreover, even when the act was in force, gambling in shares and foreign stocks was held not to be illegal, either under the act or at common law. Lord Tenterden, indeed, was of opinion that such gambling was illegal at common law. He said so in Bryan v. Lewis, R. & M. 386; but this opinion was declared erroneous in Hibblewhite v. M'Morine, 5 M. & W. 462. Under these circumstances I am unable to hold that the transactions engaged in by these parties were illegal, or that the purchases and sales made by the plaintiff were made in pursuance of or to attain an illegal object. This view is supported by the judgment of Brett, L. J., in Cooper v. Neil, W. N. 1 June, 1878; and by the case of Ashton v. Dakin, 7 W. R. 384.

In answer to the argument that a contract which is void and unenforceable cannot be made the foundation of an implied promise to indemnify, it appears to me sufficient to say that an obligation to indemnify is created whenever one person employs another to do a lawful act which exposes him to liability, and that, in my view of the evidence, the defendant did authorize the plaintiff to incur liability by buying and

selling as above described. I am unable to draw the inference which the jury drew in Cooper v. Neil, W. N. 1 June, 1878, namely, that the plaintiff was instructed to make time bargains, and that he did in fact make such bargains. A real time bargain is, I suspect, a very rare occurrence. Grizewood v. Blane, 11 C. B. 526, affords an instance of one, and Cooper v. Neil, W. N. 1 June, 1878, as understood by the jury, afforded another. But what are called time bargains are, in fact, the result of two distinct and perfectly legal bargains, namely, first, a bargain to buy or sell; and secondly, a subsequent bargain that the first shall not be carried out; and it is only when the first bargain is entered into upon the understanding that it is not to be carried out, that a time bargain, in the sense of an unenforceable bargain, is entered into. Such bargains are very rare, and this is what I understand the witnesses to mean when they say that there are no such things as time bargains on the Stock Exchange. For the above reasons I hold that the plaintiff is entitled to indemnity, notwithstanding the gambling nature of the transactions between himself and the defendant.

The defendant was himself unable to meet his engagements, and was the principal cause of the plaintiff's becoming a defaulter. The inability of the defendant to continue his speculations gave the plaintiff the right to close all the defendant's accounts; that appears from a celebrated case in Chancery, Lacey v. Hill, Law Rep. 8 Ch. 441 and 18 Eq. 182. Whether they were closed by the plaintiff or by the Stock Exchange committee, is, I think, immaterial, it not being proved that the defendant was in any way prejudiced by what was done. Consequently I give judgment for the plaintiff for the full amount claimed with costs.[8]

[8] See H. W. Franklin & Co. v. Dawson, 29 T. L. R. 479 (1913); Forget v. Ostigny, [1895] A. C. 318.

"In Irwin v. Williar, 110 U. S. 499, 510, the Supreme Court of the United States says of wagering contracts: 'In England, it is held that the contracts, although wagers, were not void at common law, and that the statute has not made them illegal, but only non-enforceable (Thacker v. Hardy, *ubi supra*), while generally, in this country, all wagering contracts are held to be illegal and void as against pubic policy. Dickson's Executor v. Thomas, 97 Penn. St. 278; Gregory v. Wendell, 40 Mich. 432; Lyon v. Culbertson, 83 Ill. 33; Melchert v. American Union Telegraph Co., 3 McCrary, 521; s. c. 11 Fed. Rep., 193 and note; Barnard v. Backhaus, 52 Wis. 593; Kingsbury v. Kirwan, 77 N. Y. 612; Story v. Saloman, 71 N. Y. 420; Love v. Varvey, 114 Mass. 80.' In considering how far brokers would be affected by the illegality of contracts made by them, that court says: 'It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction.' This was decided in Embrey v. Jemison, 131 U. S. 336. See also

## WILSON *v.* CONNOLLY.

(Court of Appeal, 1911. 27 T. L. R. 212.)

The action was brought by the plaintiff, T. H. Wilson, a bookmaker, against the defendant, D. Connolly, who was also a bookmaker, to re-

Kahn v. Walton (Ohio, 1888), 20 N. E. Rep. 203; Cothran v. Ellis, 125 Ill. 496; Fareira v. Gabell, 89 Penn. St. 89; Crawford v. Spencer, 92 Misso. 498; Lowry v. Dillman, 59 Wis. 197; Whitesides v. Hunt, 97 Ind. 191; First National Bank v. Oskaloosa Packing Co., 66 Iowa, 41; Rumsey v. Berry, 65 Maine, 570.

"It is not denied that wagering contracts are void by the common law of Massachusetts; but it is argued that they are not illegal, and that, if one pays money in settlement of them at the request of another, he can recover it of the person at whose request he pays it. It is now settled here that contracts which are void at common law, because they are against public policy, like contracts which are prohibited by statute, are illegal as well as void. They are prohibited by law because they are considered vicious, and it is not necessary to impose a penalty in order to render them illegal. Bishop v. Palmer, 146 Mass. 469; Gibbs v. Consolidated Gas Co., 130 U. S. 396. The weight of authority in this country is, we think, that brokers who knowingly make contracts that are void and illegal as against public policy, and advance money on account of them at the request of their principals, cannot recover either the money advanced or their commissions, and we are inclined to adopt this view of the law. Embrey v. Jemison, 131 U. S. 336, *ubi supra*, and the other cases there cited." Field, J., in Harvey v. Merrill, 150 Mass. 1, 10-11 (1889). See Jamieson v. Wallace, 167 Ill. 388 (1897); Waite v. Frank, 14 So. Dak. 626 (1901).

The question is whether the contract between the broker and the customer is illegal where the broker must make legal contracts on the stock exchange but agrees that the customer can settle with the broker by the payment of differences or knows that he can settle only in that way. The argument in part for the English view is thus stated by Professor Williston:

"The broker in no event can make or lose anything except the amount of his commissions, and interest, unless his customer becomes insolvent with insufficient margin, and these opportunities of gain or loss are the same whether or not he makes the agreement suggested with his customer. Likewise the speculative risks of the customer are in no way affected by such an agreement with his broker, for even though no such agreement is made it is always possible by entering into new transactions on the exchange to close his account by paying differences, and in any event he must get the gain or suffer the loss which advance or deprecation of what has been bought or sold for his account involves." 3 Williston on Contracts, § 1672.

In Samuels v. Oliver, 130 Ill. 73 (1889), brokers employed, as they knew, to aid in cornering the market in grain were denied a recovery of money advanced by them. It is stated, *Per Curiam*, that:

"The enhancement of the price of an article of prime necessity, such as wheat or other articles necessary for food, for purposes of extortion, is against public policy. (Fuller v. Dane, 18 Pick. (Mass.) 472; DeWitt v. Brisbane, 16 N. Y. 508.) 'Combinations whose object is to create what are known as "corners" in the market, or to control the traffic in any staple which is a popular necessity, or to enhance the price thereof, or to withhold the same from the market, are illegal.' (Greenhood on Public Policy 642; Wright v. Crabb, 78 Ind. 487; Craft v. McConoughy, 79 Ill. 346.) Such a transaction, if had in

cover the sum of 30*l.* 10s. alleged to be due in respect of various commissions executed by the plaintiff at the request of the defendant. The defendant pleaded the Gaming Act, and the plaintiff thereupon obtained leave to amend his particulars of claim by alleging that on the day the commissions came due the plaintiff and the defendant made a new agreement as found by the county judge. The learned county court judge gave judgment for the plaintiff, holding that there was a new contract by which the defendant agreed that if the plaintiff would give him time to pay and would refrain from announcing that he had failed to pay on the proper day, which the plaintiff would have the right to do, and which would ruin the defendant as a bookmaker, the defendant would pay at some future day, and that the plaintiff thereupon agreed not to proclaim the defendant a defaulter. He therefore gave judgment for the plaintiff for the amount claimed.

The Divisional Court held that there was evidence on which the county court judge could arrive at the conclusion at which he had arrived. The defendant appealed.

LORD JUSTICE VAUGHAN WILLIAMS[9] said that in his opinion it was impossible to say that there was no evidence on which the county court judge might arrive at the conclusion that there had been a new contract on which the plaintiff might maintain an action. The Divisional Court had reluctantly taken that view, and he could not differ from it.

*Appeal dismissed.*[10]

this state, would be void, as being in contravention of the criminal code, § 130, chap. 38; Schneider et al. v. Turner, 130 Ill. 28.

"An agreement to make a corner in stock, by buying it up so as to control the market, and then purchasing for future delivery, is illegal, and a party thereto whose funds have been used, by his consent, in carrying out the agreement, cannot recover the same back. (Sampson v. Shaw, 101 Mass. 145.) So it has been held that one who loans or advances money to be used for the purpose of making a corner in wheat, cannot recover. (Lehman v. Leavitt, 46 Mich. 447.) So, also, money paid in furtherance of an illegal transaction or purpose cannot be recovered by the party advancing the same. Ball v. Gilbert, 12 Met. (Mass.) 397; Dixon v. Olmstead, 9 Vt. 310; Wheeler v. Russell, 17 Mass. 258; The People v. Fish, 14 Wend. (N. Y.) 9.

"When the employment of an agent relates to the performance of an immoral or illegal act,—it is said by Wharton in his work on Agency (sec. 25),—neither party can make the contract the basis of a suit against the other. Advances for illegal purposes fall within the same rule, and cannot be recovered by the principal of the agent, or the agent of the principal. (*Id.* sec. 319)." See Raymond v. Leavitt, 46 Mich. 447 (1881).

On right of broker to recover commissions or advances made in furthering wagering contract, see 11 L. R. A. (N. S.) 575, note.

[9] The statement of facts is abbreviated.

[10] See Hyams v. Stuart King, [1908] 2 K. B. 696. On forbearance to sue or disclose defendant's default as new consideration for gambling debt, see 6 B. R. C. 995, note.

## IN RE TAYLOR & CO.'S ESTATE.

### APPEAL OF HOWARD.

(Supreme Court of Pennsylvania, 1899. 192 Pa. St. 304, 43 Atl. 973, 73 Am. St. Rep. 812.)

Claim of William H. Howard against the assigned estate of L. H. Taylor & Co. The auditor disallowed the claim, and exceptions thereto were dismissed by the court, and claimant appeals. Reversed.

MITCHELL, J. It has been settled by this court, so often that it ought not to require reiteration, that dealing in stocks, even on margins, is not gambling. Stocks are as legitimate subjects of speculative buying and selling as flour or dry goods or pig iron. A man may buy any commodity, stock included, to sell on an expected rise, or sell "short," to acquire and deliver on an expected fall, and it will not be gambling. Margin is nothing but security, and a man may buy on credit, with security or without, or on borrowed money, and the money may be borrowed from his broker as well as from a third person. The test is, did he intend to buy, or only to settle on differences? If he had bought and paid for his stock, held it for a year, and then sold, no one would call it gambling; and yet it is just as little so, if he had it but an hour, and sold before he had in fact paid for it. And so with selling. Every merchant who sells you something not yet in his stock, but which he undertakes to get for you, is selling "short"; but he is not gambling, because, though delivery is to be in the future, the sale is present and actual. The true line of distinction was laid down in Peters v. Grim, 149 Pa. St. 163, 24 Atl. 192, and has not been departed from or varied: "A purchase of stock for speculation, even when done merely on margin, is not necessarily a gambling transaction. If one buys stock from A, and borrows the money from B to pay for it, there is no element of gambling in the operation, though he pledges the stock with B, as security for the money. So, if instead of borrowing the money from B, a third person, he borrows it from A, or, in the language of brokers, procures A to 'carry' the stock for him, with or without margin, the transaction is not necessarily different in character. But in this latter case, there being no transfer or delivery of the stock, the doubt arises whether the parties intended there should ever be a purchase or delivery at all. Here is the dividing line. If there was not under any circumstances to be a delivery, as part of and completing a purchase, then the transaction was a mere wager on the rise and fall of prices; but if there was, in good faith, a purchase, then the delivery might be postponed, or made to depend on a future condition, and the stock carried on margin, or otherwise, in the meanwhile, without affecting the legality of the operation." This has been uniformly followed. Hopkins v. O'Kane, 169 Pa. St. 478, 32 Atl. 421; Wagner v. Hildebrand, 187 Pa. St. 136, 41 Atl. 34. And the rule goes so far that

an agreement for an actual sale and purchase will make the transaction valid, though it originated in an intention merely to wager. Anthony v. Unangst, 174 Pa. St. 10, 34 Atl. 284.

Turning now to the facts of the present case, it is clear that the law was not correctly applied by the auditor and the court below. The brokers made an assignment on December 21, 1895, on which day they held certain stock for appellant, which they had bought on his order; and he had certain other stock, which they had sold on his order, but which he had not yet delivered to them. He desired to close the account, complete the mutual deliveries, and receive the balance which the transactions left in his favor. He was entitled to do so. Even if the transactions were wagering, the agreement of the parties to make the sales actual would, under Anthony v. Unangst, 174 Pa. St. 10, 34 Atl. 284, have made them valid. It is true, the settlement was not actually made until January 10th; but it was made as of December 20th, the day before the assignment, and the auditor reports that there had been no change of values meanwhile. The time of striking a balance on the books and delivering the stock was not important. Delivery is not in itself a material fact. Its only value is as evidence of the intent to make a bona fide sale. If such is the intent, the delivery may be present or future without affecting validity. But there was no sufficient evidence that the transactions were illegal at any time. The auditor reports that "the stocks ordered to be bought or sold by the customers of L. H. Taylor & Co. were, as shown by their books, actually bought and sold; and, as this evidence is uncontradicted, I must and do so find * * * Thus, so far as L. H. Taylor & Co. were concerned, the transactions were not fictitious, but were actual purchases and sales of stock." This finding should have been a warning to caution in taking a different view of the appellant's position in the transactions. It is true, the purchase or sale may be actual on part of the broker, and merely a wager on part of the customer (see Champlin v. Smith, 164 Pa. St. 481, 487, 30 Atl. 447); but there should be at least fairly persuasive evidence of the difference. There is none here. The transactions covered by the account began with a small cash balance to appellant's credit, followed by an order to buy 200 shares of Wabash common, which were bought by the brokers, paid for by appellant, and delivered to him. The close, two years and a half later, showed, as already said, a large number of shares in the hands of the brokers bought for appellant, and of which he demanded delivery, and other shares sold for him, and which he had in his possession ready to deliver. As to the intermediate transactions, appellant testified, "It was always the intention to buy the stocks out and out, and pay for them, and I had money to do it with." In the face of these facts and this uncontradicted testimony, the auditor found that "the account, including his enormous short sales, has all the earmarks of a gaming transaction, and I so find it." This was a mere inference, unwarranted by the account itself, and wholly opposed to all

the evidence in the case. Judgment, so far as it relates to appellant's claim, reversed, and claim directed to be allowed.[11]

[11] In Board of Trade of the City of Chicago, Petitioner, v. Christie Grain & Stock Company and C. C. Christie, 198 U. S. 236, Mr. Justice Holmes, for the court, said:

"The main defense is this: It is said that the plaintiff itself keeps the greatest of bucket shops, in the sense of an Illinois statute of June 6, 1887, that is, places wherein is permitted the pretended buying and selling of grain, etc., without any intention of receiving and paying for the property so bought, or of delivering the property so sold. On this ground it is contended that if, under other circumstances, there could be property in the quotations, which hardly is admitted, the subject-matter is so infected with the plaintiff's own illegal conduct that it is *caput lupinum*, and may be carried off by any one at will.

"It appears that in not less than three quarters of the transactions in the grain pit there is no physical handing over of any grain, but that there is a settlement, either by the direct method, so called, or by what is known as ringing up. The direct method consists simply in setting off contracts to buy wheat of a certain amount at a certain time, against contracts to sell a like amount at the same time, and paying the difference of price in cash, at the end of the business day. The ring settlement is reached by a comparison of books among the clerks of the members buying and selling in the pit, and picking out a series of transactions which begins and ends with dealings which can be set against each other by eliminating those between—as, if A has sold to B 5,000 bushels of May wheat, and B has sold the same amount to C, and C to D, and D to A. Substituting D for B by novation, A's sale can be set against his purchase, on simply paying the difference in price. * * *

"As has appeared, the plaintiff's chamber of commerce is, in the first place, a great market, where, through its eighteen hundred members, is transacted a large part of the grain and provision business of the world. Of course, in a modern market, contracts are not confined to sales for immediate delivery. People will endeavor to forecast the future, and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices, and providing for periods of want. It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn. But legislatures and courts generally have recognized that the natural evolutions of a complex society are to be touched only with a very cautious hand, and that such coarse attempts at a remedy for the waste incident to every social function as a simple prohibition and laws to stop its being are harmful and vain. This court has upheld sales of stock for future delivery and the substitution of parties, provided for by the rules of the Chicago stock exchange. Clews v. Jamieson, 182 U. S. 461, 45 L. Ed. 1183, 21 Sup. Ct. Rep. 845.

"When the Chicago board of trade was incorporated, we cannot doubt that it was expected to afford a market for future as well as present sales, with the necessary incidents of such a market, and while the state of Illinois allows that charter to stand, we cannot believe that the pits, merely as places where future sales are made, are forbidden by the law. But again, the contracts made in the pits are contracts between the members. We must suppose that from the beginning, as now, if a member had a contract with another member to buy a certain amount of wheat at a certain time, and another to sell the same

## WILLIAM S. FERGUSON *v.* ALLEN COLEMAN.

(Court of Appeals of South Carolina, 1846. 3 Rich. L. 99, 45 Am. Dec. 761.)

This was an action on an instrument, dated 31st January, 1843, whereby the defendant promised "to pay on the first of January, 1844,

amount at the same time, it would be deemed unnecessary to exchange warehouse receipts. We must suppose that then as now, a settlement would be made by the payment of differences, after the analogy of a clearing house. This naturally would take place no less that the contracts were made in good faith, for actual delivery, since the result of actual delivery would be to leave the parties just where they were before. Set-off has all the effects of delivery. The ring settlement is simply a more complex case of the same kind. These settlements would be frequent, as the number of persons buying and selling was comparatively small.

"The fact that contracts are satisfied in this way by set-off and the payment of differences detracts in no degree from the good faith of the parties, and if the parties know when they make such contracts that they are very likely to have a chance to satisfy them in that way, and intend to make use of it, that fact is perfectly consistent with a serious business purpose, and an intent that the contract shall mean what it says. There is no doubt, from the rules of the board of trade or the evidence, that the contracts made between the members are intended and supposed to be binding in manner and form as they are made. There is no doubt that a large part of those contracts is made for serious business purposes. Hedging, for instance, as it is called, is a means by which collectors and exporters of grain or other products, and manufacturers who make contracts in advance for the sale of their goods, secure themselves against the fluctuations of the market by counter contracts for the purchase or sale, as the case may be, of an equal quantity of the product, or of the material of manufacture. It is none the less a serious business contract for a legitimate and useful purpose that it may be offset before the time of delivery in case delivery should not be needed or desired.

"Purchases made with the understanding that the contract will be settled by paying the difference between the contract and the market price at a certain time (Embrey v. Jemison, 131 U. S. 336, 33 L. Ed. 172, 9 Sup. Ct. Rep. 776; Weare Commission Co. v. People, 209 Ill. 528, 70 N. E. 1076), stand on different ground from purchases made merely with the expectation that they will be satisfied by set-off. If the latter might fall within the statute of Illinois, we would not be the first to decide that they did when the object was self-protection in business, and not merely a speculation entered into for its own sake. It seems to us an extraordinary and unlikely proposition that the dealings which give its character to the great market for future sales in this country are to be regarded as mere wagers or as 'pretended' buying or selling, without any intention of receiving and paying for the property bought, or of delivering the property sold, within the meaning of the Illinois act. Such a view seems to us hardly consistent with the admitted fact that the quotations of prices from the market are of the utmost importance to the business world, and not least to the farmers; so important, indeed, that it is argued here and has been held in Illinois that the quotations are clothed with a public use. It seems to us hardly consistent with the obvious purposes of the plaintiff's charter, or indeed with the words of the statute invoked. The sales in the pits are not pretended, but, as we have said, are meant and supposed to be binding. A set-off is, in legal effect, a delivery. We speak only of the contracts made in the pits, because in them the members are principals. The subsidiary rights

to W. S. Ferguson or bearer, nine hundred and two dollars, fifty-eight cents, if cotton should rise to eight cents by the first November next, and if not, to pay five hundred dollars, for value received." It was admitted at the trial that this instrument was given in part payment of a tract of land which the defendant had purchased of the plaintiff; and it was proved on the part of the plaintiff, that between the date of the agreement and the first of November, 1843, the highest prices of cotton were, in Columbia, 8 1-2 and 8 3-4 cents, and in Charleston, 9 and 9 1-4 cents.

The defendant contended, 1st, that the agreement was a wager on the price of cotton; 2d, that according to the true construction of the instrument, the defendant was only bound to pay the larger sum, if cotton was selling for eight cents on or near the first of November, and that this had not been shown.

Under the instructions of his Honor the presiding judge, the jury found for the plaintiff the larger sum.

The defendant appealed, and now moved this court for a new trial.

CURIA, *per* FROST, J. The objection chiefly urged against the instructions of the circuit judge, affects the construction of the agreement to pay the larger sum expressed in the note, "if cotton should rise to eight cents by the first of November next." It appeared by admissions at the trial that the defendant was treating with the plaintiff for the purchase of a tract of land; and declining to give the price which the plaintiff asked, it was agreed that the defendant should pay a certain sum if cotton advanced, or less if it did not. The defendant insists that the import of the agreement is, that cotton should rise to eight cents "at or near" the first of November. The various significations to which the necessities of language have applied this and other propositions, would

of their employers where the members buy as brokers we think it unnecessary to discuss.

"In the view which we take, the proportion of the dealings in the pit which are settled in this way throws no light on the question of the proportion of serious dealings for legitimate business purposes to those which fairly can be classed as wagers, or pretended contracts. No more does the fact that the contracts thus disposed of call for many times the total receipts of grain in Chicago. The fact that they can be and are set off sufficiently explains the possibility, which is no more wonderful than the enormous disproportion between the currency of the country and contracts for the payment of money, many of which in like manner are set off in clearing houses without any one dreaming that they are not paid, and for the rest of which the same money suffices in succession, the less being needed the more rapid the circulation is.

"But suppose that the board of trade does keep a place where pretended and unlawful buying and selling are permitted, which, as yet, the Supreme Court of Illinois, we believe, has been careful not to intimate, it does not follow that it should not be protected in this suit."

The statutes should be consulted.

On the legality of contracts for the sale of personal property to be delivered in the future or with options, see 1 Am. St. Rep. 752, note; 11 Ann. Cas. 440, note; 1 A. L. R. 1548, note.

render any construction of the agreement, based on a critical analysis of its meaning, very unsatisfactory. But it may be observed that "by," in its primitive sense, expresses relation to place; though by various remote and obscure analogies and casual associations, that meaning is variously modified. In relation to place, it clearly does signify "at or near," but its import is more indefinite when used to express the relation of time. In this application it signifies "on or before." Many examples of this sense readily occur. If a contract were made for the delivery of an article, or the completion of work, by a particular time, to be paid for on completion, or delivery, a claim for the price would accrue on performance, whenever that might be; for the agreement provides for a performance and payment before the appointed time, but leaves the time of performance wholly indefinite. It would be more difficult to derive an example of the defendant's construction from the transactions of life. The popular signification of words, that which use has made familiar in the affairs of men, must be adopted in giving construction and effect to their contracts.

The objection to the agreement that it is a wager is plainly inapplicable; for the parties had an interest in the contingency. The defendant purchased the land at the lowest price, unconditionally, but contracted to pay a larger sum if the value should be enhanced by the increased value of its product.

The motion is dismissed.[12]

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## GEER *v.* FRANK.

(Supreme Court of Illinois, 1899. 179 Ill. 570, 53 N. E. 965, 45 L. R. A. 110.)

Bill in equity praying for the appointment of a receiver and an accounting with a decree for the sum due under a contract between complainant Geer, the defendant Frank, and the defendant Bennett, whereby Frank assigned to each of the others one third of his claim against a certain company and in consideration Geer agreed to give his legal services in conjunction with Bennett in suing on said claim and Bennett agreed "to pay the necessary expenses in the way of cash outlays, for court costs, etc.," and his legal services. Though the opinion does not consider the fact, the contract also provided "that no settlement or compromise of said claim shall be made without the assent of all parties." Complainant prosecuted the claim against the company for defendant Frank and got a judgment and defendant Frank settled with the company, satisfied the judgment and refused to account. Defendant Bennett also asked for a decree for what was due him. The superior court dismissed the bill

[12] See Wolf v. National Bank of Illinois, 178 Ill. 85 (1899); Deyo v. Hammond, 102 Mich. 122 (1894). But see Burney v. Blanks (Tex. Civ. App.), 136 S. W. 806 (1911).

and defendant Bennett's cross-bill. The Appellate Court affirmed the decree and granted a certificate of importance by virtue of which Geer and Bennett appealed to the Supreme Court.

CARTWRIGHT, J.[13] * * * Disregarding all other questions argued, we are of the opinion that the agreement is illegal and void. It was said in Newkirk v. Cone, 18 Ill. 449, that the common law of champerty had been abolished in this state, but this statement was corrected in Thompson v. Reynolds, 73 Ill. 11, where it was said the former decision was manifestly a mistake, and that the question was not involved in such former decision, the champertous agreement having been abandoned by the parties by mutual consent. The law of champerty has been somewhat qualified by our decisions, but it is a part of the law of the state. We have held, in consonance with the great weight of modern authority, that an attorney may make an agreement for contingent fees of a legitimate character, by which he is to receive a certain share or part of the money or thing recovered. (West Chicago Park Comrs. v. Coleman, 108 Ill. 591; Phillips v. South Park Comrs., 119 *id.* 626.) In such a case he has no interest in the litigation except that of an attorney and to the extent of his legal services, and if such a contract is not against conscience and reasonable in its terms, a court of equity would doubtless enforce it. The law, however, does not permit a person having no interest in the subject-matter of a suit to become interested in it and concerned in its prosecution, and an agreement by which such person, although an attorney, agrees to bear expense and costs of litigation falls within the definition of champerty, and will not be enforced, either at law or in equity. (Gilbert v. Holmes, 64 Ill. 548; Thompson v. Reynolds, *supra.*) Under these rules the agreement between Bennett and Frank was champertous, and the undertakings of Geer and Bennett were so mutually dependent upon each other, as a consideration for the agreement of Frank, that the whole contract was tainted with illegality. The considerations for Frank's promise were the agreement of Geer to render legal services in conjunction with Bennett, Bennett's agreement to render legal services in conjunction with Geer, and Bennett's agreement to pay the costs and expenses. The agreement could not be performed and Geer render the services which he promised except by Bennett carrying out his champertous agreement, and it was so executed. The undertakings cannot be separated, and one of the considerations inducing the promise of Frank being illegal, the entire contract is void and a court of equity will not aid in its enforcement.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*[14]

[13] The statement of facts is summarized from the opinion and parts of the opinion are omitted.

[14] In England, any contract between solicitor and client for the solicitor to have a percentage of the recovery as his fee is champertous. In re Attorneys'

## MOREHOUSE *v.* BROOKLYN HEIGHTS R. CO. ET AL.

(Court of Appeals of New York, 1906. 185 N. Y. 520, 78 N. E. 179, 7 Ann. Cas. 377.)

Action by Wilmot L. Morehouse against the Brooklyn Heights Railroad Company and another. From a judgment of the Appellate Division (92 N. Y. Supp. 1134, 102 App. Div. 627), unanimously affirming a judgment (89 N. Y. Supp. 332) entered on a decision for plaintiff, defendant company appeals. Reversed, and new trial granted.

and Solicitors' Act, 1870, 1 Ch. D. 573 (1875); In re A Solicitor, [1912] 1 K. B. 302. But even there the solicitor may agree to take the regular fees only if the client recovers and only out of the damages recovered. See Rich v. Cook, 110 Law Times 94 (1900). In Massachusetts and New Hampshire it seems to be champerty for a lawyer to agree to look solely to the fund recovered with no personal claim against the client. Hadlock v. Brooks, 178 Mass. 425 (1901); Butler v. Legro, 62 N. H. 350 (1882). The objection seems to be the fact that the lawyer stands to lose, for in Taylor v. Rosenberg, 219 Mass. 113 (1914), where the lawyer was to receive a percentage of damages recovered in condemnation proceedings, since he was sure to get something the contract was held not to be champertous. But most American courts adopt the view of the principal case, Geer v. Frank, allowing contingent fee contracts unless the lawyer contracts to carry on the litigation at his own expense. (On validity of agreement by attorney to save client harmless from costs and expenses, see 6 A. L. R. 184, note.) Some courts disregard even that test and simply ask whether the contract in fact was or was not oppressive. Taylor v. Bemiss, 110 U. S. 42 (1883), Grievance Committee v. Ennis, 84 Conn. 594 (1911). See Brown v. Bigné, 21 Ore. 260 (1891), where the contingent compensation contract was with a layman who advanced thereunder the funds to carry on the suit.

In some jurisdictions, because of the public policy favoring settlements of law suits, a contract between lawyer and client binding the client not to settle without the lawyer's consent is illegal and void. North Chicago, Etc., R. Co. v. Ackley, 171 Ill. 100 (1898); Davy v. Fidelity & Casualty Ins. Co., 78 Oh. St. 256 (1908). But in other jurisdictions only that particular provision of the contract is invalid. Buckeye Cotton Oil Co. v. Winn (Ark.), 229 S. W. 734 (1921); Newport Rolling Mill Co. v. Hall, 147 Ky. 598 (1912); Greenleaf v. Minneapolis, Etc., R. Co., 30 No. Dak. 112 (1915), (But see Moran v. Simpson (N. Dak.), 173 N. W. 769 (1919). On contingent fee contracts, see 1 Ann. Cas. 299, note; 83 Am. St. Rep. 159, note. On contracts with a provision prohibiting the client from settling without the lawyer's consent, see 13 Ann. Cas. 444, note; Ann. Cas. 1913 D, 306, note; 14 L. R. A. (N. S.) 1101, note. See also Costigan's Cases on Legal Ethics, pp. 495-512.

Champerty is maintenance, for maintenance is assisting another to carry on his lawsuit without legal excuse for so doing; but it is maintenance with the objectionable features of an agreement to receive a share of the recovery for so doing, to pay the costs, or part of the costs, of suit, etc., deemed in the given jurisdiction to constitute champerty. Maintenance that is not champertous is allowable as between relatives, master and servant and as charity to poor persons. On assisting poor person to prosecute or defend suit as maintenance, see 11 Ann. Cas. 69, note.

See, generally, Percy H. Winfield, The History of Maintenance and Champerty, 35 Law Quar. Rev. 50.

HAIGHT, J.[15] This action was brought to recover of the defendant Jonas Nathan for services rendered to him by the plaintiff as an attorney at law in the commencement of an action for Nathan against the Brooklyn Heights Railroad Company, and to enforce plaintiff's lien against the railroad company. On the 19th day of February, 1902, the defendant Nathan received personal injuries on the defendant's railroad while a passenger in one of its cars, and thereupon he entered into a written agreement with the plaintiff to prosecute an action therefor, for which he agreed to pay the plaintiff 50 per cent. of whatever might be recovered in the action, by way of settlement or otherwise, together with the costs, allowances, and disbursements thereon as compensation for his services. Shortly thereafter the plaintiff did bring an action against the railroad company by the service of a summons and complaint, which action was subsequently settled by the defendant Nathan; the railroad company paying to him the sum of $2,000. The trial court has found as a fact that the settlement so made by the railroad company was honest and binding upon the plaintiff, but that the plaintiff at the time of serving the summons and complaint had also served upon the railroad company a notice of his lien for 50 per cent. Judgment was thereupon awarded against the defendant for the sum of $1,000, with the provision that execution first issue against the defendant Nathan, and, if it should be returned unsatisfied, then the plaintiff have execution against the defendant railroad company. The defense interposed by the railroad company was that the contract between Nathan and the plaintiff was unconscionable, and therefore illegal and void. Most of the evidence taken upon the trial bore upon this issue. At the conclusion of the evidence the trial court rendered a decision in writing, containing findings of fact and conclusions of law, to which reference has already been made, but containing no finding either way upon the question as to whether the contract was unconscionable and illegal and void. The defendant had submitted requests to find bearing upon this issue, to the effect that the contract was unconscionable, which requests were marked "Refused." In disposing of the case the trial judge filed his opinion, in which he stated that the claim of the defendant that the contract was unconscionable, and would not, therefore, be enforced by the court, was not available to the defendant railroad company, for the reason that, if the company still had the $2,000 in its possession, it could not raise such a question, as it would be a matter between the attorney and client only, and he did not think the company was in any better position after having paid the money in its own wrong. Exceptions were taken to the findings of fact and conclusions of law of the trial court, and to its refusals to find as requested.

I think the defense interposed by the defendant company was available to it, and that it should have been determined either one way or the

[15] Part of the opinion is omitted.

other by the trial court. It is true the defendant company paid out its $2,000 in settlement of the action brought against it; but this, as the trial justice has found, was honestly done, and consequently was not for the purpose of defrauding the plaintiff out of his compensation. It is true that this payment was made after notice of the lien had been served by the plaintiff upon the company. How the company came to make the payment after such notice is not disclosed by the record. Whether it was overlooked or forgotten, we are not advised. The company, however, has honestly settled the case and paid the money to Nathan, as it had the right to do, upon the understanding that he would settle with his attorney for the services he had received. Fischer-Hansen v. Brooklyn H. R. R. Co., 173 N. Y. 492, 60 N. E. 395. Nathan thereby became primarily liable to pay the plaintiff herein for his services in the litigation, and the defendant company only became liable to pay in case collection through execution against Nathan could not be made. In effect it became his surety. Such is the judgment entered herein. It, therefore, appears to me that the defendant company became subrogated to the rights of the defendant Nathan, and had the right to avail itself of any defense to the action that Nathan had. In the case of Pease v. Egan, 131 N. Y. 262-272, 30 N. E. 102, Peckham, J., in commenting upon the general rule of subrogation, refers to a statement of Chief Justice Marshall to the effect "that equity would clothe the party thus paying with the legal garb with which the contract he has discharged was invested, and it would substitute the party paying to every equitable interest and purpose, in the place of the creditor whose debt he has discharged." And again, later on, after referring to the cases of Gans v. Thieme, 93 N. Y. 225, and Arnold v. Green, 116 N. Y. 566, 23 N. E. 1, says with reference to them that they are "evidences of the rule that no contract need subsist upon which to base the right of subrogation, and that it is a remedy which equity seizes upon in order to accomplish what is just and fair between the parties." In Mathews v. Aikin, 1 N. Y. 595, Johnson, J., says: "It is a general and well-established principle of equity that a surety, or a party who stands in the situation of a surety, is entitled to be subrogated to all the rights and remedies of the creditor whose debt he is compelled to pay." Hinckley v. Kreitz, 58 N. Y. 583; Johnson v. Zink, 51 N. Y. 333; Lord v. Tiffany, 98 N. Y. 412, 50 Am. Rep. 689; Wheeler v. Sweet, 137 N. Y. 435, 33 N. E. 483.

Of late years the subject of attorneys' fees and their manner of procuring contracts of retainer, especially in negligence cases, have attracted the attention of both the public and the courts. The charges made in some cases have been exorbitant, if not scandalous, and have tended in a measure to bring the profession into disrepute. It is contended that a claimant who is poor and unable to pay his attorney in cash ought to be permitted to contract to pay a portion of his claim to his attorney, in order to procure his services. The validity of such contracts is not questioned. It is only where the attorney has taken advantage of the claim-

ant, by reason of his poverty or the surrounding circumstances, to extort an unreasonable and unconscionable proportion of such claim that it is condemned. The federal courts have recently, in two instances, characterized a contract of retainer giving to the attorney 50 per cent. of the recovery as unconscionable. Herman v. Met. St. Ry. Co. (C. C.) 121 Fed. 184; Muller v. Kelly, 125 Fed. 213, 60 C. C. A. 170. The Appellate Division in the First Department has also denounced such contracts. The question, however, as to whether such a contract is unconscionable, is one of fact, depending upon the character of the claim and the amount of services to be rendered in prosecuting it to judgment. An agreement to pay an attorney one-half of the recovery, where the action was to recover a penalty of $50, would not by any person be considered to be improper; but, if it was for $50,000, it might be considered quite improper. So that the mere fact that the attorney under the agreement was to receive one-half does not render it unconscionable, unless it appears from the evidence that it was induced by fraud, or, in view of the nature of the claim, that the compensation provided for was so excessive as to evince a purpose on the part of the attorney to obtain an improper or undue advantage over his client. Matter of Fitzsimons, 174 N. Y. 15, 66 N. E. 554. As we have seen, the defendant in the case under consideration interposed the defense that the contract in this case was unconscionable, and therefore void, and evidence was produced upon the trial bearing upon this defense. The defendant company, therefore, had the right to have that issue determined by the trial court. This, as we have seen, the trial judge refused to do for the reason, as he states in his opinion, that the defense was not available to it. * * *

I am, therefore, of the opinion that the failure of the trial court to find upon the issue so raised by the pleadings and the evidence given upon the trial resulted in a mistrial. Miller v. N. Y. & North Shore Ry. Co., 183 N. Y. 123, 75 N. E. 111; Dougherty v. Lion Fire Ins. Co., 183 N. Y. 302, 76 N. E. 4.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

Judgment reversed, etc.[16]

[16] In general the fact that plaintiff has made a champertous contract with his lawyer with respect to the litigation is no defense in the litigation. In exceptional situations, however, as where the defendant has settled with the plaintiff and the lawyer is seeking a judgment under an attorney's lien statute, it may be a defense, as the principal case shows. See also Fail v. Gulf States Steel Co. (Ala.) 87 So. 612 (1920). On champertous agreement to prosecute as a defense, see 19 Ann. Cas. 517, note.

Certain kinds of contingent fee contracts are held bad for special reasons of public policy. On contracts to prosecute or assist in prosecution of a criminal case where fee is contingent on conviction, see 119 L. R. 1192, note. On contracts for contingent compensation in procuring legislation, see 6 Ann. Cas. 218, note.

"In this jurisdiction, and others, a contingent fee contract made between

## JOHNSON *v.* HIGGINS ET AL.

(Superior Court of Delaware, 1917. 108 Atl. 647.)

Action by Thomas W. Johnson, Jr., executor of George W. Todd, deceased, against James Crane Higgins and Daniel W. Corbit, executors of Anthony Higgins, deceased. Directed verdict for defendants.

CONRAD, J.[17] The plaintiff rests his case upon an alleged contract claimed to have been made by Anthony Higgins, an attorney at law in this county, with one George W. Todd, not an attorney, to pay to the latter a certain percentage of the counsel fees to be received by Higgins, contingent upon the recovery of a verdict in a suit then pending against the firm of E. B. Smith & Co.; the percentage to be paid to Todd being compensation for procuring evidence, examining records and minutes, etc., for use in the above suit.

Defendants' counsel moves for a nonsuit on the ground that the contract, if proved, was null and void, being against public policy.

An old English authority cites the following instances of the application of the doctrine of contracts in contravention of public policy: Marriage brokerage bonds, contracts in restraint of trade, contracts by expectant heirs, or in consideration of illicit cohabitation, or such contracts as may injuriously affect the administration of public justice.

The case at bar is claimed to come under the last-named head.

The Supreme Court of Nebraska, in Langdon v. Conlin, 67 Neb. 243, 93 N. W. 389, 60 L. R. A. 429, 108 Am. St. Rep. 643, 2 Ann. Cas. 834, lays down the law very clearly, as follows:

"A contract between an attorney at law and one who is not such an attorney, by which the latter agrees to procure the employment of the former by third persons for the prosecution of suits in courts of record, and also to assist in looking after and procuring witnesses whose testimony is to be used in the cases, in consideration of a share of the fees which the attorney shall receive for his services, is against public policy, and void."

The Supreme Court of New York, in Lyon v. Hussey, 82 Hun, 15, 31 N. Y. Supp. 281, upholds the same doctrine, as shown by the following extract from the court's opinion:

client and attorney in retaining the latter is, in the absence of legal fraud, valid. Matter of Fitzsimons, 174 N. Y. 15, 66 N. E. 554; Morehouse v. Brooklyn Heights R. R. Co., 123 App. Div. 680, 108 N. Y. Supp. 152, affirmed 195 N. Y. 537, 88 N. E. 1126. When the contract is between the executor or administrator under [Code Civ. Proc.] section 1902 [about allowance of reasonable expenses where action for wrongful death] and an attorney, for the purpose of prosecuting or maintaining an action under the section, the law implies the additional condition that as to the damages recovered, or as to the beneficiaries, the contract is subject to the power of the court to determine the reasonable or suitable compensation or expenditure to the attorney which may be deducted from the recovery." Collin, J., in Matter of Meng, 227 N. Y. 264, 269-270 (1919).

[17] The statement of facts and a ruling on an evidence point are omitted.

"It is clear that such a contract is against public policy. The recognition of contracts of this character would be the introduction of all sorts of fraud and deception in proceedings before courts of justice, in order that parties might receive compensation out of the results of their successful manufacture of proofs to be presented to the court, thus holding out a premium upon subornation. The mere statement of the proposition seems to show that such a contract could never be recognized in any court of justice."

The courts of Kentucky and of Michigan are in accord with the same doctrine, and in fact all the courts where the subject has been discussed agree that a contract between an attorney and one not an attorney, to divide contingent fees to be received by an attorney in a suit, is repugnant to every instinct of propriety and justice, and should be regarded as immoral, illegal and void.

We are clearly of opinion that the contract relied upon in the case at bar is null and void, being against public policy.

The motion for a nonsuit is granted.

[The plaintiff declining to accept a nonsuit, a verdict for defendants was directed.[18]]

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## THE WILLIAMSON, HALSELL, FRAZIER COMPANY *v.* JOSEPH H. ACKERMAN ET AL.

(Supreme Court of Kansas, 1908. 77 Kans. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484.)

JOHNSTON, C. J.[19] This suit was brought by the Williamson, Halsell, Frazier Company to recover on three notes, one for $1,166.66 and each of the other two for $1,166.67, due respectively in one, two and three years after date, signed by Joseph J. Ackerman and his two children, John H. Ackerman and Mary H. Sproat, and to foreclose a mortgage on the home of Joseph J. Ackerman purporting to secure the payment of the notes.

The defense of Joseph J. Ackerman was that the notes and mortgage were signed under duress and therefore was unenforceable, and this defense prevailed. The defendants alleged and offered testimony to show that during the years 1903 and 1904 John H. Ackerman was an employee of the plaintiff corporation, and that Halsell, a representative of the company, came to Joseph J. Ackerman and informed him that John had embezzled about $4,000 of the company's money; that he,

[18] On the validity of contracts to furnish evidence, see 97 Am. St. Rep. 145, note; 13 Ann. Cas. 212, note; Ann. Cas. 1912 A, 657, note.

On when a lawyer's contract of employment is void as against public policy because secured by solicitation, see 119 Am. St. Rep. 1035, note.

[19] Part of the opinion is omitted.

Halsell, had obtained and had in his pocket a warrant for John's arrest for embezzlement, and that there was a deputy sheriff waiting in an adjoining room to serve the warrant, and unless the notes and mortgage were signed the warrant would be served and John would be convicted and sent to the penitentiary; that when the father and sister of John asked that they be permitted to consult with John about signing the papers Halsell objected, saying that he would deliver the warrant which he had in his pocket to the deputy sheriff and that the prosecution would go on, but if the notes and mortgages were signed there would be no prosecution. After negotiations which continued for about two hours, Halsell insisting that in case the notes and mortgages were not executed John would be arrested and locked up but if they were given no arrest would be made, and after Mrs. Sproat, who was frightened and crying, had begged her father to save John, he signed the notes and mortgage in suit. Two days afterward a flaw was found in the mortgage, and a representative of the company came to Wichita and demanded a corrected mortgage; and when Mr. Ackerman held back he was informed that a refusal meant a prosecution and the penitentiary for his son, and under these threats a corrected mortgage was executed. There was abundant testimony to show that the notes and mortgage were secured from Ackerman by threats of the arrest and prosecution of his son, and that they would never have been executed if Ackerman had been left to act of his own free will. * * *

There is no lack of testimony to show threats of the arrest and prosecution of John, and that the notes and mortgage were procured through fear excited by the threats. Joseph J. Ackerman was subject to duress because of the threats against a member of his family as much as if they had been directed against himself . In National Bank v. Croco, 46 Kan. 620, 26 Pac. 939, as well as in Heaton v. Bank, 59 Kan. 281, 52 Pac. 876, it was held that a threatened prosecution of the husband may cause duress of the wife. Many cases may be found in the books where the threatened prosecution of a child amounted to duress of the parent. An illustration may be found in Williams and another v. Bayley, L. R. 1 H. L. 200, 35 L. J. Ch. 717, where bankers had acquired paper forged by a young man, and who had brought pressure upon the father to assume the payment of his obligations. The Lord Chancellor spoke of the pressure brought upon the father as of this nature:

" 'We have the means of prosecuting and so transporting your son. Do you choose to come to his help, and take upon yourself the amount of his debts, the amount of his forgeries? If you do, we will not prosecute. If you do not, we will.' That is the plain interpretation of what passed. Is that, or is it not, legal? In my opinion I am bound to go the length of saying that I do not think it is legal." (L. J. Ch. 722.)

Lord Westbury, in concurring in the judgment, said:

"The question, therefore, my lords, is whether a father appealed to

under such circumstances to take upon himself an amount of civil liability, with the knowledge that, unless he does so, his son will be exposed to a criminal prosecution, with the certainty of a conviction, can be regarded as a free and voluntary agent? I have no hesitation in saying that no man is safe, or ought to be safe, who takes a security for the debt of a felon, from the father of a felon, under such circumstances.

"A contract to give security for the debt of another, which is a contract without consideration, is, above all things, a contract which should be based upon the free and voluntary agency of the individual who enters into it." (L. J. Ch. 725.)

See, also, The City National Bank of Dayton, Ohio, v. Kusworm, 88 Wis. 188, and note thereto in 26 L. R. A. 48.

Finding no errors in the record, the judgment [for defendants] is affirmed.[20]

[20] "A fair result of the evidence, if it is in fact true, shows that the deed was executed and delivered under the influence felt by the grantor and exercised by the grantee, and that the result of the discovery of the criminal act, for which the wife was not liable, and the fear of the criminal prosecution and imprisonment of her husband were used by the defendant, or his agent, to induce her to execute and deliver the deed. The evidence thus shows an attempt to gain an advantage or benefit from an influence improperly exerted, and indicates the use of the criminal process of a court for private and personal ends.

"The important question of law here involved, therefore, is whether one who has discovered the commission of a crime, and has caused the arrest of the perpetrator, and who, by threats of prosecution and imprisonment, has overcome the will of the wife of the perpetrator, and induced her to execute a deed which she would not have willingly executed and delivered, can hold the property so conveyed, if the wife afterwards attempts to avoid the deed and have it canceled on the ground of duress. It has sometimes been held that threats of unlawful imprisonment only can constitute duress, and some of the definitions of duress *per minas* are perhaps not broad enough to include threats of lawful imprisonment, but at present the rule has a broader application. 'It is founded on the principal that a contract rests on the free and voluntary action of the minds of the parties meeting in an agreement which is to be binding upon them. If an influence is exerted on one of them of such a kind as to overcome his will and compel a formal assent to an undertaking when he does not really agree to it, and so to make that appear to be his act which is not his, but another's, imposed on him through fear, which deprives him of self-control, there is no contract unless the other deals with him in good faith, in ignorance of the improper influence, and in the belief that he is acting voluntarily.' Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525.

"The very existence of a contract requires that the minds of the parties meet, and that it be executed freely and voluntarily by all the contracting parties. If, then, in a case like the one shown by the evidence herein, one of the parties acts under constraint, induced by the other, and signs the instrument without voluntary assent to it, the party who exerted the improper influence can take no advantage of the contract. The real question in such a case is not whether the threats relied upon as constituting duress were of

## JAMES QUIRK MILLING COMPANY *v.* MINNEAPOLIS & ST. L. R. CO.

(Supreme Court of Minnesota, 1906. 98 Minn. 22, 107 N. W. 742.)

Action by the James Quirk Milling Company against the Minneapolis & St. Louis Railroad Company. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

ELLIOTT, J. The appellant under a contract with the railway company erected a grain elevator upon its right of way. The building was

lawful or unlawful imprisonment, but whether they were of imprisonment which would be unlawful respecting the conduct of him who threatened and sought to obtain a contract by use of the threats. Such imprisonment, resulting from the execution of threats made for the purpose of securing a contract or a conveyance of property, may be lawful with respect to the public or public authorities, but unlawful with respect to him who thus, for his own private benefit, made use of the criminal process of the court provided for the prosecution of crime and the protection of the public. One who, under circumstances as now disclosed in this case, makes use of the criminal process of the court for the purpose of overcoming the will of another to secure an advantage to himself, is not in a position to obtain and hold the fruits of a contract, whether executed or executory, so obtained, on the ground that both parties were in *pari delicto*, and that in equity the court will leave them where it finds them. Under the weight of recent authority, at least, such parties, under such circumstances, cannot be looked upon as equally at fault, although they are both guilty of a wrong. The inequality of their situation, the one exacting a deed to property which the other is compelled to execute and deliver against her will in order to save her husband from imprisonment in the penitentiary and herself and children from disgrace and ruin, taints the transaction, and renders voidable the instrument obtained under the influence of her fears. This is so because she was not acting as a free agent. The evidence does not show that the conveyance was the result of her own volition, but of that of another; in reality not her contract, but another's; and in such case there is no reason why she should be held bound by the instrument. If, as indicated by the evidence now before us, her main and inspiring purpose was the release of her husband from the consequences of his crime, and to preserve the standing of herself and family in society; if such was the consideration operating in her mind when she signed the deed, a court will not be justified in upholding the transaction." Bartch, C. J., in Gorringe v. Read, 23 Utah 120, 132-134 (1901).

But, also, "It is well settled law that, though criminal proceedings have been begun and be pending against the wrongdoer for the crime, one whose money or property has been embezzled, or fraudulently procured, may contract with such wrongdoer for repayment or satisfaction of the loss and take security therefor, without invalidating such contract, unless there be included therein and as part consideration therefor some promise or agreement, express or implied, that such prosecution shall be suppressed, stifled or stayed." Miller, J., in Board of Education v. Angel, 75 W. Va. 747, 750 (1915). As to compromise of action for criminal conversation, see Ann. Cas., 1913 A, 705, note.

On contracts procured by threats of prosecution against friend or relative, see 26 L. R. A. 48, note; 20 L. R. A. (N. S.) 484, note; 37 L. R. A. (N. S.) 539, note; L. R. A. 1915 D, 1118, note; Ann. Cas., 1917 C, 1033, note.

destroyed by fire negligently scattered by the company's locomotives. The action was brought to recover the resulting damages, and the trial court sustained a demurrer to the complaint. The appeal is from this order.

The elevator was constructed under a contract between the parties which contained the following provision: "In consideration of the rights hereby acquired the second party agrees * * * to protect, save harmless, and indemnify the railway company, its successors and assigns, from liability to any person, corporation, or company, for or on account of any loss or damage by fire communicated by or escaping from any locomotive, engine, or car, or resulting in any manner from the construction or operation of said track." The appellant contends that this contract is against public policy and therefore void. This involves the denial of the right of the parties to enter into such agreement.

Public policy requires that the right to contract shall be preserved inviolate in ordinary cases. It is denied only when the particular contract violates some principle which is of even more importance to the general public. As said by Sir George Jessel, M. R., in Printing, etc., Co. v. Sampson, L. R. 19 Eq. 462, 465, 44 L. J. Ch. 705: "It must not be forgotten that you are not to extend arbitrarily those rules, which say that a given contract is void as being against the public policy, because, if there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by the courts of justice. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract." In Baltimore, etc., Ry. Co. v. Voigt, 176 U. S. 505, 20 Sup. Ct. 387, 44 L. Ed. 560, the court said: "It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligations on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare." It follows that the party who asserts that a particular contract is against public policy has the burden of proving the same. Printing, etc., Co. Sampson, supra; Rousillion v. Rousillion, 14 Ch. Div. 351; U. S. v. Trans-Missouri, etc., Co., 58 Fed. 58, 7 C. C. A. 15, 24 L. R. A. 73; Hartford Fire Ins. Co. v. Chicago Railway, etc., Co., 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193; Stewart v. Transportation Co., 17 Minn. 372 (Gil. 348).

The appellant assumes that there is a general rule of law which forbids a party to protect himself by contract against damages resulting from his own negligence. But this is true only when the contract protects him against the consequences of a breach of some duty which is im-

posed by law. Generally a person may waive the right of action which he has against another for an injury received from the negligence of the latter, provided the contract of waiver is supported by a consideration deemed valuable by law and procured without mistake or fraud, such as would avoid other contracts. Thompson, Negligence, vol. 1, § 182. In Hartford Ins. Co. v. Chicago, etc., Ry. Co., 175 U. S. 91, 98, 20 Sup. Ct. 33, 36, 44 L. Ed. 84, Mr. Justice Gray, after stating the rule applicable to public carriers, said: "The plaintiff further insisted that the same rules apply universally and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct. But the only authority cited which supports this proposition is a general statement in Cooley on Torts, 387, and an *obiter dictum* in Johnson's Adm'x v. Richmond, etc., Ry. Co., 86 Va. 975-978, 11 S. E. 829, and it is certainly too sweeping. Even a common carrier may obtain insurance against losses occasioned by the negligence of himself or his servants, or may by stipulation with the owner of the goods carried have the benefit of such insurance procured thereon by such owner." Minneapolis, etc., Ry. Co. v. Insurance Co., 64 Minn. 61, 69, 66 N. W. 132; Phoenix Ins. Co. v. Erie Transportation Co., 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873; California Ins. Co. v. Union Compress Co., 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 730; Wager v. Providence Ins. Co., 150 U. S. 99, 14 Sup. Ct. 55, 37 L. Ed. 1013. The right to insure against loss by fire occasioned by the negligence of the insured is no longer questioned. Liverpool & Great Western Steam Co. v. Phoenix Ins. Co., 129 U. S. 438, 9 Sup. Ct. 469, 32 L. Ed. 788; Kerr, Ins. p. 375. A stronger illustration is found in the recognized business of insuring employers of labor against damages resulting from personal injuries occasioned by the negligence of the insured.

Exceptions to the general rule which protects the freedom of contract, are made in some instances, especially such as involve the relation of master and servant and the transactions of railway companies when acting as public carriers of persons and property. Positive and peremptory duties are imposed upon public carriers. Public policy requires that contracts which relieve from these absolute duties shall be held null and void. The law imposes upon a railway company the absolute duty to operate its railways, to employ suitable men to operate them, and to exercise ordinary care to furnish them a reasonably safe place to work and with reasonably safe machinery and appliances with which to perform their work. The obligation is imposed by law, and does not arise out of contract. Any breach of this duty, therefore, is a violation of the law which imposes the duty. It follows that a contract which exempts the carrier from damages resulting from negligence in the discharge of these duties is void, because it relieves it of an absolute duty which the law imposes upon it, and because it unreasonably endangers the lives of employés and passengers. The parties to

such contracts do not stand upon an equal footing. The law imposes upon the company the absolute duty to accept passengers and freight when offered, and to carry the former with the utmost and the latter with ordinary care. The traveler is often obliged to travel and the shipper to send his goods by railway. A person cannot stop to settle the terms and to negotiate a contract every time he desires to use a railway. On the other hand, a railroad, with its trained employés and monopoly of transportation facilities, has the power to exact any contract it desires. This inequality in the situation of the parties would, if permitted, enable the company to obtain unfair contracts, and the fact that a contract which exempts the company from liability for negligence relieves it from an absolute duty imposed by law and increases the danger to the lives and property of the people constitutes the reason for the rule that such contracts are against public policy. Hartford Fire Ins. Co. v. Chicago, etc., Ry. Co., 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 198.

Entirely different conditions are presented by the case at bar. In making the lease in question the railway company was dealing with individuals in reference to the use of its property only remotely, if at all, connected with its business as a common carrier. No law imposed upon it the duty of leasing a portion of its right of way to the appellants. A railway holds its station grounds and right of way for the public use for which the company was incorporated, "yet it is its private property, and to be occupied by itself and by others in the manner which it may consider best fitted to promote or not to interfere with the public use. It may in its discretion permit them to be occupied by others with structures convenient for the receiving and delivering of its freights upon its railroads, so long as a free and safe passage is left for the carriage of passengers and freight." Hartford Ins. Co. v. Chicago, etc., Ry. Co., 175 U. S. 92, 99, 20 Sup. Ct. 36, 44 L. Ed. 84; Grand Trunk Ry. Co. v. Richardson, 91 U. S. 454, 23 L. Ed. 356; Osgood v. Central Vermont Ry. Co., 77 Vt. 334, 60 Atl. 137, 70 L. R. A. 930. The laws of this state authorized the condemnation of a part of the right of way of a railway company for the erection of a public warehouse and elevator. Chapter 64, p. 177, Gen. Laws 1893; Gen. St. 1894, §§ 7724-7732; Rev. Laws 1905, §§ 2106-2113. But the appellant did not resort to this procedure, which would have made its elevator a public enterprise and thus subject to public regulation. Stewart v. N. P. Ry. Co., 65 Minn. 515, 68 N. W. 208, 33 L. R. A. 427. It chose rather to enter into a private contract with the railway company and to release it from liability for damages occasioned by fire which might escape from its engines. For this waiver of the right of action it must have received some benefit which it deemed the equivalent of the right of action which it waived. The company was under no legal obligation to make the lease. It might leave the appellant to its right to proceed under the statute and accept the obligations arising out

of the relation thus created. The company would not be liable for damages to property placed upon its right of way by strangers without its permission, caused by fires occasioned by its want of ordinary care. Having the right to refuse to make the contract, it might stipulate for exemption from damages caused by its negligence in setting fire to the property which the lessee placed upon the leased premises. Placing the building upon the right of way was an inconvenience to the railway company and increased the danger of fire to its own property. In the absence of the stipulation in question, the risks and liabilities of the company would have been materially increased. As the contract in no way relieves the railway company from the discharge of any absolute duty which it owes to the public or to any citizen, it is not against public policy, and is therefore binding upon the parties. The authorities, without exception, sustain this view. Elliott on Railroads, vol. 3, § 1236; Griswold v. Ill. Cent. Ry. Co., 90 Iowa, 265, 57 N. W. 843, 24 L. R. A. 647; Stephens v. Southern Pac. Ry. Co., 109 Cal. 86, 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17; King v. Southern Pac. Ry. Co., 109 Cal. 96, 41 Pac. 786, 29 L. R. A. 755; Kan. City, etc., Ry. Co. v. Blaker, 68 Kan. 244, 75 Pac. 71, 64 L. R. A. 81, 1 Am. & Eng. Ann. Cas. 883; Greenwich Ins. Co. v. Louisville, etc., Ry. Co. (Ky.) 66 S. W. 411, 67 S. W. 16, 56 L. R. A. 477, 99 Am. St. Rep. 313; Wabash Ry. Co. v. Ordelheide, 172 Mo. 436, 72 S. W. 684; Hartford Fire Ins. Co. v. Chicago, etc., Ry. Co., 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193, same case on appeal 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84; Baltimore, etc., Ry. Co. v. Voigt, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560; Osgood v. Cent. Vt. Ry. Co., 77 Vt. 334, 60 Atl. 137, 70 L. R. A. 930; Richmond v. New York, etc., Ry. Co., 26 R. I. 225, 58 Atl. 767; Woodward v. Ft. Worth, etc., Ry. Co. (Tex. Civ. App.), 79 S. W. 896; Mann v. Pere Marquette Ry. Co. (Mich.) 97 N. W. 721. Cf. Quimby v. Boston & Me. Ry. Co. (Mass.) 23 N. E. 205, 5 L. R. A. 846; Russell v. Pittsburgh, etc., Ry. Co., 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. Rep. 214; Tex. & Pac. Ry. Co. v. Watson, 190 U. S. 287, 293, 23 Sup. Ct. 681, 47 L. Ed. 1057.

The order appealed from is affirmed.

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## ROBERTS ET AL. *v.* CRISS.

(United States Circuit Court of Appeals, Second Circuit, 1920. 266 Fed. 296, 11 A. L. R. 698.)

Action by Jesse Nevin Roberts and another against Hugh Ferguson Criss. Judgment for defendant, and plaintiffs bring error. Pending appeal, defendant below died, and Helen G. Criss, administratrix, appeared on order. Affirmed.

ROGERS, J.[21] * * * It appears that the cause of action grows out of the failure of defendant to secure to the plaintiffs the benefit of defendant's membership in the [New York Stock] Exchange, when to have done so would have caused him to break his contract with the Exchange. The question comes down to this: Can such a cause of action be sustained? There can be no doubt concerning the answer which must be given to such a question. We are satisfied that the agreement into which these parties entered violated the rules of the Exchange, and that all parties, the plaintiffs as well as the defendant, knew that fact when they entered into it. The court below was clearly right in saying that the plaintiffs with knowledge that "the defendant was a member of the New York Stock Exchange and bound by its rules—in other words, that he had a contractual relation with the Exchange to obey these rules—entered into a contract with the defendant in violation of these rules."

The courts do not aid the parties to illegal agreements. If any principle of law is settled it is that a party to an illegal undertaking cannot come into a court either of law or equity and ask to have his illegal contract carried out. *Ex dolo malo non oritur actio,* and *in pari delicto potior est conditio defendentis.* It makes no difference whether the contract has been executed, or remains still executory. The defense of illegality may be set up, not as a protection to defendant, but as a disability in the plaintiff. It was said by Lord Mansfield in Holman v. Johnson, 1 Cowper, 341, 343:

"No court will lend its aid to a man who founds his cause of action on an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa* or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

In Dent v. Ferguson, 132 U. S. 50, 66, 10 Sup. Ct. 13, 19 (33 L. Ed. 242), the Supreme Court, speaking through Mr. Justice Lamar, cited with approval Chancellor Walworth's opinion in Bolt v. Rogers, 3 Paige, 154, 157, in which he said:

"Wherever two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of those persons, as against the other, from the consequence of their own misconduct."

In Hocking Valley Ry. Co. v. Barbour, 190 App. Div. 341, 179 N. Y. Supp. 810, recently decided, the plaintiff had sold certain gondola cars to the Central Locomotive & Car Works. Prior to that sale the plaintiff had entered into a contract with one Wardwell for the sale of 300 of the said gondola cars. The two sales left about 50 cars be-

[21] The statement of facts and part of the opinion are omitted.

longing to the plaintiff unsold. [The plaintiff and the Central Locomotive & Car Works then arranged another agreement for the purchase by the latter of all the cars of the plaintiff, including the cars theretofore contracted to Wardwell.] The plaintiff, apparently being unwilling to hazard a liability to Wardwell by making the sale to the Central Locomotive & Car Works, insisted that the latter should give a bond, executed by it and signed by defendant's testator, to save the plaintiff harmless from all damages and costs which might result if the plaintiff made the sale. The bond was given, the contract between the plaintiff and Wardwell was broken, and all the cars were delivered to the Central Locomotive & Car Works. An action was then brought by Wardwell against the plaintiff, and judgment was obtained for the breach of contract. Then suit was brought by plaintiff against the executors of the bondsmen upon his contract to save the plaintiff harmless from all damages arising from the failure to deliver the cars to Wardwell. The Supreme Court, Appellate Division, First Department, held the action could not be maintained, as the bond was unenforceable, having been executed as an inducement to the seller to break his contract with a third party. The bond was executed for an illegal purpose. In the course of its opinion the court said:

"Whatever right of action Wardwell may have had against the plaintiff, he had a primary right to have his contract consummated, and as this indemnity bond was given with full knowledge of all the parties of the fact that its purpose was to procure the plaintiff to deliberately violate his contract with Wardwell, the court will not give its aid. The law cares nothing for what a fraudulent party may lose, but will leave the parties where it finds them, and will leave them to disentangle themselves from the meshes in which they have become involved by their fraudulent agreement." [22]

In Wald's Pollock on Contracts (3 Am. Ed.) 376, it is said:

"An agreement will generally be illegal, though the matter of it may not be an indictable offense, and though the information of it may not amount to the offense of conspiracy, if it contemplates any civil injury to third persons. Thus an agreement * * * to carry out some object in itself not unlawful * * * by means of * * * breach of contract or breach of trust is unlawful and void."

[22] "It is not necessary here to hold that one purchasing goods known to have been contracted to another makes a contract tainted with illegality. Where, however, the contract, as in the case at bar is to give a bond for the very purpose of inducing the vendor to violate his contract known to have been made, a different question is involved, and the contract comes within the condemnation of the law as one made directly for an illegal purpose, and therefore tainted with illegality." Smith, J., in Hocking Valley Ry. Co. v. Barbour, 179 N. Y. Supp. 810, 813 (1920).

In 13 Corpus Juris, § 343, it is said that:

"An agreement is illegal and void where its object is the commission of a civil wrong against a third person, although the wrong may not be an indictable offense or crime, either at common law or under the statutes. This is true, for example, * * * of an agreement to perpetrate a fraud on a third person."

It is clear to us that the plaintiffs' cause of action grows out of an illegal and immoral contract. The immorality of the agreement to allow the plaintiffs the use of defendant's seat on the Stock Exchange contrary to the rules of the Exchange, and known to be so to all the parties, is so apparent that discussion is really unnecessary; and it is a well-established principle of sound public policy that no court will lend its aid to a plaintiff who grounds his action upon an immoral agreement. Therefore the court below was right in his direction to the jury to find a verdict for the defendant.

The fact that the illegality of the agreement was not pleaded is of no moment. In Oscanyan v. Winchester Repeating Arms, etc., Co., 103 U. S. 261, 26 L. Ed. 539, the court held that the illegality of the contract might be considered without being pleaded, saying:

"The position of the plaintiff that the illegality of the contract in suit cannot be noticed, because not affirmatively pleaded, does not strike us as having much weight. We should hardly deem it worthy of serious consideration, had it not been earnestly pressed upon our attention by learned counsel. * * * It [the objection of illegality] was one which the court itself was bound to raise in the interest of the due administration of justice. The court will not listen to claims founded upon services rendered in violation of common decency, public morality, or the law. * * * It would not be restrained by defects of pleading, nor, indeed, could it be by the defendant's waiver, if we may suppose that in such a matter it would be offered."

Inasmuch as the cause of action grows out of an agreement which the court cannot recognize, it is unnecessary to consider any other question. The direction of a verdict, in favor of the defendant, was justified under the circumstances. *Judgment affirmed.*[23]

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## C. F. JEWETT PUBLISHING CO. *v.* BENJAMIN F. BUTLER.

(Supreme Judicial Court of Massachusetts, 1893. 159 Mass. 517, 34 N. E. 1087, 22 L. R. A. 253.)

Action by C. F. Jewett Publishing Company against Benjamin F. Butler for breach of contract. The court reported the case to the Supreme Judicial Court. Judgment for plaintiff.

[23] On validity of contract which contemplates the violation of a contract with a third person, see 11 A. L. R. 706, note.

The contract between the parties recited that the defendant "is minded and intending to write and have published two volumes in the nature of autobiography or reminiscences of his life, and the acts and doings of other public men, so far as they may seem to him to elucidate the history of the country or public affairs," and it was stipulated that the plaintiff should do the publishing. The declaration alleged that, after defendant had written the work, he permitted it to be published by other parties, and that plaintiff had suffered damages in having prepared for the publication, and in the loss of profits which it would have made from the sale.

MORTON, J.[24] The first question is whether the contract is, as the defendant contends, illegal on its face. The words relied on to show that it is are as follows: "The party of the first part agrees to accept full responsibility of all matter contained in said work, and to defend at his own cost any suits which may be brought against the party of the second part for publishing any statements contained in said work, and to pay all costs and damages arising from said suit." The presiding justice found that "the contract was made without illegal intent, unless and except so far as the words used import one as matter of law." Do the words used, as quoted above, import one as matter of law? We think not. The parties were contracting respecting a book which was not in existence, but was to be written. There was nothing in the character of the proposed work which naturally or necessarily involved the publication of scandalous or libelous matter, as was the case, for instance, in Shackell v. Rosier, 2 Bing. N. C. 634, referred to by the defendant. At the same time it was not impossible that, in spite of due care and good faith on the part of the author and publisher, the proposed book might contain matter which others perhaps would deem libelous. In such a case it would be no more unlawful for the parties to provide that the author should save the publisher harmless from all costs and damages to which he might be subjected by reason of the publication of the book than it would be for a patentee to agree with his licensee that he would protect him against all costs and damages to which he might be subjected in consequence of using the patent to which the license applied. The case stands on grounds entirely different from those on which it would stand if it appeared that the parties intended to publish or contemplated the publication of libelous matter. There is nothing in the agreement fairly to show that such was their purpose. The most that can be said is that, though there was no intention to write or publish, nor any contemplation of writing or publishing, libelous matter on the part of the author or publisher, it might turn out, after the book was published, that it did contain libelous matter. But that is very far from saying that the parties had in view an illegal purpose in publishing the book. We see nothing unlawful in

[24] The statement of facts is abbreviated and parts of the opinions are omitted.

a contract which provides, without anything more, that the author shall indemnify the publisher for costs and damages to which he may be subjected by reason of the publication of a book to be written by the author. Moreover, it was possible in this case that the book might not contain libelous matter, although libel suits against the publisher might grow out of it. It would be hard to say, in such event, that the publisher, who might have published the book without any libelous purpose, and in the full belief that it contained nothing libelous, could not recover of the author under this clause in the contract the costs and damages to which he had been put by such suits. In order, we think, to render the contract unlawful, it should appear that there was an intention on the part of the author and publisher to write and publish libelous matter, or that the author proposed, with the knowledge and acquiescence of the publisher, to write libelous matter, or that the contract on its face provided for or promoted an illegal act. We do not think the clause in question is fairly susceptible of either construction. Fletcher v. Harcot, Hut. 55; Battersey's Case, Winch, 49; Betts v. Gibbons, 2 Adol. & E. 57; Adamson v. Jarvis, 4 Bing 66; Waugh v. Morris, L. R. 8 Q. B. 202; Pearce v. Brooks, L. R. 1 Exch. 213; Cannan v. Bryce, 3 Barn. & Ald. 179; Graves v. Johnson, 156 Mass. 211, 30 N. E. Rep. 818. * * * A majority of the court think the entry should be, judgment for plaintiff for $2,500 and interest from June 9, 1890, and it is so ordered.

LATHROP, J. (dissenting). I am unable to concur in the opinion of the majority of the court that the contract sought to be enforced is a valid contract. * * * While it is found that the parties acted without illegal intent, yet if the legal effect of the language used is to make the contract against the policy of the law, this court ought not to enforce it. It seems to me to be impossible to say that the language used applies only to groundless suits, and that it should so be construed. What the parties contemplated, and what they intended to provide for, was that actions might be brought against the publisher for libelous matter contained in the work; that these actions might be successfully maintained against the publisher, who would then be compelled to pay damages and costs. In this event the writer agreed to indemnify the publisher. Could such an agreement have been enforced? In my opinion, it could not, and this view is sustained by the authorities. Shackell v. Rosier, 2 Bing. N. C. 634; Colburn v. Patmore, 1 Cromp. M. & R. 73; Gale v. Leckie, 2 Starkie, 107; Clay v. Yates, 1 Hurl. & N. 73; Arnold v. Clifford, 2 Sum. 238, Fed. Cas. No. 555; Odgers, Sland. & L. (2d Ed.) 8. See, also, Bradlaugh v. Newdegate, 11 Q. B. Div. 1, 12; Babcock v. Terry, 97 Mass. 482. It follows that the whole contract was tainted with illegality, and neither party was bound to go on with it. Robinson v. Green, 3 Metc. (Mass.) 159, 161; Perkins v. Cummings, 2 Gray, 258; Woodruff v. Wentworth, 133 Mass. 309;

Bishop v. Palmer, 146 Mass. 469, 16 N. E. Rep. 299; Lound v. Grimwade, 39 Ch. Div. 605, 613.

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## BENJAMIN STERLING *v.* SENECA SINNICKSON.

(Supreme Court of New Jersey, 1820. 5 N. J. L. 756.)

Plaintiff declared against the defendant, in debt, on a sealed bill, in the usual form of declarations. Defendant prayed oyer of the sealed bill; which was given in these words:

"I, Seneca Sinnickson, am hereby bound to Benjamin Sterling, for the sum of one thousand dollars, provided he is not lawfully married, in the course of six months from date hereof. Witness my hand and seal. Burlington, May 16th, 1816.

"Witness Jas. S. Budd. Seneca Sinnickson." (Seal)

Defendant, after oyer, demurred generally, to the plaintiff's declaration; and plaintiff joined in demurrer.

KIRKPATRICK, C. J.[25] * * * The contract was not only useless and nugatory, but it was contrary to the public policy.

Marriage lies at the foundation, not only of individual happiness, but also, of the prosperity, if not the very existence of the social state; and the law, therefore, frowns upon, and removes out of the way, every rash and unreasonable restraint upon it, whether by way of penalty or inducement.

If these parties had entered into mutual obligations, the plaintiff not to marry within six months, and the defendant to pay him therefor this sum of $1,000, there can be no doubt, I think, but that both the obligations would have been void. In the case of Key v. Bradshaw (2 Vern. 102), there was a bond in the usual form but proved to be upon an agreement to marry such a man, or to pay the money mentioned in the bond; but the bond was ordered to be cancelled, it being contrary to the nature and design of marriage, which ought to proceed from free choice, and not from any restraint or compulsion. In the case of Baker v. White (2 Vern. 215), A gave her bond to B for 100*l.* if she should marry again, and B gave her his bond for the same sum, to go towards the advancement of her daughter's portion, in case she should not marry; it was, as Lord Mansfield says, in Lowe v. Peters (Bur. 2231), a mere wager, and nothing unfair in it; and yet A was relieved against her bond, because it was in restraint of marriage, which ought to be free. A bond, therefore, to marry, if there be no obligation on the other side, no mutual promise; or a bond not to marry, are equally against law. They are both restraints upon the freedom of choice and of action, in a case where the law wills that all shall be

[25] Part of the opinion is omitted, as is also the opinion of Rossell, J.

free. If the consideration for which this money was to be paid, then, was the undertaking of the plaintiff not to marry, that consideration was unlawful; he would have been relieved against it, either at law or in equity; and if so, the corresponding obligation to pay, according to the principle before stated, is void.

It has been spoken of, by the plaintiff, as if this were an obligation to pay money upon a future contingency, which any man has a right to make either with, or without consideration; and as if the not marrying of the plaintiff were not the consideration of the obligation, but the contingent event only, upon which it became payable. But I think this is not a correct view of the case. Where the event, upon which the obligation becomes payable, is in the power of the obligee, and is to be brought about by his doing or not doing a certain thing, it cannot be so properly called a contingency; it is rather the condition meritorious, upon which the obligation is entered into, the moving consideration for which the money is to be paid. It is not, therefore, to be considered as a mere contingency, but as a consideration, and it must be such consideration as the law regards.

Nor does it at all vary the case, that the restraint was for six months only. It was still a restraint, and the law has made no limitation as to the time. Neither can the plaintiff's performance, on his part, help him. It imposed no obligation upon the defendant; it was wholly useless to him; the contract itself was void from the beginning. Therefore, in my opinion, let there be judgment for the defendant.

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## KING *v.* KING.

**(Supreme Court of Ohio, 1900. 63 Ohio St. 363, 59 N. E. 111, 52 L. R. A. 157, 81 Am. St. Rep. 635.)**

The plaintiff in error was the plaintiff below. Her action was to recover for personal services rendered in the performance of a contract made with James Howland, in 1881, whereby plaintiff agreed to live with him and take care of him during his life. He was a man of means, well advanced in years, without family, living on Euclid avenue in Cleveland, and much of the time in ill health. The plaintiff was a daughter of his niece. She performed the contract on her part, the service extending from the year 1881 to 1896, when Howland died. The contract, as stated in the petition, was that "this plaintiff agreed with the said James Howland that she would refrain from marriage while he should live, and that she would live with him and take care of him while he lived; and he, in consideration thereof, agreed that he would provide for her amply sufficient to make her comfortable and well off." Howland, in his will, left to plaintiff a legacy of $500, but, save small amounts of money given her from time to time, did not perform the contract. A recovery was

had in the common pleas. The judgment was reversed by the circuit court because of error in the charge in instructing the jury that the contract was a legal one, and, if proven to have been made as alleged, and duly performed by plaintiff, there might be a recovery. To reverse this judgment of reversal this proceeding is prosecuted.

SPEAR, J. The sole ground of reversal is that the contract is void, because against public policy, being in restraint of marriage; hence there could be no recovery. That contracts in restraint of marriage are void, as being contrary to the public policy of the law, is conceded. But the question here is whether the contract to render service, fully performed by the one party, so rests upon the promise not to marry, or is so tainted by that part of the agreement as to be incapable of enforcement. The consideration moving to the agreement on the part of Howland to make ample provision for his niece was, on its face, two-fold: One, the promise to perform the service agreed upon; the other, not to marry during the continuance of such service. The first was a valid promise, and of itself sufficient to support the promise of the other party; the second was a void promise, not affording any consideration whatever. As given in text-books and numerous decisions, the general rule is that if one of two considerations for a promise be merely void, the other will support the promise, although, if one of two considerations be unlawful, the promise of the other party is void; and yet this rule has many exceptions, as will be shown later on. That is, if one of two considerations is void merely for insufficiency, and not for illegality, the other will support the contract. Widoe v. Webb, 20 Ohio St. 435; Metc. Cont. 246; Chitty. Cont. 988; 1 Pars. Cont. 456; Comst. Cont. 24; Pikard v. Cottels, Yel. 56; Bliss v. Negus, 8 Mass. 51; Carleton v. Woods, 28 N. H. 290; Woodruff v. Hinman, 11 Vt. 592; King v. Sears, 2 Cromp., M. & R. 48; Erie Ry. Co. v. Union Locomotive and Express Co., 35 N. J. Law 240; Bradburne v. Bradburne, Cro. Eliz. 149. This distinction between a contract merely void and an illegal contract would seem to be an important one. Courts, as a general proposition, are open for the enforcement of contracts; not for their destruction. So that where parties have deliberately entered into a contract valuable to them, and one has received the full advantage of it, the general policy of the law is to exact proper performance by him who has thus obtained the advantage; and some substantial defect should be shown before a court will refuse enforcement. A mere technical objection should not prevail. Now, a void contract is one which has no legal force, and which, for that reason, cannot be enforced; an unlawful contract is one to do an act which the law forbids, or to omit an act which the law enjoins and for that reason is not enforceable. There is no provision, either by statute or at common law, which enjoins upon any particular person the duty to marry; nor can any one be punished for not marrying. To marry or not to marry is left to the free choice of all who are eligible to marriage. Hence to omit to

marry is not illegal, though the promise to omit is one which the law will not enforce. It would appear naturally to follow that the only result of making such a promise would simply be that no legal right could be founded on the promise, and no remedy afforded for its breach. It is difficult to see any good reason for denouncing such contract as illegal in the sense of violating any law, or of placing parties who may have entered into it outside the pale of the law. But, aside from this, in the present case the promise on the part of the woman, which was of value to the man, was the promise to care for him. The promise not to marry was a mere incident to the main purpose, entered into simply because it was supposed that by remaining single the woman could the better perform her contract. It was immaterial to the man whether she married or not, so long as she fulfilled her promise as to care. In other words, the promise to remain unmarried did not enter into or become part of the substance of the general agreement. That agreement was for the performance of services. If the performance was adequate and the services rendered in a satisfactory manner, their value could neither be enhanced nor diminished by the fact that they had been rendered by a single woman rather than a married one. So that, had the plaintiff married, yet, if she satisfactorily performed her contract, the recipient of the services would lose nothing by the fact of marriage. As matter of fact she did not marry; whether because of the contract or for reasons wholly apart from it is not material, for she was under no obligation to marry nor to refrain from so doing. She did perform the service. That, the verdict and judgment of the common pleas settles to all intents and purposes for the present inquiry. As above stated, the promise not to marry, although void because against public policy, was not illegal as against positive law; and it is not easy to perceive how its presence in the contract, or its observance by her, or both facts, could place the parties in what is termed *in pari delicto,* i. e., in a position where the law should adjudge them guilty of its violation, and hence refuse relief for that reason in the face of the fact that the claimant had fully performed. In such case the maxim, "*In pari delicto melior est conditio possidentis,*" has, in reason, no application, and, we think, ought not to have application in law.

Courts refuse to enforce or recognize certain classes of acts because against public policy on the ground that they have a mischievous tendency, and are thus injurious to the interests of the state, apart from illegality or immorality. A contract in restraint of marriage is of this nature. But, as before suggested, it does not follow that all contracts which may have an element of insufficiency and may be void as to one feature, are incapable of enforcement, or even that all that are illegal will not be enforced. Decisions are abundant in support of the proposition that even where the acts of the parties have been in violation of positive law the contract may, under some circumstances, be enforced. A case in point is Lester v. The Bank, 33 Md. 558. The bank's charter forbade a director, under penalty of fine and imprisonment, to

borrow money from the bank. It was claimed that the act of thus lending by the bank was null and void; that no rights could accrue from it, and hence no action could be had by either party based upon it. The court held, however, that: "Contracts made in violation of statute, are not necessarily incapable of enforcement because of their illegality. Whether the courts will enforce them or not, is a question of public policy, and they will be enforced when it may be adjudged that such policy requires their enforcement." Robinson, J., in the opinion, remarks that: "Public policy, it must be borne in mind, lies at the basis of the law in regard to illegal contracts, and the rule is adopted not for the benefit of parties but of the public. It is evident, therefore, that cases may arise, even under contracts of this character, in which the public interests will be better promoted by granting than by denying relief, and in such the general rule must yield to this policy," and cites 1 Story's Eq. Jur., sec. 298. This policy of the law finds expression in our statutes authorizing the recovery back of money lost at gaming, and the decisions under them. See, also, Burkholder's Appeal, 105 Penn. St. 31. To justify refusal of relief to the plaintiff, on the ground referred to, the court ought to be ready to hold that the public mischiefs would be greater by permitting a party to recover who had made and performed a contract otherwise well founded but embracing an agreement not to marry while in its performance, than by permitting the other party to have the full benefit of meritorious service for nothing, thus repudiating his agreements, all of which were legal and based upon at least one consideration entirely adequate and wholly lawful. We are not prepared to make such a holding, but are clearly of opinion that no mischiefs to the public would result from sustaining a right to recover in a case like the present comparable to those which would follow a contrary holding, one which would encourage the violation of contracts and the repudiation of just obligations after full value had been received.

Other phases of the case are argued by defendants in error. The printed record presented embraces only the question here treated. It is not the duty of the court to hunt through portions of the record not printed in the quest of other reasons why the judgment of the common pleas should have been reversed, and we decline to do so.

*The judgment of the circuit court will be reversed and that of the common pleas affirmed.*[86]

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## IN RE GROBE'S ESTATE.

(Supreme Court of Iowa, 1905. 127 Iowa 121, 102 N. W. 804.)

MCCLAIN, J. The finding of facts by the trial court was that there was a contract between Mrs. Aldinger, the claimant, and the deceased,

[86] See, *accord*, Fletcher v. Osborn, 282 Ill. 143 (1918). But see, *contra*, Lowe v. Doremus, 84 N. J. L. 658 (1913), citing Sterling v. Sinnickson, reported, *ante*.

whereby the latter agreed to pay to the former $200, if she would go to Chicago to see a woman whom he was desirous of marrying, and give her information concerning him, and the claimant went to Chicago in pursuance of this contract, and incurred certain expenses, all at the request of deceased. The court allowed a portion of the claim, which was for money advanced, but denied recovery for compensation on account of services rendered, on the ground that the contract was a marriage brokerage contract, and void as against public policy.

It is well settled that no recovery can be had under a contract for services to be rendered in promoting or bringing about a marriage. Advice and solicitation on the part of a third person with reference to entering into the important relation of marriage are presumed to be given from considerations affecting the interests of the parties themselves, and not for pecuniary reward. It is contrary to public policy to make such advice or solicitation the basis of an agreement to pay money. And the rule is equally applicable to advice or solicitation with reference to carrying out a marriage contract, as it is with reference to the formation of such contract. "The freedom of choice is essential to a happy marriage; and the voluntary selection by each spouse of the person who is to be his companion for life, with all that is implied in the relation of marriage, are as fully prevented by the employment of a person who is governed solely by mercenary motives to induce one of the parties to the agreement of marriage to carry it into effect, if he has once been disposed to abandon it, as to endeavor to bring about such an agreement between parties who do not sustain any relation to each other." Morrison v. Rogers, 115 Cal. 252, 46 Pac. 1072, 56 Am. St. 95.

It does not clearly appear in the present case whether the deceased had already a contract of marriage with the woman in Chicago, which he desired the claimant to assist him in bringing about, or whether he was seeking to induce her to enter into a contract of marriage with him. But it is wholly immaterial what was the prior relation between the parties. It is clearly shown that the services to be rendered by claimant under her agreement with deceased, and for which she desires compensation, were to give the woman whom deceased wished to marry information concerning him which would tend to induce the woman to enter into such marriage relation; and no argument is necessary to demonstrate that this arrangement was a marriage brokerage contract, pure and simple—such as is deemed by the law to be against public policy, and therefore void. Duval v. Wellman, 124 N. Y. 158, 26 N. E. 343; Fuller v. Dame, 18 Pick. (Mass.) 472, 481; Morrison v. Rogers, *supra;* 2 Pomeroy, Equity, § 932.

*The judgment of the lower court is affirmed.*[87]

[87] So a contract to prevent a marriage between a man and a woman of bad character was held illegal in Sheppey v. Stevens, 177 Fed. 484 (1910).

On validity of marriage brokerage contracts, see 3 B. R. C. 643, note; 1 Ann. Cas. 696, note; 104 Am. St. Rep. 919, note.

## GYLES MERRILL *v.* BYRON L. PEASLEE ET AL.

**(Supreme Judicial Court of Massachusetts 1888. 146 Mass. 460, 16 N. E. 271, 4 Am. St. Rep. 334.)**

Contract upon a promissory note for $5,000, payable to the order of the plaintiff on demand and signed by Hiram Peaslee, the defendant's testator. The plaintiff was trustee to pay the proceeds to Abby D. Peaslee, the testator's wife, provided she had lived with the testator as his wife until his death. The evidence tended to show that the wife was entitled to a divorce for extreme cruelty and had left him, and that the note was given by the testator in consideration that his wife would return to him and live with him as his wife, and in consideration that she would not institute proceedings for a divorce and alimony. Also that she did return to and lived with him as his wife until his death. Verdict ordered for defendant. Plaintiff alleged exceptions.

W. ALLEN, J.[28] The note was given to carry out a contract between husband and wife, by which, in consideration that she should live with him as his wife during their joint lives, he was to cause to be paid to her five thousand dollars after his decease, if she survived. The consideration of the note was the agreement, or the performance of the agreement, of the wife to live in marital relations with her husband. It was not to perform some service for him which could be hired, as to keep his house, or to nurse him in sickness, but to give him the fellowship and communion of a wife. This is not a service which the wife can sell or the husband buy. Perhaps a husband can hire his wife to do anything for him which a servant can be hired to do, or can buy of her anything that is the subject of barter; but a servant cannot be hired to fulfil the marital relation, and the fellowship of the wife is not an article of trade between husband and wife. Like parental authority and filial obedience, conjugal *consortium* is without the range of pecuniary considerations. The law fixes and regulates it on public considerations, and will not allow the parties to discard and resume it for money.

It is the same when the misconduct of one party has given to the other the option to withdraw conjugal fellowship. It is not a mere personal right affecting only the parties to the marriage, but a right which is an incident of the status of marriage, and which affects children, the family, and society, and which must be exercised upon considerations arising from the nature of the right. It is given to the injured party to be used in the interests of justice and of society. It is as much against public policy to restore interrupted conjugal relations for money, as it is to continue them without interruption for the same consideration. The right of condonation is not exercised for the sake of justice to the injured party, or with regard to the rights of

[28] The statement of facts is abbreviated.

others or the interests of the public, when it is sold for money, and the law cannot recognize such a consideration for it; it implies forgiveness founded on the supposed penitence of the wrongdoer and the hope that he will not again offend. The resumption of marital intercourse after a justifiable separation without such forgiveness, and only for money, shows connivance rather than condonation: See Copeland v. Boaz, 9 Baxter, 223; Van Order v. Van Order, 8 Hun, 315; Roberts v. Frisby, 38 Tex. 219; Miller v. Miller (Iowa), 35 N. W. Rep. 464; Adams v. Adams, 91 N. Y. 381; Garth v. Earnshaw, 3 Y. & C. 584; Gipps v. Hume, 2 Johns. & Hem. 517; Brown v. Brine, 1 Ex. D. 5.

In the present case the wife had left her husband, and had a good cause of divorce from him on account of extreme cruelty. But the agreement did not look to a provision for the separate support of the wife, nor to a bar against proceedings by her for a divorce, except as that was involved in the resumption by her of marital relations. Had the consideration of the note been an agreement not to prosecute proceedings for a divorce, a different question would have been presented, upon which we express no opinion. See Newsome v. Newsome, L. R. 2 P. & D. 306. When the wife, who was living separate from her husband for justifiable cause, voluntarily returned to him, the law conclusively presumed that she returned because she had condoned the offence, and not because she was paid to live with him; and it will not enforce or recognize as valid a promise of the husband to pay money to the wife to induce her to return to him, or to condone the offence. In the opinion of a majority of the court the entry must be,

*Exceptions overruled.*

HOLMES, J. We must assume, and the majority of the court do assume, that a consideration furnished by a married woman who is a *cestui que trust* will sustain a promise by her husband to her trustee. Whatever might be thought upon this point as a new question, it has been settled, not without discussion, and we are bound by the decisions. Butler v. Ives, 139 Mass. 202. See Nichols v. Nichols, 136 Mass. 256.

In the case at bar the evidence tended to show that the defendant's testator had been guilty of extreme cruelty to his wife, entitling her to a divorce, and that she had separated from him, and had consulted counsel with a view to obtaining a divorce and alimony. The consideration for the note in suit was, that "she would not proceed against him for a divorce or alimony, and would return to him and live with him as his wife." This consideration, however construed, was fully furnished. She did not proceed against him, and she did return and did live with him as his wife until his death.

I do not understand it to be denied that this conduct on the wife's part was such a change of position, or detriment in the legal sense of that word, as to be a sufficient consideration for a promise, if not an illegal one. We must take it that the wife had a right to refuse to

return to cohabitation, and it seems to follow that, apart from illegality, the return itself was sufficient consideration for the note. Burkholder's Appeal, 105 Penn. St. 31, 37. The case is not like those where the wife was only doing what she was legally bound to do. This was the ground of decision in Miller v. Miller (Iowa, Dec. 13, 1887), 35 N. W. Rep. 464, and, so far as appears, was the fact in Copeland v. Boaz, 9 Baxter, 223; Roberts v. Frisby, 38 Tex. 219. The last two cases seem to go in part also upon the ground that a contract by a husband upon a consideration moving from the wife is void, notwithstanding the intervention of a trustee, which cannot be taken here, in view of the cases first cited.

At all events, the giving up or refraining from proceedings for a divorce and alimony, which the wife is entitled to maintain, is both a sufficient and legal consideration. Wilson v. Wilson, 1 H. L. Cas. 538, 574; s. c. 14 Sim. 405, 5 H. L. Cas. 40; Hart v. Hart, 18 Ch. D. 670, 685; Sterling v. Sterling, 12 Ga. 201, 204. So that I understand the precise reason on which the decision of the majority goes to be that coupling the wife's return to cohabitation with the legal consideration of giving up her divorce suit made the contract illegal.

I find no decision or *dictum* in favor of this proposition. On the other hand, the Court of Errors and Appeals of New York has unanimously sustained the validity of a note given by a husband to a trustee for his wife on substantially the same consideration as in the case at bar, and has declared itself unable to see anything against public policy in the transaction. It seems probable that the Supreme Court of Pennsylvania would decide in the same way, and it is hardly open to doubt that the same view would be taken in England. Adams v. Adams, 91 N. Y. 381; Burkholder's Appeal, 105 Penn. St. 31, 37; Newsome v. Newsome, L. R. 2 P. & D. 306; Jodrell v. Jodrell, 9 Beav. 45, 56, 59, and cases *supra;* Symons v. Burton, Monro, Acta Cancellariæ, 266.

It seems to me that reason as well as authority is opposed to the decision. The actual return to cohabitation was perfectly lawful, whatever the motive which induced it. I cannot think that it is unlawful to make a lawful act, which the wife may do or not do as she chooses, the consideration of a promise, merely because, by reaction, the making of the promise tends to mingle a worldly motive with whatever other motives the wife may have for renewing cohabitation. No one doubts that marriage is a sufficient consideration for a promise to pay money. Pub. Sts. c. 78. § 1, cl. 3. I do not quite understand why it should be more illegal to make such a promise for the resumption than for the assumption of conjugal relations.

I agree too to what is said in Adams v. Adams, *ubi supra.* The arrangements "tended to restore peace and harmony between husband and wife, and renew their conjugal relations. Agreements to separate

have been regarded as against public policy,[29] but it would be strangely inconsistent if the same policy should condemn agreements to restore marital relations after a temporary separation had taken place. While the law favors the settlement of controversies between all other persons, it would be a curious policy which should forbid husband and wife to compromise their differences, or preclude either from forgiving a wrong committed by the other." [30]

[29] While separation agreements are illegal if they relate to a future separation, agreements when separation has taken or actually is taking place are generally upheld in so far as they provide for the separate maintenance of the wife.

"It is contended that deeds of separation between husband and wife cannot be upheld, because it is against public policy to allow parties sustaining that relation to vary their duties and responsibilities by entering into an agreement which contemplates a partial dissolution of the marriage contract. If the question were before us, unaffected by decision, it would present difficulties, for it cannot be doubted that there are serious objections to voluntary separations between married persons. But contracts of this nature for the separate maintenance of the wife, through the intervention of a trustee, have received the sanction of the courts in England and in this country for so long a period of time that the law on the subject must be considered as settled." Davis, J., in Walker v. Walker, 9 Wall. (U. S.) 743, 750 (1869).

See Terkelsen v. Peterson, 216 Mass. 531 (1914).

[30] The majority of courts agree with the dissenting opinion of Justice Holmes.

In Barbour v. Barbour, 49 N. J. Eq. 429, 24 Atl. 227 (1892), the bill was for specific performance of an agreement by a husband with his wife, in and by which he promised, that if she would dismiss her suit for divorce and return to him, and live with him as his wife, he would execute and deliver to her a deed for the house in and the lot upon which they had been living. Bird, V. C., said: "It is not contrary to public policy, as understood in this state, notwithstanding it may be so regarded in others, to maintain the integrity of such contracts. In Merrill v. Peaslee, 146 Mass. 460, 16 N. E. 271, it was held by a divided court that such contract ought not to be enforced. To the same effect is the case of Copeland v. Boaz, 9 Baxt. (Tenn.) 223. But I take it for granted from what has been said by the courts of this state respecting agreements between husband and wife, looking to their separation, that agreements providing for the peaceable continuance of their marital relations would be most certainly sustained."

In Moayon v. Moayon, 114 Ky. 855, 863-866 (1903), O'Rear, J., said: "It is conceded by the demurrer that Mrs. Moayon had legal grounds for her separation and divorce; that she and her husband were then living apart because of those grounds; and that she had retained counsel to prepare, and he had prepared, a suit for her seeking a divorce from her husband. She, at her husband's solicitation, forgave his wrong, resumed a relation which he, by his conduct, had forfeited, and had no legal right to longer claim, and saved to him the costs of the threatened litigation. Also, under the facts admitted, she was certainly entitled to recover from him substantial alimony, including maintenance for herself and children pending the action, and including a sum sufficient to enable her to employ counsel and defray the costs of her suit against him. As between other persons, where one has a cause of action against the other, and is about to begin a suit on it, its abandonment and satis-

## BURTON *v.* BELVIN.

(Supreme Court of North Carolina, 1906. 142 N. C. 151, 55 S. E. 71.)

Action by Lucy Burton against N. J. Belvin. From a judgment for plaintiff, defendant appeals. Affirmed.

CLARK, C. J. The complaint alleges that the defendant, who is a married man, seduced the plaintiff when she was 14 years of age and

faction will constitute a consideration to support a contract based upon that fact. Clarke v. McFarland's Exrs., 5 Dana, 48; Brown v. Buford, 3 B. Mon. 508, 39 Am. Dec. 477; 6 Am. & Eng. Ency. of Law 2d Ed.) 947, and cases. Nor is it even necessary that the party sought to be charged shall have been benefited by the abandonment of the suit. If the other party has thereby been put to an irretrievable disadvantage, that fact will equally constitute what is termed a valuable consideration. Ford v. Crenshaw, 1 Litt. 70; Gaines v. Scott, 3 Ky. Law Rep. 418. Becoming reconciled to the husband, with full knowledge of his actionable offense, will be a bar, as a condonement, to the suit of the wife for divorce, based upon the original facts. Independent of the question whether the fact of the reconciliation was not of as much value to the wife as to the husband, and that a mere claim or right to a divorce is of no legal value, yet her right to a settlement upon herself and children as alimony and maintenance was a right possessing money value. When she abandoned and obliterated her cause for divorce in this case, it likewise nullified her right to sue for and recover alimony.

"It is argued, though, that it is the duty of the wife, no less than of the husband, to maintain in good faith the marital relation; that a promise of one to pay money to the other to continue the married relation is at best but an agreement to pay for the performance of a duty already undertaken for a sufficient consideration (to wit, the mutual undertaking to live together in the married state); and that, therefore, there is nothing upon which to rest the new promise. Were it the fact that there was no cause for the separation, this argument of appellee would be good. The other side of this proposition—that is, an agreement between husband and wife by which the former undertook to pay the latter a stipend in consideration of their living apart—has been before this court frequently. In all those cases it was shown that the marital relations had become unendurable to the parties, whether because of statutory grounds of divorce or not was not always shown. The contract of the husband to pay the wife a stipulated sum, or to convey to her certain property, was upheld on the theory that it was the legal and moral duty of the husband to support the wife, and that these contracts were but another form of, and were in lieu of, the original undertaking, and were consequently valid. Gaines' Adm'x v. Poor, 3 Metc. 303, 79 Am. Dec. 559; Flood v. Flood, 5 Bush, 170; Loud v. Loud, 4 Bush, 455; Evans v. Evans, 93 Ky. 510, 20 S. W. 605. Nor was it held in those cases to be necessary that the suit for divorce should be pending in order to support the agreement. It was sufficient if there was an actual or impending separation and suit for divorce. Gaines' Adm'x v. Poor, *supra*. It is the policy of the law, because it has been found best for social happiness and progress, that the state of marriage be encouraged. Certainly, if an agreement between husband and wife, settling the obligations of the husband to provide for the wife in contemplation of their living permanently apart, will be specifically enforced, as being based upon a sufficient legal consideration, and as being not contrary to the policy of the law, *a fortiori* must be a contract between them under like conditions founded on the consid-

has begotten three children by her; that during such cohabitation, in response to her repeated requests for assistance for herself and children, she then being again with child by him and disclosing her purpose to appeal to the bastardy law if refused, the defendant promised that, if she would not institute such proceeding, he would provide her "with money and necessaries for the support of herself and children, begotten by him, and for the expenses of her sickness and lying in, and for her mainte-

eration of the restoration or preservation of the marital relation. See Bishop on Marriage, Divorce & Separation, section 1279. As said in Adams v. Adams, 91 N. Y. 381, 43 Am. Rep. 675: 'While the law favors the settlement of controversies between all other persons, it would be a curious policy which would forbid husband and wife to compromise their differences, or preclude either from foregoing a wrong committed by the other.' To same effect is the case of Phillips v. Meyers, 82 Ill. 70, 25 Am. Rep. 295."

In Rodgers v. Rodgers, 229 N. Y. 255, 258-259 (1920) Pound, J., said:

"We think that the complaint is sufficient. The agreement set forth therein is not on its face against public policy. It is for the resumption of marital relations between husband and wife separated for cause. In the absence of proof, it may not be presumed that the wife's grievance was unsubstantial. It rests on a valuable consideration. The wife condoned the alleged adultery of the husband. That was a detriment to her. She surrendered a right. The husband got rid both of the action and the cause of action for divorce. He might have been successful in his defense, but it was a substantial benefit to him to have the case ended and his wife again under his roof. The performance of marital duty should not be made the subject of bargain and sale, but it does not appear that reconcilement was plaintiff's duty in this case. Rather it was her right to refuse to condone an offense against the marriage relation and to insist on a divorce, with separate support and maintenance. The husband was not hiring a discontented wife, separated from him without good cause, to return to him. She was to be paid to give up her right to live apart from him. She did not return until she was assured of proper treatment as a wife, and the court will not say to her that she sold her forgiveness, and that 'conjugal consortium is without the range of pecuniary consideration.' To apply such a rule to cases like this would be to discourage the reunion which the law should favor, of couples unhappily parted. We are dealing with the contract that was executed by plaintiff, and not with unexecuted possibilities based on subsequent separation of husband and wife. Adams v. Adams, 91 N. Y. 381, 43 Am. Rep. 675. The wife, when she returned to her husband, was entitled by law to her support. It cannot be presumed from the allegations of the complaint that such support was the equivalent of the allowance provided for her by the agreement of the parties."

In Miller v. Miller, 78 Ia. 177 (1889), however, a contract between husband and wife, made after the husband had given the wife cause to leave him and have separate support, whereby it was agreed that they should drop all matters of dispute, refrain from scolding, fault-finding, and anger, and live together as husband and wife; that the wife should keep her home in a comfortable condition; and that the husband should provide all the necessary expenses of the family, and pay the wife in addition a certain sum per month so long as she faithfully should observe the terms and conditions of the agreement, was held to be contrary to public policy, because of the undesirable investigations into family discord which it would necessitate, as well as because of the discord which it would tend to promote.

nance when she was unable to work. These promises he continued to make and renew from time to time to the plaintiff and to her father for her, and by means of his said promises, all of which were based upon their relations and the results thereof, and without stipulation or reference to any future cohabitation, she was induced to refrain from making application to the court under the provisions of the bastardy law or to bring any action against him." The complaint further alleges that the defendant has broken his oft repeated and solemn promises and removed to Virginia, leaving her, and his children by her, destitute and unprovided for, and asks for the recovery of damages sustained from the breach of the defendant's promises.

The defendant demurred on the grounds:

1. "That this is a proceeding in bastardy, and a justice of the peace has exclusive original jurisdiction." This is not a bastardy proceeding, but it is an action for damages from a breach of a promise made upon good and valid consideration. Bastardy proceeding would not be a feasible remedy, for the defendant has removed from the state. Besides, the plaintiff sues for breach of a promise and asks damages beyond the jurisdiction of a justice of the peace.

2. "That the action, being based upon a promise not to institute bastardy proceedings, is illegal and void and against public policy." Bastardy proceedings are civil, not criminal, in their nature (State v. Liles, 134 N. C. 735, 47 S. E. 750), and an agreement not to resort to or to discontinue such proceeding is "a good consideration for a pecuniary settlement or compromise" (9 Cyc. 510).

3. "That the alleged cause of action is based upon an immoral and illegal contract and is therefore void as against public policy." It is true that a contract for future cohabitation is immoral and void, as against public policy. But a contract in consideration of past cohabitation to support the mother and children is in the nature of reparation, as far as it goes, and to be commended. It is neither void nor immoral, even though the illegal cohabitation continues, if there is no stipulation for future cohabitation. Brown v. Kinsey, 81 N. C. 245, and cases there cited. It would be infinitely more to the credit of the defendant that he should provide for the victim of his lust and the innocent children of whom he has become the father, and should keep them from suffering and from becoming a charge upon the taxpayers, than that he should remove to another state, leaving her and his children in destitution and, when sued for breach of his promise, should plead his own immorality and violation of law as a defense. The defendant was under a natural obligation to support his illegitimate offspring (Kimborough v. Davis, 16 N. C. 74), and maintain the plaintiff in her sickness, which he had caused. This obligation the law not only recognizes, but enforces it in bastardy proceedings. It cannot be immoral for the defendant to promise to do his natural and legal duty by the plaintiff and his illegitimate offspring. He presents a very sorry spectacle in pleading to be

released from liability on the ground that such promise is immoral and against public policy. He has been immoral, but not in promising to provide for the support of his victim and his children. It is in furtherance of, not against, public policy that provision for them should be made by him and the burden not be cast upon the taxpayers. Brown v. Kinsey, *supra,* is exactly in point. Corbett v. Clute, 137 N. C. 546, 50 S. E. 216, which holds that a bond given as consideration for the suppression of a criminal prosecution is null and void, has no application. The execution of public justice cannot be stayed by the payment of money or by any private arrangement. But bastardy proceedings are not in the enforcement of punishment. It is a quasi civil remedy for the sole purpose of providing support for the woman and child, and to save the taxpayers from that expense.

*The judgment overruling the demurrer is affirmed.*[81]

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## UNITED STATES ASPHALT REFINING CO. *v.* TRINIDAD LAKE PETROLEUM CO., LIMITED (two cases).

**(United States District Court, S. D. New York, 1915. 222 Fed. 1006.)**

In Admiralty. Suits by the United States Asphalt Refining Company against the Trinidad Lake Petroleum Company, Limited. On motions by defendant to stay prosecution of the suits until further order of the court. Denied.

HOUGH, J. One of these actions is brought for the alleged breach of the charter party of the steamship Russian Prince, and the other for a similar breach of a like charter party relating to the steamship Roumanian Prince. Libelant is a corporation of South Dakota. Respondent was the chartered owner of the steamships above named. It is a British corporation, and the vessels are of British registry.

The charter parties by which libelant took the steamers from respondent were made in London, and granted libelant the right to use the vessels in any lawful traffic in most parts of the world. As matter of fact the steamers were employed between Trinidad and United States ports until the outbreak of war in August, 1914, when it is alleged that the vessels were wrongfully withdrawn from charterer's service. These actions *in personam* were begun with clause of foreign attachment, and appearance enforced by seizure of funds within this jurisdiction. Before any steps in the actions other than appearing and giving security for the seized property had been taken, these motions were made.

[81] On discontinuance of bastardy proceedings as consideration for contract, see 2 Ann. Cas. 493, note.

On the compromise of an action for criminal conversation, see Ann. Cas. 1913 A, 704.

The charter party of each steamer contained the following very ordinary clause:

"19. Any dispute arising under this charter shall be settled in London by arbitration, the owners and charters each appointing an arbitrator, and the two so chosen, if they do not agree, shall appoint an umpire, the decision of whom shall be final. Should either party refuse or neglect to appoint an arbitrator within 21 days of being required to do so by the other party, the arbitrator appointed may make a final decision alone, and this decision shall be binding upon both parties. For the purpose of enforcing any award, this agreement shall be made a rule of court."

There can be no doubt that this was a submission to arbitration, and for that reason was a contract between the parties to this action: District of Columbia v. Bailey, 171 U. S. at page 171, 18 Sup. Ct. 868, 43 L. Ed. 118; citing Whitcher v. Whitcher, 49 N. H. 176, 6 Am. Rep. 486. It is equally plain that under the law of the place of the contract—i. e. England—this arbitration agreement was at the time of making the charter parties entirely valid, and any endeavor to do exactly what libelant has done by bringing these suits would have been restrained by the English courts, acting under authority of the English Arbitration Act of 1889 (chapter 49, 52-53 Victoria). See, also, Manchester Ship Canal Co. v. Pierson & Son, [1900] 2 Q. B. 606; Austrian Lloyd Co. v. Gresham, etc., Society, [1903] 1 K. B. 249.

The contentions of the parties litigant may therefore be summed up as follows: Respondent urges that the contract for arbitration contained in the charter parties was valid and enforceable when and where it was made, and must consequently be enforced everywhere, unless some positive rule of the law of the forum prevents such recognition and enforcement. Libelant asserts that, whether the contract was or was not good at the time and place of making, it has always been invalid under the law of the United States and most of the states thereof, with the admitted and asserted result that an American may make a solemn contract of this nature in England and repudiate it at will in America with the approbation of the courts of his own country.

There has long been a great variety of available reasons for refusing to give effect to the agreements of men of mature age, and presumably sound judgment, when the intended effect of the agreement was to prevent proceedings in any and all courts and substitute therefor the decision of arbitrators. The remarkably simple nature of this libelant's contract breaking has led me to consider at some length the nature and history of the reasons adduced to justify the sort of conduct, by no means new, but remarkably well illustrated by these libels.

It has never been denied that the hostility of English-speaking courts to arbitration contracts probably originated (as Lord Campbell said in Scott v. Avery, 4 H. L. Cas. 811)—

"in the contests of the courts of ancient times for extension of jurisdic-

tion—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction."

A more unworthy genesis cannot be imagined. Since (at the latest) the time of Lord Kenyon, it has been customary to stand rather upon the antiquity of the rule than upon its excellence or reason:

"It is not necessary now to say how this point ought to have been determined if it were *res integra*—it having been decided again and again," etc. Per Kenyon, J., in Thompson v. Charnock, 8 T. R. 139.

There is little difference between Lord Kenyon's remark and the words of Cardozo, J., uttered within a few months in Meacham v. Jamestown, etc., R. R. Co., 211 N. Y. at page 354, 105 N. E. at page 656:

"It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary."

Nevertheless the legal mind must assign some reason in order to decide anything with spiritual quiet, and the causes advanced for refusing to compel men to abide by their arbitration contracts may apparently be subdivided as follows:

(a) The contract is in its nature revocable.

(b) Such contracts are against public policy.

(c) The covenant to refer is but collateral to the main contract, and may be disregarded, leaving the contract keeper to his action for damages for breach of such collateral covenant.

(d) Any contract tending to wholly oust the courts of jurisdiction violates the spirit of the laws creating the courts, in that it is not competent for private persons either to increase or diminish the statutory juridical power.

(e) Arbitration may be a condition precedent to suit, and as such valid, if it does not prevent legal action, or seek to determine out of court the general question of liability.

### The Doctrine of Revocability.

This seems to rest on Vynior's Case, 8 Coke, 81b, and is now somewhat old-fashioned, although it appears in Oregon, etc., Bank v. American, etc., Co. (C. C.) 35 Fed. 23, with due citations of authority; and in Tobey v. County of Bristol, 3 Story, 800, Fed. Cas. No. 14,065, it is treated at great length.

### The Public Policy Doctrine.

No reason for the simple statement that arbitration agreements are against public policy has ever been advanced, except that it must be against such policy to oust the courts of jurisdiction. This is hardly a variant of the reasoning ascribed by Lord Campbell to the "courts of ancient times":

"Such stipulations [for arbitration] are regarded as against the policy of the common law, as having a tendency to exclude the jurisdiction of the courts." Hurst v. Litchfield, 39 N. Y. 377.

"Such agreements have repeatedly been held to be against public policy and void." Prince Co. v. Lehman (D. C.) 39 Fed. 704, 5 L. R. A 464.

The above are two examples of the cruder forms of statement; but of late years the higher courts have been somewhat chary of the phrase "public policy," and in Insurance Co. v. Morse, 20 Wall. 457, 22 L. Ed. 365, Hunt, J., quotes approvingly from Story's Commentaries, thus:

"Where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of dispute to refer the same to arbitration, a court of equity will not, any more than a court of law, interfere to enforce the agreement, but will leave the parties to their own good pleasure in regard to such agreements."

But neither the court nor the commentator pointed out any other method by which an arbitration agreement could be against the policy of the law, unless it were by seeking to divest the "ordinary jurisdiction of the common tribunals of justice."

Having built up the doctrine that any contract which involves an "ouster of jurisdiction" is invalid, the Supreme Court of the United States has been able of late years to give decision without ever going behind that statement. Thus in Insurance Co. v. Morse, *supra,* it is said:

"Agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void."

In Doyle v. Continental Insurance Co., 94 U. S. 535, 24 L. Ed. 148, the case last cited is distinctly reaffirmed. The lower courts have followed, and in Perkins v. United States, etc., Co. (C. C.) 16 Fed. 513, Wallace, J., said:

"It is familiar doctrine that a simple agreement inserted in a contract, that the parties will refer any dispute arising thereunder to arbitration, will not oust courts of law of their ordinary jurisdiction."

Even a partial ouster was held "evidently invalid" when inserted in a bill of lading, in The Etona (D. C.) 64 Fed. 880, citing Slocum v. Western Assurance Co. (D. C.) 42 Fed. 236, and the Guildhall (D. C.) 58 Fed. 796.

The Doctrine That the Covenant to Refer is Collateral Only.

This idea is set forth with his customary clearness by Jessel, M. R., in Dawson v. Fitzgerald, 1 Ex. D. 257. It was repeated in Perkins v. United States, etc., Co., *supra,* and accepted in Crossley v. Connecticut, etc., Co. (C. C.) 27 Fed. 30. The worthlessness of the theory was amply demonstrated in Munson v. Straits of Dover (D. C.) 99 Fed. 787, affirmed 102 Fed. 926, 43 C. C. A. 57, where Judge Brown, accepting without query or comment the doctrine that any agreement which completely ousted the courts of jurisdiction was specifically unenforceable, found himself unable to award more than nominal damages for

the breach of the collateral agreement. The opinion for affirmance (102 Fed. 926, 43 C. C. A. 57) is written by Wallace, J., who had himself pointed out in Perkins v. United States, etc., Co., *supra,* that the action for breach of the collateral agreement to refer was a remedy against the contract breaker who sued when he had promised not to. Comment seems superfluous upon any theory of law (if law be justice) that can come to such conclusions.

The Theory That Arbitration Agreements Violate the Spirit of the Laws Creating the Courts.

This is the accepted doctrine in New York, as shown in Meacham v. Jamestown, etc., Railroad, *supra.* Yet it is surely a singular view of juridical sanctity which reasons that, because the legislature has made a court, therefore everybody must go to the court.

The Theory That a Limited Arbitration, Not Ousting the Courts of Jurisdiction, May Be Valid.

This is thought to be the doctrine of Delaware, etc., Co. v. Pennsylvania, etc., Co., 50 N. Y. 265, and it is plainly accepted by the Supreme Court of the United States. Hamilton v. Liverpool, etc., Insurance Co., 136 U. S. at page 255, 10 Sup. Ct. 945, 34 L. Ed. 419, shows the familiar proviso in an insurance policy by which the amount of loss or damage to the property insured shall be ascertained by arbitrators or appraisers, and further that, until such an award should be obtained, the loss should not be payable and no action should lie against the insurer. This makes the appraisal or partial arbitration a condition precedent to suit. Gray, J., said:

"Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country."

In Hamilton v. Home Insurance Co., 137 U. S. at page 385, 11 Sup. Ct. at page 138, 34 L. Ed. 708, the same learned Justice said (of a somewhat similar proviso in an insurance policy):

"If the contract * * * provides that no action upon it shall be maintained until after such an award, * * * the award is a condition precedent to the right of action."

But persons who would thus far avail themselves of compulsory arbitration must be careful, for it has been said:

"While parties may impose, as a condition precedent to applications to the courts, that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law. * * * Such stipulations are repugnant to the rest of the contract and assume to divest courts of their established jurisdiction. As conditions precedent to an appeal to the courts, they are void."

Stephenson v. Insurance Co., 54 Me. 70, cited in Insurance Co. v. Morse, *supra.*

Finally, in Guaranty, etc., Co. v. Green Cove, etc., R. R. Co., 139 U. S. at page 142, 11 Sup. Ct. at page 514, 35 L. Ed. 116, Brown, J., considered a proviso in a mortgage to the effect that a sale by the trustee should be "exclusive of all other" methods of sale, and he laid down the law thus:

"This clause, * * * is open to the objection of attempting to provide against a remedy in the ordinary course of judicial proceedings, and oust the jurisdiction of the courts, which (as is settled by the uniform current of authority) cannot be done."

This decision was filed in 1890. The latest opinion in this circuit known to me is Gough v. Hamburg, etc., Co. (D. C.) 158 Fed. 174, where Adams, J., lays down the rule without comment that any limitation upon the jurisdiction of courts contained in a contract is void.

Whatever form of statement the rule takes, the foregoing citations show that it always amounts to the same thing, viz.: The courts will scarcely permit any other body of men to even partially perform judicial work, and will never permit the absorption of all the business growing out of disputes over a contract by any body of arbitrators, unless compelled to such action by statute. Even such cases as Mittenthal v. Mascagni, 183 Mass. 19, 66 N. E. 425, 60 L. R. A. 812, 97 Am. St. Rep. 404, show no more than a belated acceptance of the right to confine litigation by contract to a particular court, for even that opinion does not recognize the right of mankind to contract themselves out of all courts. For a comparison of earlier cases in Massachusetts with the English cases, see an article on "Arbitration as a Condition Precedent," 11 Harvard Law Rev. 234.

The English Arbitration Act, *supra,* is such a statute. It has compelled the courts of that country to abandon the doctrine that it is wrong or wicked to agree to stay away from the courts when disputes arise. It is highly characteristic of lawyers that, when thus coerced by the legislature, the wisdom of previous decisions begins to be doubted. In Hamlyn v. Talisker Distillery, [1894] App. Cas. 202, Lord Watson said:

"The rule that a reference to arbitrators not named cannot be enforced does not appear to me to rest on any essential considerations of public policy. Even if an opposite inference were deducible from the authorities by which it was established, the rule has been so largely trenched upon by the legislation of the last 50 years * * * that I should hesitate to affirm that the policy upon which it was originally based could now be regarded as of cardinal importance."

Neither the legislature of New York nor the Congress has seen fit thus to modernize the ideas of the judges of their respective jurisdictions. It has not seemed necessary to pursue this subject beyond the courts of the United States, New York, and Massachusetts; but, with

the possible exception of Pennsylvania, the result would not, I think, be different.

The question presented by these motions is to be regarded as one of general law; i. e., one wherein the courts of the United States are not bound to follow or conform to the decisions of the state jurisdiction in which they may happen to sit. This was intimated by Dallas, J., in Mitchell v. Dougherty, 90 Fed. 639, 33 C. C. A. 205, and explicitly held in Jefferson Fire Insurance Co. v. Bierce (C. C.) 183 Fed. 588.

Furthermore the question is one of remedy, and not of right. Such was substantially the holding in Mitchell v. Dougherty, *supra;* and in Stephenson v. Insurance Co., *supra,* it is pointed out that:

"The law and not the contract prescribes the remedy; and parties have no more right to enter into stipulations against a resort to the courts for their remedy, in a given case, than they have to provide a remedy prohibited by law."

Finally it has been well said by Cardozo, J., in Meacham v. Jamestown, etc., R. R. Co., *supra,* that:

"An agreement that * * * differences arising under a contract shall be submitted to arbitration relates to the law of remedies, and the law that governs remedies is the law of the forum."

It follows that the final question for determination under these motions is whether the law as laid down by the Supreme Court of the United States permits the enforcement as a remedy of the arbitration clause contained in a contract, assuming that such clause (as here) is intended to oust the courts and all courts of their jurisdiction.

I think the decisions cited show beyond question that the Supreme Court has laid down the rule that such a complete ouster of jurisdic- as is shown by the clause quoted from the charter parties is void in a federal forum. It was within the power of that tribunal to make this rule. Inferior courts may fail to find convincing reasons for it; but the rule must be obeyed, and these motions be severally denied.[32]

[32] See Addison C. Burnham, Arbitration as a Condition Precedent, 11 Harv. L. Rev. 234.

There is considerable confusion in the cases, with seemingly the weight of American authority in accord with the actual decision in United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co. See 3 Williston on Contracts § 1721.

"It is not necessary to cite authorities for what is so well settled, as that where a railroad or canal company and its contractors or in a contract between original and subcontractors, it is agreed that to prevent disputes the engineer of the work shall in all cases determine the amount or quality of the several kinds of work which are to be paid for under the contract, and decide every question which can or may arise relative to the execution of the contract on the part of the contractor, that his decision has been uniformly held to be final and coclusive." Thompson, J., in O'Reilly v. Kerns, 52 Pa. St. 214. 217 (1866). To the same effect, see Chandley Bros. & Co. v. Cambridge Springs Borough, 200 Pa. St. 230 (1901), where, however, the engineer exceeded his contract powers. And where arbitration and award are made conditions precedent to action, no action can be maintained in Pennsylvania without award.

## NASHUA RIVER PAPER CO. *v.* HAMMERMILL PAPER CO.

(Supreme Judicial Court of Massachusetts, 1916. 223 Mass. 8, 111 N. E. 678, L. R. A. 1916 D, 691.)

Action by the Nashua River Paper Company against the Hammermill Paper Company. Demurrers to defendant's answer in abatement and

Gowen v. Pierson, 166 Pa. St. 258 (1895). So enthusiastically is the freedom of contract view of these matters entertained in Pennsylvania that it was held there that a statute was unconstitutional which provided that "no provision in any contract providing, either in express words or in substance and effect, that an award or appraisement of an engineer, architect or other person shall be final or conclusive, nor any provisions that a certificate of an engineer, architect or other person shall be a condition precedent to maintaining an action on such contract, shall oust the jurisdiction of the courts; but any controversy arising on any contract containing such provisions or any of them shall be determined in due course of law, with the same effect as if such provisions were not in such contract: Provided, that this act shall not apply to municipal or other corporations invested with the privilege of taking private property for public use." Adinolfi v. Hazlett, 242 Pa. 25 (1913).

In Miles *et al.* v. Schmidt, 168 Mass. 339, 340 (1897), Morton, J., said: "Perhaps, if the question were a new one, no objection would be found to permitting parties to select their own tribunals for the settlement of civil controversies, even though the result might be to oust the courts of jurisdiction in such cases. But the law is settled otherwise in this state. * * * When the question is a preliminary one, or in aid of an action at law or suit in equity, such, for instance, as the ascertainment of damages, an agreement for arbitration will be upheld."

In Meacham v. Jamestown, F. & C. R. Co., 211 N. Y. 346 (1914), it was held, that a provision in a railroad construction contract for the arbitration of all disputes to the exclusion of the jurisdiction of the courts did not prevent an action on the contract in New York, though the contract was made outside the state and was to be performed in Pennsylvania, where such provision was valid and enforceable, since judicial comity does not require the enforcement of such a provision as between nonresidents where the contract is executed and to be performed without the state where enforcement is denied when the contract is made and performed within the state. See Ann. Cas., 1915 C, 854, note.

In Jureidini v. National British and Irish Millers Ins. Co., [1915] A. C. 499, arbitration and award as to the amount of a loss in case differences arose as to the amount were made, "independently of all other questions," a condition precedent to any right of action on the policy, and yet the repudiation *in toto* by the company of a claim for loss by fire on the ground of fraud and arson was held to preclude the company from relying on the arbitration clause as a bar to the action to enforce the claim. Some, and seemingly most, of the judges thought the arbitration clause applied only where the dispute was confined to the quantum of damages, but Viscount Haldane, L. C., went farther, saying (p. 505):

"There has been in the proceedings throughout a repudiation on the part of the respondents of their liability based upon charges of fraud and arson, the effect of which, if they are right, is that all benefit under the policy is forfeited. But one of the benefits is the right to go to arbitration under this contract, and to establish your claim in a way which may, to some people, seem preferable to proceeding in the courts; and accordingly that is one of

answer in bar overruled, and case reported. Demurrers sustained, and case to stand on answer to the merits.

RUGG, C. J.[33] The question is whether, in a contract between a manufacturer and its sales agent, a provision is valid to the effect that:

"No action at law, equity or chancery shall be instituted or maintained by the corporation in any court of any state of the United States or in any Circuit or District Court of the courts of the United States against the company other than in the courts of the common pleas of the state of Pennsylvania."

This stipulation occurs in an ordinary commercial contract between a corporation domiciled in this commonwealth and another corporation incorporated under the laws of Pennsylvania.

It becomes necessary to review some of the cases. Nute v. Hamilton Mut. Ins. Co., 6 Gray, 174, was an action upon a policy of insurance, one stipulation of which, incorporated in the contract by reference to the by-laws of the company, was in substance that any "action shall be brought at a proper court in the county of Essex." It was held that this stipulation was not binding, and that an action could be brought in any county where the venue properly might be laid. The general principle on which this decision was made to rest was that it was not within the province of parties to enter into an agreement concerning the remedy for a breach of contract, which is created and regulated by law. Considerations of public policy were adverted to as supporting the conclusion, but not given decisive weight. Chief Justice Shaw, in concluding the discussion, said:

"The greatest inconvenience would be in requiring courts and juries to apply different rules of law to different cases, in the conduct of suits, in matters relating merely to the remedy, according to the stipulations of parties in framing and diversifying their contracts in regard to remedies."

In Hall v. People's Mut. Fire Ins. Co., 6 Gray, 185, the provision of the contract of insurance was explicit to the effect that no action should be brought upon the policy except in the county of Worcester. Chief Justice Shaw, in giving the opinion of the court, after adverting to Nute v. Hamilton Mut. Ins. Co. as substantially deciding the question, said:

"The court were of opinion that a stipulation in an original contract, that in case of breach the suit shall be brought in a particular county, or, in other words, that a suit shall not be brought in a county in which it is directed by law to be brought, is not a proper matter of contract. After a contract has been made and broken, the remedy is

the things which the appellants have, according to the respondents forfeited with every other benefit under the contract."

But is not that argument more specious than sound?

[33] Parts of the opinion are omitted.

regulated by law, and of course must be governed by the law of the forum where the remedy is sought. * * * It is a well settled maxim that parties cannot, by their consent, give jurisdiction to courts, where the law has not given it; and it seems to follow, from the same course of reasoning, that parties cannot take away jurisdiction, where the law has given it." * * *

So far as we are aware, the current of authority (with the exceptions presently to be noted) is unbroken in support of the principle laid down in Nute v. Hamilton Mut. Ins. Co., 6 Gray, 174, although that principle is followed by compulsion of authority and under protest by Judge Hough in United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., Ltd. (D. C.) 222 Fed. 1006. * * *

In Mittenthal v. Mascagni, 183 Mass. 19, 66 N. E. 425, 60 L. R. A. 812, 97 Am. St. Rep. 404, the parties were both nonresidents. The action was on a contract made in Florence, Italy, where the defendant, a subject of the king of Italy, had his home and where the plaintiffs, citizens of New York, elected a domicile by a provision of the contract. It related to a concert tour through the various states of this country, and was partly to be performed in Florence, and contained the provision that the courts of Florence, Italy, should have exclusive jurisdiction of any difference between the parties, except that the defendant reserved a right of action in New York for a payment of his recompense due under the contract. It was held that under the circumstances of hurried travel through many different jurisdictions, it was reasonable that the parties should fix upon the jurisdiction of the domicile of the defendant as the one where disputes should be adjusted. As both the parties were nonresidents, they had no standing in the courts of this state as matter of strict right, but only as matter of comity. National Telephone Mfg. Co. v. Du Bois, 165 Mass. 117, 42 N. E. 510, 30 L. R. A. 628, 52 Am. St. Rep. 503. It, therefore, was regarded as appropriate to yield to the terms of a contract between the parties having such obvious foundation in convenience and reason, although the court well might have declined to exercise any jurisdiction of the case on the ground that the parties were aliens. Nute v. Hamilton Mut. Ins. Co., 6 Gray, 174, was referred to in the opinion and not treated as overruled.

In this connection Palmer v. Lavers, 218 Mass. 286, 291, 105 N. E. 1000, 1002, may be adverted to, where it was said that:

"Where one of two parties to a possible litigation, in order to obtain a release from what is equivalent to an attachment, agrees that the judgment of a court of first instance shall be final, that agreement does not come within that principle [that is, the principle of Nute v. Hamilton Mut. Ins. Co., 6 Gray, 174], and that it is an agreement which is binding and will be enforced."

That decision has no relevancy to the question now presented. Nor is the question here raised, whether the parties may by contract pro-

vide that their respective rights growing out of the agreement shall be determined according to the law of a particular jurisdiction. See Brandeis v. Atkins, 204 Mass. 471, 476, 90 N. E. 861, 26 L. R. A. (N. S.) 230; Pritchard v. Norton, 106 U. S. 124, 136, 1 Sup. Ct. 102, 27 L. Ed. 104; Greer v. Poole, 5 Q. B. D. 272, 274. * * *

The Nute Case lays down the general principle. * * * That case, as has been pointed out, states a general principle which has been adopted and prevails in all federal courts by reason of the binding decisions of the United States Supreme Court, in Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. Ed. 365; and Doyle v. Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148. The same rule prevails generally in all states where the question has arisen. It relates to a matter as to which uniformity of decision and harmony of law among the several jurisdictions of this country is desirable. It would be unfortunate if contracts touching a subject of general commercial interest and which may be broadly operative as to jurisdiction, should be held valid in one state and invalid in all others. All these circumstances bring us to the conclusion that the clause in the contract here in question is unenforceable and that, therefore, the action can be maintained in the courts of this commonwealth.

The plaintiff's demurrers to the defendant's answer in abatement and to the part of the answer in bar setting up the same matter must be sustained. The case is to stand for disposition upon the issues raised by the answer to the merits. So ordered.[34]

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## STEEN *v.* MODERN WOODMEN OF AMERICA.

(Supreme Court of Illinois, 1920. 296 Ill. 104, 129 N. E. 546.)

Action by Louisa W. Steen, as beneficiary of death benefit certificate issued to Albert F. Steen, against the Modern Woodmen of America. On May 7, 1910, Albert F. Steen disappeared from his home in Chicago unaccountably and was never heard of again. The defendant was kept fully informed and October 15, 1917, plaintiff gave defendant notice of Albert F. Steen's disappearance and absence and requested payment of benefits under the certificate and on refusal of the request, brought this action in the superior court. The defendant in a special plea relied on the following amendments to its by-laws:

"Sec. 64. *Action on Certificates Must be Brought Within Eighteen Months.*—No action for recovery on a death claim based upon any benefit certificate heretofore or hereafter issued by this society can or shall be

[34] See the admiralty case of Kuhnhold v. Compagnie Générale Transatlantique, 251 Fed. 387 (1918).

On validity of provision in contract as to place where action may be brought, see L. R. A. 1916 D 696, note.

maintained until after the proofs of death and claimant's rights to benefits, as provided in these by-laws, shall have been filed with the head clerk and passed upon by the board of directors, nor unless brought within eighteen months from the date of death of the member. * * *

"Sec. 66. *Disappearance No Presumption of Death.*—No lapse of time or absence or disappearance on the part of any member heretofore or hereafter admitted into the society, without proof of the actual death of such member while in good standing in the society, shall entitle his beneficiary to recover the amount of his benefit certificate, except as hereinafter provided. The disappearance or long-continued absence of any member unheard of shall not be regarded as evidence of death or give any right to recover on any benefit certificate heretofore or hereafter issued by the society until the full term of the member's expectancy of life according to the National Fraternal Congress Table of Mortality has expired within the life of the benefit certificate in question, and this law shall be in full force and effect, any statute of any state or country or rule of common law of any state or country to the contrary notwithstanding. The term 'within the life of the benefit certificate,' as here used, means that the benefit certificate has not lapsed or been forfeited and that all payments required by the by-laws of the society have been made."

The special plea of defendant further averred that proof of the actual death of Albert F. Steen had never been furnished to defendant, and that the expectancy of life of Albert F. Steen according to the National Fraternal Congress Table of Mortality had not expired. To this special plea plaintiff filed a general demurrer, which was overruled. She elected to stand by her demurrer, and the superior court entered judgment in favor of defendant, which judgment was on appeal affirmed by the Appellate Court for the First District. That court granted a certificate of importance, and plaintiff further appealed.

THOMPSON, J.[35] * * * The only question presented by this appeal is the validity of section 66 of appellee's by-laws. Appellant contends that this by-law is void because its meaning is uncertain, it is unreasonable, and it is against the public policy and established law of the state. * * *

At the time this benefit certificate was issued there was a well-established rule of evidence in this state that the unexplained absence of a person from home without having been heard from for 7 years by those who would naturally have heard from him if he had been alive, although diligent efforts were made to find him, raised a presumption of death, unless the circumstances of the case were such as to account for his not being heard of without assuming his death. Whiting v. Nicholl, 46 Ill. 230, 92 Am. Dec. 248; Donovan v. Major, 253 Ill. 179, 97 N. E. 231. This

[35] The statement of facts is summarized from the opinion and parts of the opinion are omitted.

is an arbitrary presumption, rendered necessary on grounds of public policy, in order that rights depending upon life or death of persons long absent and unheard of may be settled by some certain rule. * * *

This legal presumption of death from 7 years' unexplained absence arose by analogy under two early English statutes, the one exempting from the penalty of bigamy any person whose husband or wife should be continuously beyond the seas or should absent himself or herself for the space of 7 years together, and the other providing that persons in leases for lives who shall remain beyond the seas or absent themselves from the realm for more than 7 years shall, in the absence of proof to the contrary, be deemed naturally dead. That the rule in question is merely a rule of evidence is unquestioned. Stevenson v. Montgomery, 263 Ill. 93, 104 N. E. 1075, Ann. Cas. 1915 C 112. It is so treated by all the text-book writers. It was a rule born of necessity, to prevent the prosecution for bigamy of a deserted spouse, on the one hand, and to settle the property affairs of the absentee, on the other hand. It grew up in England at a time when travel was fraught with every danger known to man and when means of communication were primitive. Since this rule of law was established the social aspects of our civilization have been almost revolutionized. The improbability that accident, injury, sickness, or death could overtake a member of this society without information of the fact reaching his family and friends is very great. In case of need he scarcely could fail to find assistance among the million members of his own fraternity. Hospital, police, burial, and other records are collected and preserved in practically every state in this country and newspapers are published in every city and village, and, except for the reasons for which the law was originally established, there is now no sound reason for continuing the rule except that it has existed for so long a time that convenience makes it the best rule to follow where no other rule is established by statute or by agreement.

The contract in question here is insurance on life, and the one essential fact necessary to mature this contract is the death of the insured. The burden is on the beneficiary to prove his death. The rule of law which appellant invokes is a rule of evidence and relates to the manner and quantum of proof necessary to establish death. By the common-law rule a finding of the death of the insured will be sustained on proof of seven years' continued absence without intelligence of such absent person. Under the by-law in question such proof is not sufficient unless the absence has continued for a period equal to the member's expectancy of life. There is no vested right in a rule of evidence, and parties may by contract change an established rule of evidence and provide that a different rule shall apply in determining controversies that may arise between the parties to the contract. Roeh v. Business Men's Protective Ass'n, 164 Iowa 199, 145 N. W. 479, 51 L. R. A. (N. S.) 221, Ann. Cas. 1915 C 813; Lundberg v. Interstate Business Men's Accident Ass'n, 162 Wis. 474, 156 N. W. 482, Ann. Cas. 1916 D 667; Cobble v. Royal Neigh-

bors (Mo. App.), 219 S. W. 118. In Chicago, Burlington & Quincy Railroad Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278, we said:

"No man or corporation has a vested right in the rules of evidence. They pertain to the remedies provided by the state for its citizens, and do not constitute a part of any contract."

To the same effect is our holding in People v. Rose, 207 Ill. 352, 69 N. E. 762, and in Chicago Transfer Railroad Co. v. City of Chicago, 217 Ill. 343, 75 N. E. 499.

The average duration of human life after any given age being now ascertained and stated in well-authenticated tables, which have been recognized by the courts as safe rules in the calculation of the value of annuities and in other similar cases, no good reason is perceived why the same tables may not be accepted as furnishing ground legally to presume the death of a person after the lapse of the period of probable duration of his life, in the absence of any evidence to the contrary. These tables are scientifically made from actual experience in dealing with a given number of human lives at a given age. As we have said, the presumption of death on account of 7 years' unexplained absence is an arbitrary rule, established by necessity, and has no basis in fact or in experience. The purpose of the by-law under consideration is not to do away with presumption of death on account of disappearance and continued absence, but is to substitute certainty for uncertainty, to displace guesswork by science, and to supplant groundless conjecture by actual experience. The record shows that Albert F. Steen was born in 1870 and joined the society in 1897. He was then 27 years of age, and according to the National Fraternal Congress Table of Mortality, his expectancy of life was then 40.2 years. He disappeared in 1910 and was then 40 years of age. According to the same table his expectation of life was then 29.9 years. This by-law, it will be seen, does not oust the courts of jurisdiction nor destroy the cause of action. In the instant case it merely delays the cause. Suppose, however, the member had been 74 years of age when he disappeared. Then, according to the table adopted by the by-law, his expectancy of life would have been 7 years, and under those circumstances the rule fixed by the by-law and the common-law rule of evidence would have established death at exactly the same time; but, if the member had been 79 years of age at the time of his disappearance, his natural expectancy of life would have been 5 years, or, if he had been 85 years of age at the time of his disappearance, his expectancy would have been 3 years, and, if he had been 96 years of age, his expectancy would have been one year. Under these circumstances it will be noted that the by-law provides a rule of evidence much more favorable to the beneficiary than the common-law rule. The rule of evidence established by this by-law is for the mutual benefit of all the million members of this society. The insured had the benefit of this agreement as well as all other members, and his beneficiary must share its

burdens. Parties have a right to agree as to what proof of death shall be furnished before the policy is payable. Appellee, as a legal entity, has no interest in this matter apart from its membership, because it is a society organized not for profit. The unjust losses that might be paid under the common-law 7 years' absence rule would fall on the members of the society. Appellee merely distributes the funds which are collected from the members. Where the common-law rule is invoked for the purpose of settling title to property by administration or succession, there is no incentive for the absentee to purposely absent himself and conceal his whereabouts, but rather the reverse. A by-law similar to the one challenged has been sustained in Cobble v. Royal Neighbors, *supra;* in McGovern v. Brotherhood of Locomotive Firemen & Engineers, 31 Ohio Cir. Ct. 243, affirmed by the Supreme Court without an opinion, 85 Ohio St. 460, 98 N. E. 1128; in Kelly v. Catholic Mutual Benefit Ass'n, 46 App. Div. 79, 61 N. Y. Supp. 394; and in Porter v. Home Friendly Society, 114 Ga. 937, 41 S. E. 45.[36] * * *

It is further urged that the by-law is void because it is against the public policy and established law of the state. * * *

The courts must act with care in extending those rules which say that a given contract is void because against public policy, since, if there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into fairly and voluntarily, shall be held sacred and shall be enforced by the courts.

Because a contract may waive constitutional or statutory rights or may change an established rule of law does not necessarily render it void on the ground that it is against public policy. In Peoria Marine & Fire Ins. Co. v. Whitehill, 25 Ill. 382 (original edition, p. 466), this court held that an insurance company had the right in its policies to limit the time in which an action should be brought for a loss, and that the by-law was not against public policy simply because it fixed a period less than that fixed by the statute of limitations. In Pacaud v. Waite, 218 Ill. 138, we held that parties may make valid and binding agreements to submit question in dispute to the arbitrament of persons or tribunals other than the legally organized courts, and in Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915 A 241, this court laid down the rule that a contract waiving the constitutional right of a trial by jury was not against public policy.

Much that we have said regarding the reasonableness of this by-law applies with equal force to the objection now being considered. The purpose of this by-law is to protect the members and their beneficiaries by protecting the benefit fund against doubtful and unjust claims. The time when a disappeared member will be presumed to be dead is based

[36] Compare Becker v. Interstate Business Men's Acc. Ass'n, 265 Fed. 508 (1920).

upon the actual experience of human life as shown by a standard table of mortality. We do not see how it can reasonably be said that a rule of evidence based upon human experience, rather than upon necessity and convenience, is contrary to public policy.

The Supreme Courts of other states passing upon this by-law, or others identical with it, have come to a conclusion directly opposed to the one we have reached. Haines v. Modern Woodmen (Iowa), 178 N. W. 1010; Garrison v. Modern Woodmen (Neb.), 178 N. W. 842; Sweet v. Modern Woodmen, 169 Wis. 462, 172 N. W. 143; Gaffney v. Royal Neighbors, 31 Idaho 549, 174 Pac. 1014; Hannon v. United Workmen, 99 Kan. 734, 163 Pac. 169, L. R. A. 1917 C 1029. These are well-considered opinions, but we think the conclusion reached in them violates sound and well-settled principles of law, and we cannot adopt the views expressed by these able and distinguished courts.

For the reasons hereinbefore stated, the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*[37]

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## THE KING *v.* PORTER.

(Court of Criminal Appeal. [1910] 1 K. B. 369.)

Appeal against conviction.

At the Worcestershire Assizes, before Jelf, J., the appellant and one Brindley were tried on an indictment for conspiracy.

The fifth count of the indictment, after alleging that proceedings on a charge of felony had been taken against one Clark before Justices, and that on May 24, 1909, Clark was committed for trial at the Worcestershire quarter sessions, and that the appellant and Brindley entered into a recognizance each in 50*l.* conditioned for the appearance of Clark at the quarter sessions, charged that between April 30 and June 28, 1909, the appellant and Brindley, whilst the charge against Brindley was pending, well knowing the premises, unlawfully did conspire together and with Clark that Clark should indemnify the appellant and Brindley against their liability on their recognizance which the appellant and Brindley had duly entered into as sureties for the attendance of Clark at the next Worcestershire quarter sessions on June 28. The count then set out the overt acts of the appellants and Brindley in pursuance of the conspiracy.

In other counts the same conspiracy was alleged with intent to obstruct and pervert the due course of law and justice at the trial of

[37] See John H. Wigmore, Contracts to Alter or Waive the Rules of Evidence, 14 Ill. L. Rev. 87. See also 8 Am. St. Rep. 921, note; Ann. Cas. 1916 B, 690, note.

Clark, and with intent that Clark might evade justice and go unpunished.

Jelf, J., told the jury, quoting Wilson v. Strugnell (1881), 7 Q. B. D. 548, that a contract to indemnify a bail against his liability was contrary to public policy and therefore illegal, and that if the parties had entered into the alleged agreement they were guilty of a criminal conspiracy, even though the jury should find that the alleged intent had not been proved. The learned judge left the following questions to the jury with regard to the appellant:— "Was Porter a party to an agreement with Clark that if Brindley and Porter would go bail for him in 50*l.* then he would give then 50*l.* each as security so that Brindley and Porter should lose nothing if he absconded? "If so, was Porter a party to such agreement with Clark with the intention that Clark should abscond?" To the first question the jury answered "yes", and to the second "No." Jelf, J., held that this was a verdict of guilty on the fifth count, and the appellant was bound over on his own recognizance in 20*l.* to come up for judgment if called upon.

LORD ALVERSTONE, C. J. In this case the appellant and another man named Brindley were indicted for conspiracy. The indictment contains several counts, but the only one which it is necessary to consider is the fifth, which alleges an unlawful conspiracy by the appellant, Brindley and Clark that Clark should indemnify the appellant and Brindley against their liability on their recognizance which they had entered into as sureties for the appearance of Clark at quarter sessions. This count does not contain any averment of intent, and the question which we have to decide is whether that count as it stands without any averment of intent, discloses any offence.

It has been clearly established by a series of authorities that an agreement to indemnify bail is one which cannot be enforced. Judgments to this effect were delivered by Stephen, J., in Wilson v. Strugnell, 7 Q. B. D. 548, by Lord Esher, M. R., in Herman v. Jeuchner, 15 Q. B. D. 561, and by North, J., in Consolidated Exploration and Finance Co. v. Musgrave, [1909] 1 Ch. 37, and agreeing as we do with those judgments it is impossible for us to hold that a contract such as this is one which can be enforced. But that is not enough to dispose of the question in the case, for there are many contracts which, though not enforceable, are not contracts so unlawful as to render them the subject of an indictment for conspiracy. This question was very fully discussed in Rex v. Brailsford, [1905] 2 K. B. 730, and I there pointed out that "it cannot, of course, be maintained that every fraud and cheat constitutes an offence against the criminal law, but the distinction between acts which are merely improper or immoral and those which tend to produce a public mischief has long been recognized;" and after referring to the cases which had been cited in the argument as illustrations of that distinction, I went on to say: "Without saying that there cannot be acts upon which an innocent construction might be

put or that in some cases it might not be for the jury to find as a fact whether the act was innocent or not, we are clearly of opinion that no such argument can possibly be urged in this case. In criminal as well as in civil cases persons are responsible for the natural consequences of their acts. * * * We are of opinion that it is for the court to direct the jury as to whether such an act may tend to the public mischief, and that it is not in such a case an issue of fact upon which evidence can be given."

Applying that principle to the present case we have to see whether Jelf, J., was right in drawing the conclusion of law on the facts found by the jury that the agreement entered into by the appellant and Brindley with Clark was an agreement to do something which tended to produce a public mischief. The findings of the jury were that the appellant was a party to an agreement with Clark that if Brindley and the appellant would go bail for him in 50*l.*, then Clark would give them 50*l.* each as security, so that they should lose nothing if Clark absconded, but that the appellant, in becoming a party to that agreement, did not do so with the intention that Clark should abscond. It has been contended for the appellant that in order that the appellant could be convicted of an indictable offence it was necessary that the jury should have found that the agreement was entered into with intent to obstruct and pervert the course of justice, and that, although there are counts in the indictment which contain averments to that effect, as the appellant was convicted on the fifth count also, which contains no such averment, the conviction cannot stand. It is in our opinion, difficult to conceive any act more likely to tend to produce a public mischief than that which was done in this case. It is to the interest of the public that criminals should be brought to justice, and, therefore, that it should be made as difficult as possible for a criminal to abscond; and for many years it has been held that not only are bail responsible on their recognizance for the due appearance of the person charged, but that, if it comes to their knowledge that he is about to abscond, they should at once inform the police of the fact. It has been suggested to us that the more modern view of bail is that it is a mere contract of suretyship, and that an agreement to indemnify bail, therefore, does not involve any illegality. If that were so, as soon as the bail had got his indemnity, he would have no interest whatever in seeing that the accused person was forthcoming to take his trial, and it is obvious that criminals, particularly if possessed of means, would very frequently abscond from justice. We have been asked to follow the opinion expressed by Martin, B., in Reg. v. Broome, 18 L. T. (O. S.) 19, that there is no objection to the indemnification of bail, which opinion was acted on by the Recorder of London in Rex v. Stockwell, 66 J. P. 376. It is sufficient to say that we do not agree with the opinion of Martin, B.

In these circumstances we are of opinion that Jelf, J., rightly held that the agreement entered into by the appellant was an illegal contract,

not only in the sense of being unenforceable, but also as being one which clearly tended to produce a public mischief, and that it amounted to a criminal conspiracy, without any necessity for a finding by the jury that there was an intent to pervert or obstruct the course of justice. The conviction was, therefore, a good conviction on the fifth count of the indictment, and the appeal consequently fails.

*Appeal dismissed.*[38]

[38] But in New York, where cash bonds are permitted, a contract by one surety to give security and indemnity to another if the latter would also go bail for an accused was held legal in Moloney v. Nelson, 158 N. Y. 351, 355 (1899). Parker, C. J., said: "It is true that in some other jurisdictions, as is pointed out in the very careful opinion of the Appellate Division, it has been suggested, if not decided, that it is against public policy to allow bail to become indemnified, the reason given being that the object for which the bail is required is to assure the appearance of the prisoner to answer the charge against him, and that necessarily the bail had a direct pecuniary interest in preventing the escape of the prisoner, which he would not have were he fully indemnified. That is not the public policy of this state; for the giving of bail in criminal cases is regulated by statute, and the legislature has, by its provisions, provided that a personally responsible surety may be altogether omitted if the accused prefers to make a deposit of money; he may have his choice either to give a bond with sureties, or make a deposit of money. It is the loss of the money deposited, or the assurance that the sureties will be obliged to pay the amount of the bail, that is relied upon to secure the presence of the accused. It, therefore, cannot be said to be a part of the public policy of this state to insist upon personal liability of sureties, for there need not be such personal liability in any case if the accused makes a deposit of money in lieu of bail, as provided by statute." *Accord*, see Essig v. Turner, 60 Wash. 175 (1910).

And in Carr v. Davis, 64 W. Va. 522 (1908), it was held that a contract by an accused to indemnify one who signed his recognizance was legal, Brannon, J., for the majority of the court saying (p. 526): "The law allows bail. We may say that the law favors bail as a relief from prison in cases where bail is grantable and it would tend to defeat this merciful provision of law, if we should adopt the harsh rule that a man perhaps innocent, cannot use his property to indemnify his friend to relieve him from prison bars." In West Virginia there seems not to have been a statute such as existed in New York and Washington.

In either situation, if the contract is made with intent to have the accused flee from justice the contract is illegal. Dunkin v. Hodge, 46 Ala. 525 (1871). Compare Baehr v. Wolf, 59 Ill. 470 (1871). But except where there is such illegal intent, the American cases in general are in accord with the New York and the West Virginia cases, *supra*.

In Leary v. U. S., 224 U. S. 567 (1912), the contract alleged was that Leary, the intestate of the plaintiff in intervention, became surety on one Greene's bail bond to the United States upon the understanding and conditions that certain securities held in trust or on deposit by one Kellogg for Greene should remain in Kellogg's hands as security and indemnity to Leary for signing the bond. Greene failed to appear and the United States obtained a judgment against the plaintiff as Leary's administrator. And the question was whether the administrator of Leary or the United States, which claimed the trust funds as obtained through fraud against the United States, had a better right to the funds. On the question whether the contract between Greene and Leary was against public policy, Holmes, J., for the court, said (pp. 575-576), that

## MILLS *v.* BENNETT.

(Supreme Court of Tennessee, 1895. 94 Tenn. 651, 30 S. W. 748, 45 Am. St. Rep. 763.)

Action by W. H. Mills against H. H. Bennett. From a judgment for defendant, plaintiff brings error. Affirmed.

MCALISTER, J.[39] The only question presented for determination in this cause is whether a debtor may waive his exemptions for the benefit of his creditor. The stipulation for a waiver of exemptions was incorporated in the following note, viz.: "Memphis, Tenn., Aug. 23, 1894. Thirty days after date, I promise to pay to the order of G. M. Anderson five dollars. I do hereby agree to waive my rights to exemption under the laws of the state of Tennessee until the bill is paid in full. Value rec'd. H. H. Bennett. Due. Witness: J. M. Simms. Wm. H. Mills." Indorsed: "I do hereby transfer the within note to W. H. Mills. G. M. Anderson." The defendant, Bennett, is a daily laborer, in the employment of Stewart Gwynne & Co., a mercantile firm in the city of Memphis. The creditor is seeking by these proceedings to subject to the payment of his judgment wages due Bennett, which are exempt by law from execution, seizure, or attachment. Code, § 2931. It appears from the record that Bennett is the head of a family, with a wife and three children. This consideration, however, is immaterial, since it is not necessary in order to entitle the defendant to this particular exemption that he should have been the head of a family. Of course, this fact only emphasizes the necessity for such exemption, but it is not material as a matter of law. There are other exemptions which are dependent

"the ground for declaring the contract invalid rests rather on tradition than on substantial realities of the present day. It is said, that the bail contemplated by the Revised Statutes (§ 1014), is common-law bail and that nothing should be done to diminish the interest of the bail in producing the body of his principal. But bail no longer is the *mundium*, although a trace of the old relation remains in the right to arrest. Rev. Stat., § 1018. The distinction between bail and suretyship is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary. If, as in this case, the bond was for $40,000, that sum was the measure of the interest on anybody's part and it did not matter to the government what person ultimately felt the loss so long as it had the obligation it was content to take. The law of New York recognizes the validity of contracts like the one alleged, and without considering whether the law of New York controls we are content to say merely that the New York decisions strike us as founded in good sense. Maloney v. Nelson, 144 N. Y. 182, 189; s. c., 158 N. Y. 351, 355."

In New York it seems that a so-called "implied agreement" to indemnify sureties on a bail bond will be enforced now that an express agreement to indemnify in such a case is valid. Badalato v. Molinari, 174 N. Y. Supp. 512 (1919).

On the validity of agreement to indemnify bail in a criminal case, see 20 L. R. A. (N. S.) 58, note.

[39] Parts of the opinion are omitted.

upon this condition, and the validity of contracts entered into by the head of the family is considered from this point of view. It will be observed that the defendant in this case, upon the face of the note, waives all his exemptions,—those secured to him as the head of a family, and those to which he is entitled independent of the family. Is such a contract valid and enforceable?

It was held in the case of Denny v. White, 2 Cold. 283, that "the property exempt from execution in the possession of the head of a family is held by him for the use and benefit of the family; and, while he has the right to sell or exchange such property, it cannot be levied on and sold on execution by his consent, this being a privilege he cannot waive." Said the court, viz.: "The language of the act is imperative. The property exempt shall not be liable to seizure and sale by execution, and the head of the family cannot waive the right, as those dependent on him are under the protection of the law and secured in the enjoyment of the property." * * * Says the Supreme Court of Illinois, viz.: "That such a waiver, where the same is attempted to be made by an executory contract, is ineffectual, and will not be enforced, is definitely settled. * * * Such contracts contravene the policy of the law, and hence are inoperative and void. The owner may, if he choose, sell or otherwise dispose of any property he may have, however much his family may need it; but the law will not aid in that regard, nor permit him to contract in advance, that his creditor may use the process of the courts to deprive his family of its use and benefit when an exemption has been created in their favor. Laws enacted from considerations of public concern, and to subserve the general welfare, cannot be abrogated by mere private agreement." Recht v. Kelly, 82 Ill. 147. Says Judge Denio: "The maxim '*Modus et conventio vincunt legem*' is not of universal application. It applies only to agreements in themselves legal. Where no rule of law or principle of public policy is concerned, the parties may by contract make a law for themselves. One object of municipal law is to promote the general welfare of society. The exemption laws seek to accomplish this by taking from the head of the family the power to deprive it of certain property by contracting debts which shall enable the creditors to take such property on execution. The parties to this contract sought to set aside these laws so far as this debt was concerned. This they could not do." The learned judge says: "I am of opinion that a person contracting a debt cannot agree with the creditor that, in case of nonpayment, he shall be entitled to levy his execution upon property exempt from execution by the general laws of the state. * * * If effect shall be given to such provisions, it is likely that they will be generally inserted in obligations for small demands, and in that way the policy of the law will be completely overthrown. Every honest man who contracts a debt expects to pay it, and believes he will be able to do so without having his property sold on execution. No one

worthy to be trusted would therefore be apt to object to a clause subjecting all his property to levy on execution in case of nonpayment. It was against the consequences of this overconfidence and the readiness of men to make contracts which may deprive them and their families of articles indispensable to their comfort that the legislature has undertaken to interpose. Where a man's last cow is taken on an execution on a judgment rendered upon one of these notes, it is not sufficient to say that it was done pursuant to his consent, freely given when he contracted the debt. The law was designed to protect him against his own improvidence in giving such consent. The statutes contain many examples of legislation based upon the same motives. The laws against usury, those which forbid imprisonment for debt, and those which allow a redemption after the sale of land on execution are of this class." Kneettle v. Newcomb, 22 N. Y. 249.

The Supreme Court of Iowa, after a full consideration of the subject, said, viz.: "Without pursuing the discussion of the subject further, we are agreed in the conclusion that a person contracting a debt cannot, by a contemporaneous and simple waiver of the benefit of the exemption laws, entitle the creditor, in case of failure to pay, to levy his execution, against the defendant's objection, upon exempt property. Such an agreement is contrary to public policy, and will not be enforced." Curtis v. O'Brien, 20 Iowa, 376. * * *

The result of our examination is that the main current of judicial enunciation is against the validity of such contracts. Possibly the only court out of line is that of Pennsylvania. Such contracts are also sustained in Alabama, but under the authority of an express statute. Brown v. Leitch, 60 Ala. 313. We think the weight of reason as well as authority is opposed to such stipulations. In our view, it is immaterial whether the contract is made by a single man or the head of a family. In either case it contravenes a sound public policy, and, if enforced, abrogates the exemption statutes. The judgment is affirmed.[40]

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## LIVINGSTON *v.* PAGE.

**(Supreme Court of Vermont, 1902. 74 Vt. 356, 52 Atl. 965, 59 L. R. A. 336, 93 Am. St. Rep. 901.)**

Action of assumpsit by James H. Livingston against Carrol S. Page.

[40] The opinions of courts are more nearly unanimous on the question of contracts waiving in advance exemptions from execution than they are on that of contracts never to plead the statute of limitations. The conflict as to the statute of limitations question seems to be due mainly to the fact that judicial attitude towards statutes of limitation has sometimes been hostile and sometimes friendly. That a contract never to plead the statute of limitations is illegal as violating the legislative intent in supplying a statute of repose, see Crane v. French, 38 Miss. 503 (1860). *Contra*, see State Trust Co. v. Sheldon, 68 Vt. 259 (1895). See 95 Am. St. Rep. 411, note.

From a judgment for the defendant, the plaintiff brings exceptions. Affirmed.

MUNSON, J. At the close of the plaintiff's evidence the defendant moved that a verdict be directed in his favor, on the ground that the contract claimed by the plaintiff was void, as against public policy. The court held the contract void for the reason assigned, and directed a verdict accordingly. The case is here upon the plaintiff's exception to this holding.

The plaintiff called the defendant as witness. The evidence consisted of certain correspondence had by the parties; and the testimony of the parties to the circumstances in which the letters were written, the meaning that was attached to the language used, the matters inclosed for publication by one party and the services rendered by the other, subsequent transactions bearing upon their understanding of the relations they had sustained. The defendant claimed that no contract with the plaintiff was in fact consummated, and that the only contract ever contemplated was one for the publication of extracts from other papers at a legitimate charge for the space actually taken. The plaintiff did not claim to recover on this ground, but claimed to recover a reasonable compensation for the support and influence of his paper and his services as its editor. The plaintiff was a Democrat, publishing a Democratic paper of independent proclivities. The defendant was a Republican, seeking a nomination to Congress from a Republican convention. It appeared from the plaintiff's testimony that he considered defendant's proposal an application for the use and influence of his paper in the nature of a retainer; that he accepted it with the understanding that his paper and his services as editor would be at the command of the defendant during the campaign, to be settled for at its close; that he was to do all he could to influence the choice of delegates and secure the defendant's nomination; that original matter was within the scope of his contract, and that his editorials were written in that view; that he supported defendant because of this contract and the money he was to get out of it; that he expected to receive a larger compensation if defendant was nominated than he otherwise would; that he tried to conceal his relations with the defendant from the public, and understood that the defendant was trying to do the same; that he took this course because it would make his efforts in influencing voters in defendant's behalf more successful.

The case of Nichols v. Mudgett, 32 Vt. 546, decided by this court in 1860, is one of the few cases bearing upon this subject. The plaintiff in that case was a candidate for the office of town representative, and a creditor of the defendant. The defendant's party affiliations were such as would naturally lead him to vote for the opposing candidate. Conversations were had which resulted in a mutual understanding that the defendant should use his influence in favor of the plaintiff's

election, and that, if the plaintiff was successful, the defendant's indebtedness should be treated as paid. Induced by this agreement, the defendant supported the plaintiff's candidacy until his election was declared. There was no agreement that defendant should vote for the plaintiff unless it was implied in the above understanding. He voted for the plaintiff, however, and did so because of the understanding. The suit was for the recovery of the indebtedness referred to, and the defendant claimed that it had been satisfied. The court considered that there was a sale of the defendant's influence and vote, held the agreement void, and gave judgment for the plaintiff. The agreement in that case involved both the defendant's vote and his influence upon the votes of others, but the court's discussion of the subject does not leave much doubt as to what its conclusion would have been if the undertaking had been confined to the latter service. Certainly no distinction could properly be made between the two. But that contract had reference to the votes to be cast at an election, and the plaintiff contends that, inasmuch as caucauses and conventions are not creations of the law, contracts for services in influencing the choice of delegates and the action of a convention cannot be considered against public policy. In Liness v. Hessing, 44 Ill. 113, 92 Am. Dec. 153, the contract was for services of this character. It was suggested that there may have been a law in that state regulating primaries, but there is no intimation of one in the opinion, and we have found none in the examination we have been able to make. There the plaintiff sent the defendant $20, with a request that he use his influence to get plaintiff nominated for a certain office, and a direction to call upon him for $20 more if he got the nomination. The defendant kept the $20, and aided the plaintiff's opponent. The suit was to recover this money, but the defendant had judgment. The decision was announced by Justice Lawrence, who characterized the transaction as "an attempt to influence, by moneyed considerations, the action of the defendant in a matter where every person should be governed solely by a regard for the public welfare."

In Strasburger v. Burk, 13 Am. Law Reg. (N. S.) 607, decided by the city court of Baltimore, the defendant was the keeper of a lager beer saloon, and agreed to give his political influence and furnish beer and cigars to secure a caucus nomination for the plaintiff's father. The gratuitous furnishing of food or liquor to secure votes at an election was prohibited by the Code, but the only statutory recognition of primary elections was a provision for the preservation of order. The court considered that in applying the principles of public policy no distinction could be made between voluntary meetings of this character and elections ordained by law. Mr. McCrary adopts the conclusions of this opinion in his work on Elections, and applies the doctrine to the sale of influence, as well as the sale of votes. Mr. Redfield, in commenting upon the same opinion in 13 Am. Law Reg. (N. S.) at page 610, says

that the invalidity of contracts designed to control the freedom of elections results from the principles of common law, and that those relating to caucuses cannot be made an exception on the ground that such meetings are not recognized by the statute. We cannot doubt the correctness of this conclusion. The rule would largely fail of its purpose if not so applied.

When the voters are unevenly divided into two parties, the nomination of the stronger organization is usually equivalent to an election. And when party action is less decisive the subsequent efforts of the voters are ordinarily confined to a selection from the candidates regularly presented. The individual voter of a large electorate can seldom give an effective expression to a choice that is not in line with the action of some party convention. To secure a free and exact expression of the sovereign will, there must be a proper selection of candidates, as well as an honest election. If the choice of delegates and the action of the nominating convention are improperly determined, the election ballots will fail to express the real judgment of the voters.

It is not claimed in argument, and no ground occurs to us upon which it could be claimed, that this contract was any the less obnoxious to the law because the purchased influence was to be exerted through the columns of the plaintiff's paper. A newspaper is understood to present the views of some one connected with its management or views deemed consistent with some settled policy, and has a patronage and influence which are due to that understanding. As long as the editorial column is relied upon as a public teacher and adviser, there can be no more dangerous deception than that resulting from the secret purchase of its favor. We hold that the contract testified to and relied upon by the plaintiff is contrary to public policy, and therefore void.

*Judgment affirmed.*

Note. Since the delivery of the above opinion, we have seen Fitch v. De Young, 66 Cal. 339, 5 Pac. 364, where it was held, upon views similar to those expressed in concluding the opinion, that an article charging a publisher with selling the support and advocacy of his paper for money is libelous.[41]

[41] On what contracts with newspapers are against public policy and therefore void, see 93 Am. St. Rep. 905, note.

In Stirtan v. Blethen, 79 Wash. 10 (1914), a contract employing an agent to start and carry through a movement for an election to recall certain officers, with expenses to be paid and without disclosing the real parties and actual motives responsible for the movement, was held illegal and void.

So contracts to pay for securing the promisor an appointment to public office are illegal. Meguire v. Corwine, 101 U. S. 108 (1879). See 7 Ann. Cas. 874, note. On promise to accept less than compensation fixed by law as affecting right to hold office, see L. R. A., 1917 B, 196, note; 19 Ann. Cas. 1075, note. On validity of agreement to divide fees and salary of public officer, see 43 L. R. A. (N. S.) 422, note.

Closely connected with problems of contracts concerning the election, appoint-

## HENRY HOLCOMB *v.* THOMAS H. WEAVER.

**(Supreme Judicial Court of Massachusetts, 1884. 136 Mass. 265.)**

HOLMES, J. The plaintiff in New Bedford was written to from New York on behalf of the Pasque Island Club, and requested to find a

ment or recall, and the compensation, of public officials is that of lobbying contracts. In Trist v. Child, 21 Wall. (U. S.) 441 (1874), a contingent fee contract whereby Child was to get 25 per cent of what he could get Congress to allow on a claim of Trist against the United States and to receive nothing if Congress allowed nothing, was sought to be enforced. Swayne, J., for the court, said:

"Was the contract a valid one? It was, on the part of Child, to procure by lobby service, if possible, the passage of a bill providing for the payment of the claim. The aid asked by the younger Child of Trist, which indicated what he considered needful, and doubtless proposed to do and did do himself, is thus vividly pictured in his letter to Trist of the 20th February, 1871. After giving the names of several members of Congress, from whom he had received favorable assurances, he proceeds: 'Please write to your friends to to write to any member of Congress. Every vote tells, and a simple request may secure a vote, he not caring anything about it. Set every man you know at work. Even if he knows a page, for a page often gets a vote.' * * *

"Before considering the contract here in question, it may be well, by way of illustration, to advert to some of the cases presenting the subject in other phases, in which the principle has been adversely applied.

"Within the condemned category are:—

"An agreement to pay for supporting for election a candidate for sheriff; to pay for resigning a public position to make room for another; to pay for not bidding at a sheriff's sale of real property; to pay for not bidding for articles to be sold by the government at auction; to pay for not bidding for a contract to carry the mail on a specified route; to pay a person for his aid and influence in procuring an office, and for not being a candidate himself; to pay for procuring a contract from the government; to pay for procuring signatures to a petition to the governor for a pardon; to sell land to a particular person when the surrogate's order to sell should have been obtained; to pay for suppressing evidence and compounding a felony; to convey and assign a part of what should come from an ancestor by descent, devise, or distribution; to pay for promoting a marriage; to influence the disposition of property by will in a particular way.

"The question now before us has been decided in four American cases. They were all ably considered, and in all of them the contract was held to be against public policy, and void. We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included, drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them, orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptional. But such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows were resorted to in this case. * * *

"The agreement in the present case was for the sale of the influence and

builder who could erect a building for them cheaper than the New York builders. The letter continued, "but we only want parties that you can indorse in every way responsible and reliable." The plaintiff in reply introduced the defendant, who made his estimates, was employed, erected the building, and was paid. At an early stage of the proceedings, the plaintiff asked and obtained a promise from the defendant to pay him $250, "as a commission or compensation for his trouble in the matter," which is the promise sued upon. The plaintiff testified that this promise was made without the knowledge of the club, but that he expected no pay from them for procuring the defendant to erect the building. The court ruled that the plaintiff could not recover; and the plaintiff excepted.

The ruling was clearly right. The plaintiff was not asked merely to introduce a possible contractor, who was to be dealt with by the club on the same footing as any one else, and to stand at no advantage in bargaining with them by reason of the introduction, as in Rupp v. Sampson, 16 Gray, 398. He was asked to recommend some one as in every way responsible. His recommendation obviously was expected to have weight with the club, and did have it. If his agreement with the defendant was made before his recommendation, it had a necessary tendency to give a bias to what they knew the club relied on as disinterested. A recommendation under these circumstances would have been a fraud, even if gratuitous, and it is therefore immaterial whether the club was to pay for it or not, although it is hard to see why the plaintiff could not have recovered for his trouble if he had dealt fairly. If, then, the agreement was made at the time supposed, it was open to all the objections so fully stated in Fuller v. Dame, 18 Pick. 472, and was void

exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking. * * *

"We are aware of no case in English or American jurisprudence like the one here under consideration, where the agreement has not been adjudged to be illegal and void." See Herrick v. Barzee (Ore.), 190 Pac. 141 (1920); Adams v. East Boston Co. (Mass.), 127 N. E. 628 (1920). See also on lobbying contracts, 30 L. R. A. 737, note; 4 L. R. A. (N. S.) 213, note; 121 Am. St. Rep. 726, note. Compare Wright v. Fissell (N. J. Eq.), 113 Atl. 699 (1921).

In Spaulding v. Maillet (Mont.), 188 Pac. 377 (1920), a contract between a lawyer and a person convicted of crime that the lawyer would use personal solicitation and influence to procure a recommendation from the judge or the district attorney that a petition for pardon should be favorably received was held void because of its bad tendency even though unlawful means were neither resorted to nor contemplated. On validity of contract to procure pardon, parol or commutation of sentence, see L. R. A., 1916 D, 580, note.

by that and other Massachusetts decisions. Rice v. Wood, 113 Mass. 133. See also Atlee v. Fink, 75 Mo. 100; Harrington v. Victoria Graving Dock Co., 3 Q. B. D. 549; Panama & South Pacific Telegraph v. India Rubber, Gutta Percha, & Telegraph Works, L. R. 10 Ch. 515.

The agreement was open to the same objections on another ground, whether made before or after the plaintiff had written his recommendation. It was made at all events before the defendant had completed his bargain with the club. The parties knew that the club were seeking to get the work done as cheaply as they could get a trustworthy man to do it. If the defendant had to pay the plaintiff, he would naturally charge it to the club in his estimate, or in some way make the club pay him back. The tendency of the contract was to induce the defendant to charge, and to make the club pay, more than was necessary or fair, when the plaintiff had led them to expect that they would be dealt with honestly and economically, and certainly with no adverse interest emanating from the plaintiff.

We may add, that, if the date of the promise in suit were material and left in doubt, we would assume the fact to be that which was most favorable to the ruling; and also that, if the promise was made after the plaintiff had written to New York recommending the defendant, the plaintiff would have a good deal of difficulty in showing a consideration which was not executed before the promise was made. For the trouble for which the plaintiff was to have a commission obviously meant his recommendation of the defendant. He does not appear to have taken any other.

*Judgment affirmed.*[42]

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## VAN SLYKE *v.* ANDREWS ET AL.

**(Supreme Court of Minnesota, 1920. 178 N. W. 959.)**

Action by V. H. Van Slyke against James C. Andrews and others. Motion by defendants James C. Andrews and others for judgment on the pleadings granted, and plaintiff appeals. Affirmed.

[42] On the validity of a contract to influence by apparently disinterested advice the conduct of a third person to whom the promisor owes no contractual duty, see L. R. A., 1917 F, 468, note.

Where there is a contractual duty, even that of an independent contractor as distinguished from an agent or servant, a contract inconsistent with the due performance of that duty may be illegal. In Woodstock Iron Co. v. Richmond & Danville Extension Co., 129 U. S. 643, the Extension Company had made a contract with the Georgia Pacific Railway Company to construct a road for the latter between certain points at $20,000 per mile "by the nearest, cheapest and most suitable route." It then contracted with the Iron Company to locate the railroad by way of a town which caused the road to depart from the nearest and most natural route by five miles and, therefore, at an addi-

TAYLOR, C.[43] * * * The complaint sets forth that plaintiff made an agreement with the defendants to resign the office of president of the bank on November 1, 1917, and to sell his bank stock to the defendants, or any of them, for $130 per share, and that in consideration thereof the defendants agreed to buy one-half of his bank stock at $130 per share, to elect him chairman of the board of directors of the bank and maintain him in that office for a period of fourteen months from November 1, 1917, to cause the sum of $14,000 to be paid to him, or to his widow in case of his death, by and through the bank in monthly instalments of $1,000 each, and to secure the continuance and ratification of the agreement by the incoming board of directors to be elected at the annual stockholders' meeting in January, 1918. * * *

We sustain respondent's contention that the contract set forth in the complaint is void as against public policy, and that no right of action can be founded thereon. The directors of a bank occupy a fiduciary relation to the bank and its stockholders which disables them from binding themselves by contract to take action in their official capacity for the personal benefit of any one. And if they undertake to bind themselves by contract to elect a designated person as an officer of the bank for a specified time at a specified salary, such contract is illegal and void as it might result in detriment to the interests of the bank. Dickson v. Kittson, 75 Minn. 168, 77 N. W. 820, 74 Am. St. Rep. 447; West v. Camden, 135 U. S. 507, 10 Sup. Ct. 838, 34 L. Ed. 254; Gage v. Fisher, 5 N. D. 297, 65 N. W. 809, 31 L. R. A. 557; Noel v. Drake, 28 Kan. 265, 42 Am. Rep. 162; Guernsey v. Cook, 120 Mass. 501; Scripps v. Sweeney, 160 Mich. 148, 125 N. W. 72. Furthermore the national banking law expressly provides that any officer of a national bank may be removed at any time by the board of directors, and any contract which would restrict the right to exercise this statutory power is necessarily void. * * *

*Judgment affirmed.*[44]

tional cost of $100,000 to the Railway Company. The court held, the contract between the Extension Company and the Iron Company to be illegal.

On the validity of a contract made to influence the location of a railroad, see 21 L. R. A. (N. S.) 800, note. On the validity of a contract with a railroad company to establish and maintain a station, see 15 L. R. A. (N. S.) 594, note; L. R. A., 1916 F, 691, note.

[43] Parts of the opinion are omitted.

[44] In Spinks v. Davis, 32 Miss. 152 (1856), Handy, J., said: "The declaration in this case states, in substance, that the plaintiff contracted with and retained the defendant as an attorney-at-law, to collect certain claims to a large amount, due him from the estate of one John Carson, deceased, who resided in Alabama, and died insolvent, but was entitled to a distributive share of the estate of his father, William Carson, who had previously died in Tallahatchie county, in this state. * * *

"This agreement as stated is, in substance, that the defendant who was thus retained as the attorney of the plaintiff, to collect his debt, for compensation, should also become administrator of the debtor's estate, and thereby accom-

## HOPKINS *v.* ENSIGN ET AL.

(Court of Appeals of New York, Second Division, 1890. 122 N. Y. 144, 25 N. E. 306, 9 L. R. A. 731.)

This action was to foreclose a mortgage upon real estate in the city of Buffalo, and made by the defendant Mary A. Ensign to Truman C.

plish the object of his original engagement and collect the debt. The question is, do not these respective duties involve incompatible obligations, or, does not the faithful performance of one of them tend necessarily to the violation of the other?

"It was the duty of the attorney diligently to prosecute the claim according to law, and to collect it if it could be done by legal means. It was the duty of the administrator to scrutinize the claim rigidly, and to refuse payment if there was any doubt about its justness in fact, or its validity according to strict legal rules; to defend, upon the ground of the statute of limitations, the illegality or want of consideration of the claim, or any other bar which was a sufficient defence to it in law. And all such defences it was the plain duty of the attorney to resist. In short, the attorney was bound to protect the interest of his client, and the administrator was primarily bound to protect the legal interests of the estate. Under such circumstances, the attorney could not have performed his duty to prosecute the claim, if its validity had been doubtful, consistently with his duty to defend the estate against its collection. Hence, a strong temptation would necessarily arise to violate his duty in the latter capacity, and to pay the claim; because the attorney would thereby make a profit by his retainer in addition to the commission which he would at all events receive as administrator; and instead of acting as a faithful and impartial administrator, he stands under a strong temptation to abuse his trust to his own private gain. If the claim should be of such doubtful validity as to make it the duty of the administrator to resist its payment and to render a suit necessary, what is his attitude? He must either become the plaintiff's attorney in the suit against himself as administrator, or he must procure some one else to bring the suit against him. In this, there would be an almost irresistible inducement to malpractice and collusion; for, considering the infirmities of human nature, it is scarcely to be supposed, that he would make a very vigorous defense to a suit in which he was directly interested that the plaintiff should recover.

"But in this case, the main object of the arrangement was the collection of the plaintiff's claim, and to that the defendant was primarily bound by his agreement. The administration was to be undertaken merely as a means to that end. How, then, could the attorney properly perform his contract to collect the plaintiff's claim, when it might become his duty as administrator to resist it? Either by the force of his contract, and in furtherance of the object of the undertaking, or by the temptation to do wrong which his situation would render almost irresistible, he must act as administrator, so as to facilitate the end for which the whole arrangement was entered into, and thereby violate his duty in that capacity.

"The obligations are, therefore, manifestly inconsistent, and are calculated to induce a violation of one of two high public duties; and the agreement must therefore be condemned as illegal and against public policy, so far as it charged the attorney, upon his individual undertaking, to collect the claim by means of the administration.

"It is no answer to this view of the case to say, that the defendant might properly have performed his duty generally, as administrator, as well to others

White to secure the payment of $2,500 and interest, and by said White assigned to the plaintiff.

The mortgage was given to secure the plaintiff's assignor the amount of his claim against the defendant's husband for services rendered. The husband had died insolvent and the plaintiff's assignor, White, was intending to bid for the mortgaged property at the foreclosure sale when the defendant, who had arranged to buy the property at the sale, agreed that if White would refrain from bidding and if she should obtain the premises for the amount needed to satisfy the mortgage foreclosed, she would execute and deliver the bond and mortgage set forth in the complaint, which she did. Foreclosure and sale were decreed on the bond

interested as to the plaintiff, and yet have properly paid the claim of the plaintiff; and that it is to be presumed that the arrangement was intended to be carried out by legal means, and not by those which were illegal. It is a sufficient objection to a contract, on the ground of public policy, that it has a direct tendency to induce fraud and malpractice upon the rights of others, or the violation or neglect of high public duties. Upon this principle, contracts to procure the making of a will in favor of a particular party, or to bring about a marriage between certain parties, and the like, are held to be illegal as being against public policy. For although the act contracted to be done may be just and beneficial as between the parties immediately concerned in it, and though it be accomplished in good faith and without undue means, yet the contract to procure it to be done is held to be against public policy, because its natural effect is to cause the party to abuse the confidence placed in him by those upon whom the influence is to be exerted, and thereby prejudicially to affect the rights of others. Fuller v. Dame, 18 Pick. 472; Collins v. Blantern, 2 Wils. 347, 1 Story, Eq. Jur., §§ 265, 266; Chit. Cont. 525, 526; 1 Lead. Cas. Eq. 150-169, and cases there cited.

"It is urged, in support of this action, that by our laws a creditor has the right to take out letters of administration upon his debtor's estate, if parties having the prior right fail to do so; and that there can be no impropriety in the attorney's doing that which his client, who had the same temptation to do wrong as the attorney, is allowed to do.

"But the question is, not whether the attorney had the right to administer, but whether a contract by which he was either bound, or under a strong and direct temptation, to use his trust for the purpose of paying the claim of the plaintiff, is proper and legal. The creditor-administrator is under no contract to induce him to abuse his trust; and being known as a creditor, his acts will, in all probability, be closely examined by those interested in the estate. But the attorney appears as a disinterested person, in whom the parties may confide for the faithful performance of all his duties, and especially for the protection of the rights and interests of the estate. He is supposed not to be acting in his own right, but for the benefit of others, and impartially; and from the confidence that may well be presumed to be reposed in him, he will have much greater power to make underhand arrangements than would the creditor himself, who was known to be acting mainly for his personal interest. The policy of the statute allowing a creditor to administer upon his debtor's estate, proceeds on the ground of enabling the creditor to collect his debt, and that from necessity, because no one else will administer. But it is not to be extended to justify agreements made by third persons who may become administrators, the performance of which will have a direct tendency to cause malpractice and fraud in the administration."

and mortgage thus given by defendant. The General Term affirmed that decree and defendant appealed.

BROWN, J.[45] The defense to this action was placed upon two grounds: First, that the bond and mortgage in suit were obtained by duress; second, that they were not supported by a valid and legal consideration. The referee found that Mrs. Ensign executed the bond and mortgage "intelligently, and without duress, with full knowledge of all her rights," and as there was ample evidence to support that conclusion the exception to that finding need not be further referred to. The lack of a valid consideration to support the contract is said to result from the agreement on the part of the mortgagee not to bid at the foreclosure sale under the Potter mortgage, and it is contended that that agreement was one to prevent or suppress competition at a public sale, and was therefore void as against public policy. There is authority for this contention in many of the older cases. Jones v. Caswell, 3 Johns. Cas. 29; Doolin v. Ward, 6 Johns. 194; Wilbur v. How, 8 Johns. 444; Thompson v. Davies, 13 Johns. 112. See, also, 1 Story, Eq. Jur. § 293. But the rule applied in these cases has been very materially modified by the later decisions of the courts, and it is now settled that agreements between two or more persons, that all but one shall refrain from bidding and permitting that one to become the purchaser, are not necessarily, and under all circumstances, void. They may be entered into for a lawful purpose, and from honest motives, and in such cases will be upheld; and they will not vitiate the purchase, or necessarily destroy the completed contracts to which they refer, and in respect to which they are made. People v. Stephens, 71 N. Y. 526-546; Marsh v. Russell, 66 N. Y. 288; Marie v. Garrison, 83 N. Y. 14-28; Myers v. Dorman, 34 Hun, 115; Kearney v. Taylor, 15 How. 494; Wicker v. Hoppock, 6 Wall. 94; Phippen v. Stickney, 3 Metc. (Mass.) 384; Maffet v. Ijams, 103 Pa. St. 266; Garrett v. Moss. 20 Ill. 549; Bank v. Sprague, 20 N. J. Eq. 159; In re Carew's Estate, 26 Beav. 187. * * *

The courts will now look to the intention of the parties, and if that be fair and honest, and the primary purpose be not to suppress competition, but to protect their own rights, and there be no fraudulent purpose to injure or defraud others interested in the result of the sale, the agreement may be upheld. The question is one of fact, to be determined by the trial court upon the evidence before it. We have then in this case to inquire as to the character of the agreement which the appellant assails. Mr. White, the mortgagee, had rendered a large amount of professional services to the surviving partner of the firm of Holt & Ensign, for which he had received no compensation, and for which compensation could not be compelled on account of Holt's insolvency. He might have secured the amount by bidding at the sale, and expect-

[45] The facts are abbreviated and parts of the opinion are omitted.

ed to reimburse himself in that way. He refrained from so doing on account of Mrs. Ensign's promise to pay the debt. It was her desire to obtain title to the property for the amount due on the Potter mortgage; and the only creditor of her husband's estate who appears to have been pecuniarily interested in that estate was willing she should do so. If all parties interested in the land had agreed that Mrs. Ensign might purchase the property freed from their claims upon paying to White the amount of his debt, no one could question the legality of such an agreement. Public policy would not forbid it, and no one being injured there would be no one who could complain. Substantially that is what was done. * * * We are of the opinion that this agreement was not illegal, although it had the effect incidentally to prevent competition between White and Mrs. Ensign. The referee has not found that the intention of the parties was to suppress competition, and the evidence shows that such was not their purpose. * * *

There is no analogy between such an agreement as we are considering and one made to suppress bidding when a contract for the performance of a public work is to be awarded to the lowest bidder, or one where the intention is to have property sell for less than its real value, and thus deprive those interested therein of their just rights. The first class are justly declared void on grounds of public policy, and the second because of their corrupt purpose, and the fraudulent intent of the parties to them. Here there was no corrupt intent, and no illegality in White's attempting to obtain payment or security for that which was equitably due to him, and there was no valid ground for the claim that his purpose was injurious to those interested in the sale. The purpose of the agreement being lawful, and the motive of the parties honest, in the absence of a finding of unlawful intent, the case falls within the principle of the authorities cited.

We are also of the opinion that White's relinquishment of his right to bid at the sale was a sufficient consideration to support the mortgage. * * *

The judgment should be affirmed with costs.

*Judgment affirmed.*[46]

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## J. N. TILLOCK *v.* JOHN WEBB.

**(Supreme Judicial Court of Maine, 1868. 56 Me. 100.)**

Assumpsit for a note of $48, given by the defendant to the plaintiff, dated April 13, 1867. Plea, general issue, with brief statement deny-

[46] But in England the rule is otherwise. In Rawlings v. General Trading Co., [1921] 1 K. B. 635, the Court of Appeal, reversing a decision reported in [1920] 3 K. B. 30, held that an agreement made by two persons at an auction sale of government stores that in order to keep down prices only one of them

ing any consideration, and also alleging that the consideration was an unlawful one.

The case was tried by the judge (without the intervention of a jury), whose decision was subject to exceptions in matters of law.

The judge found, as matter of fact, that the defendant, at Bucksport, at 4½ o'clock on one Sunday afternoon in July, 1865, hired a horse and carriage of the plaintiff, who was a stable-keeper, and took from the house where the defendant was living, two young ladies, one of whom had come from church about an hour previous, whither she had walked that day from her home, two or three miles distant; that he drove about one half a mile beyond her house, and while in the act of turning the horse and carriage for the purpose of going back to leave her at her house, upset and badly injured the buggy, and frightened and more or less thereby injured the horse for stable use; that after tying together the broken buggy, the defendant undertook to lead the horse back, but the horse got away from him and ran home with the buggy; that the plaintiff had the carriage repaired at an expense of $60; that the defendant paid the plaintiff $30, and gave the note in suit for the balance of damages claimed.

The judge ruled that the facts disclosed a sufficient consideration for the note, and that the consideration was lawful. To which ruling the defendant alleged exceptions.

APPLETON, C. J. The defendant hired of the plaintiff and his partner a horse and wagon to ride on Sunday. The hiring was not for any purpose of necessity or charity. Being illegal between the parties, it is not made legal because the hirer did a kind act by conveying a young lady home, who had been "to meeting" during the day. The contract, so far as disclosed, was indefinite as to time, distance, and use, and not being for any purpose of necessity or charity, was one which the law will not enforce, nor will it give compensation for its violation. Way v. Foster, 1 Allen, 408; Morton v. Gloster, 46 Maine, 520.

If the defendant injured the horse and wagon by his careless or negligent driving, the remedy for the bailors would be against him for breach of his duty as bailee,—that is, for a breach of the duties arising from and under the contract of bailment. But, as that contract was against the provisions of the statute, no action could have been maintained upon it.[47]

should bid and that they should share the profits was not illegal or against public policy and was enforceable. Scrutton, L. J., dissented.

On contracts to suppress bidding at judicial sales, see Ann. Cas. 1917 D, 232, note; 38 L. R. A. (N. S.) 719, note.

[47] Maine is one of the jurisdictions holding that where a horse is hired on Sunday in violation of the Sunday statute and the hirer injures it through his negligence, as by immoderate driving, the hirer is not liable in tort in the absence of a statute making the violation of the Sunday laws no defense to a tort action, because in the judgment of the Maine court the other party,

The only consideration for the note is the liability of the defendant under a contract prohibited by law; but this cannot be regarded as a legal consideration. The rights of the parties remain as if no note had been given. The original contract, being void, was not susceptible of ratification. Day v. McAllister, 15 Gray, 433.[48]

In Morton v. Gloster, 46 Maine, 520, and in Woodman v. Hubbard, 5 Foster, 520, the bailee was guilty of a conversion of the property bailed, and was held liable therefor in trover. Not so here. The defendant is not proved to have kept the horse and wagon longer or to have driven further than he agreed to. He is not shown to have been guilty of any act of conversion.

*Exceptions sustained.*[49]

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## BENJAMIN SHARP, ADM'R OF ANNA SHARP *v.* MOSES FARMER.

(Supreme Court of North Carolina, 1838. 20 N. C. 255.)

This was an action of Assumpsit commenced in the name of Benjamin Sharp and his wife Anna, and upon the death of the wife, contin-

the bailor, cannot recover without relying on the illegal contract of bailment. Parker v. Latner, 60 Me. 528 (1872). But *contra*, see the horse driving case of Newbury v. Luke, 68 N. J. L. 189 (1902), where the court held that the Sunday overdriving of the horse and not the Sunday contract law violation was the proximate cause of the injury. Compare, however, Brunhoelzl v. Brandes, 90 N. J. L. 31 (1917), which while not a Sunday contract case was one of an infant's contract as bailee and the infant's negligence as to the bailed property, and where Garrison, J., said (pp. 32-33):

"In the present case the promise of the infant as bailee was that he would exercise reasonable care in driving the borrowed car. If injury came to the car, because of the failure of the bailee to exercise such care, he cannot be held liable therefor in tort without being in effect held liable for a breach of his promise. The facts that constitute the breach of such promise cancel all of the facts that constitute the alleged tort, leaving nothing over and above the breach of the contract upon which to found an action."

[48] But "the terms of an agreement made on Sunday may subsequently be adopted by the parties on a secular day as the terms of a [new] contract then made. In most, though not all, of the cases supporting the proposition that a Sunday contract may be ratified, it will be found that these conditions existed." 3 Williston on Contracts, § 1707, p. 2991.

[49] In the case of Sunday contracts, as of others, if legal and illegal are inextricably mixed so as not to be separated without making a new contract for the parties, as where the contract is for services at so much per seven day week, there can be no recovery on the contract. Stewart v. Thayer, 168 Mass. 519 (1897). Later, in the same case, it was held that there could be no quasi contract recovery for six-sevenths or any of the services. Stewart v. Thayer, 170 Mass. 560 (1898), Holmes J., for the court, pointing out, "that this contract was bad, not because of the time when it was made, but because of its contents. Unless the original contract had been split up, of which there was no pretense, there could be no question of fact whether a valid contract

ued by the said Benjamin as her administrator. The defendant pleaded the general issue, and upon the trial at Edgcomb on the last circuit before his Honor Judge Saunders, it appeared that the plaintiff was entitled in right of his wife to a distributive share of the estate of one Jerusha Farmer, deceased, and thereupon made an agreement with the defendant, who was also a distributee, that the latter, instead of taking out letters of administration on the estate of the said Jerusha should collect and sell the estate, and, after paying the debts, divide the residue among those entitled to distribution. The defendant, in pursuance of this agreement, sold the property and paid the debts of the said Jerusha, and a balance remaining in his hands, the plaintiff demanded the share to which he was entitled in right of his wife, and upon the defendant's refusal to pay the same brought this suit.

His Honor being of opinion, upon these facts, that the right of action vested in the plaintiff alone in his own right, and not in the plaintiff and his wife, directed a nonsuit to be entered and the plaintiff appealed.

BUFFIN, C. J. The point, whether the right of action on this contract, supposing it to be a lawful and valid contract, is in the husband in his own right, or survived to him as administrator of the wife, involves much nice learning. We are relieved from going into it by other matter apparent on the record, upon which we are satisfied that neither the husband, nor the husband and wife, together, could have an action upon this contract. It is an agreement between the next of kin of an intestate for an administration of the estate and its distribution by one of them, without obtaining letters of administration, or taking the oath of office, or giving bond. This is prohibited by the act of 1715, Rev. Stat. ch. 10, secs. 4 and 5, under a penalty of fifty pounds. (See 1 Rev. Stat. ch. 46, sec. 8.) After a vast number of cases upon the subject, it seems to be now perfectly settled, that no action will be sustained in affirmance and enforcement of an executory contract to do an immoral act, or one against the policy of the law, the due course of justice, or the prohibition of a penal statute. The distinction between an act *malum in se* and one merely *malum prohibitum* was never sound, and is entirely disregarded; for the law would be false to itself if it allowed a party through its tribunals to derive advantage from a contract made against the intent and express provisions of the law. Lankton v. Hughes, 1 Maul & Selw. 593, and Beasley v. Bignold, 5 Barn, and Ald. 341, establishes this principle upon consideration of all the previous cases.[50] It will be seen at once that the court could not give

was not made at a later time, such as sometimes has arisen under the Sunday law."

[50] "The distinction between *malum in se* and *malum prohibitum* has long since been exploded, and as 'There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal' (Bank of United States v. Owen, 27 U. S., 2 Pet. 527, 539), it is clear that contracts in direct violation of statutes expressly forbidding their execu-

the plaintiff a judgment; since by the very act of receiving the sum recovered the plaintiff would be executor *de son tort*, which is a consequence to which a court cannot allow itself to be made accessory.

The nonsuit must therefore stand and the judgment be affirmed.

PER CURIAM.

*Judgment affirmed.*[51]

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## RANDALL *v.* TUELL.

(Supreme Judicial Court of Maine, 1897. 89 Me. 443, 36 Atl. 910, 38 L. R. A. 143.)

FOSTER, J.[52] The only question presented in this case is whether an innholder, who has no license, under Rev. St. c. 27, can recover for board and lodging furnished by him in such inn.

While the statute contains no express provision declaring contracts by an unlicensed innholder to be void, it does, by § 13, expressly provide that "no person shall be a common innholder or victualer without a license, under a penalty of not more than fifty dollars."

It is the general doctrine, now settled by the great weight of authority, that where a license is required for the protection of the public, and to prevent improper persons from engaging in a particular business, and the license is not for revenue merely, a contract made by an unlicensed person in violation of the act is void.

Did the legislature, by the requirement of a license, intend to prohibit the exercise of the business without a license, or was the statute enacted for revenue purposes only?

It can hardly be contended that the statute is in any sense for mere revenue. The fee required is only one dollar. The licensee must show that he is a man of good moral character, must give bond not to violate the prohibitory law, and must allow no gambling on his premises. The legislative intent is best inferred from the language of the statute itself. The statute is explicitly prohibitory, and the license required is clearly for the protection of the public, and to prevent improper persons from engaging in a particular business.

The question has come before the courts not only in this, but in other states, and the great trend of authority is in but one direction.

* * *

A contract for shingles not surveyed as required by law was held void in Richmond v. Foss, 77 Me. 590, 1 Atl. 830, although the statute contained no express prohibition.

tion, cannot be enforced." Fuller, C. J., in Gibbs v. Consolidated Gas Co., 130 U. S. 396, 411-412 (1888).

51 On validity of family settlement of intestate's estate, see 6 A. L. R. 555, note.

52 The statement of facts and parts of the opinion are omitted.

In Cope v. Rowland, 2 Mees. & W. 149, it was held that a person acting as a broker without license could not recover his commissions, where the statute required a license, and imposed a penalty for its violation. "It is perfectly settled," says Baron Parke, "that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition." * * *

In Tennessee the court say that the revenue test is to be applied only where there is doubt from the language of the statute itself whether or not the legislature intended to prohibit the exercise of the privilege without a license, and that under a statute providing that the business of a real estate broker shall not be pursued without a license it was held that an unlicensed broker could not recover his commission. Stevenson v. Ewing, 87 Tenn. 46, 9 S. W. 230.

If the statute in question was enacted for revenue purposes only, instead of being prohibitory, the plaintiff might properly recover. But we are satisfied that such was not the intention of the legislature. The statute being by implication prohibitory by reason of the penalty attached, the plaintiff is precluded from recovering. Basing his action upon a clear violation of the statute, he cannot successfully invoke the aid of the court. Miller v. Post, 1 Allen (Mass.) 434.

*Exceptions [of defendant] sustained.*[53]

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## GRIFFITH *v.* WELLS.

**(Supreme Court of New York. July, 1846. 3 Denio, 226.)**

Error to Oneida, C. P. Griffith sued Wells before a justice of the peace in December, 1843, and declared in assumpsit for two half gallons of whisky and two glasses of beer, sold and delivered to the defendant, of the value of three shillings and six pence. The plaintiff, who was a grocer, proved his declaration. The defence was, that the plaintiff sold the liquor without having a license to sell spirituous liquors. The justice gave judgment for the plaintiff for 44 cents damages, besides costs. On *certiorari*, the C. P. reversed the judgment, on the ground that the plaintiff did not show a license to sell spirituous liquors. The plaintiff brings error.

[53] On effect of failure to procure license for business on validity of contract therein, see 16 L. R. A. 423, note; 12 L. R. A. (N. S.) 613, note. On effect of contract by teacher without license or certificate of qualification, see 42 L. R. A. (N. S.) 412, note. On right of one not admitted to practice, or unlicensed, to recover compensation for legal services, see 4 A. L. R. 1087, note.

BRONSON, C. J. Our excise law does not, in terms, prohibit the sale of strong or spirituous liquors without a license, nor declare the act liberal; but only inflicts a penalty upon the offender. 2 Rev. St. 680, §§ 15, 16. From this it is argued, that although the seller without a license incurs a penalty, the contract of sale is valid, and may be enforced by action. But it was laid down long ago, that "where a statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful; for it cannot be intended that a statute would inflict a penalty for a lawful act." Bartlett v. Viner, Skin. 322. In the report of the same case in Carthew (page 252), Holt, C. J., said: "A penalty implies a prohibition, though there are no prohibitory words in the statute." Although this was but a *dictum*, the doctrine has been fully approved. De Begnis v. Armistead, 10 Bing. 107; Foster v. Taylor, 3 Nev. & M. 244, 5 Barn. & Adol. 887; Cope v. Rowlands, 2 Mees. & W. 149; Mitchell v. Smith, 1 Bin. 110, 4 Dall. 269; Leidenbender v. Charles, 4 Serg. & R. 159, per Tilghman, C. J.; Bank v. Merrick, 14 Mass. 322. When a license to carry on a particular trade is required for the sole purpose of raising revenue, and the statute only inflicts a penalty by way of securing payment of the license money, it may be that a sale without a license would be valid. Johnson v. Hudson, 11 East, 180; Brown v. Duncan, 10 Barn. & C. 93; Chit. Cont. (Ed. 1842) 419, 697. But if the statute looks beyond the question of revenue, and has in view the protection of the public health or morals, or the prevention of frauds by the seller, then, though there be nothing but a penalty, a contract which infringes the statute cannot be supported. Law v. Hodgson, 2 Camp. 147; Brown v. Duncan, 10 Barn. & C. 93; Foster v. Taylor, 3 Nev. & M. 244, 5 Barn. & Adol. 887; Little v. Poole, 9 Barn. & C. 192; Tyson v. Thomas, McClel. & Y. 119; Wheeler v. Russel, 17 Mass. 258; Bensley v. Bignold, 5 Barn. & Ald. 335; Drury v. Defontaine, 1 Taunt. 136, per Mansfield, C. J.; Cope v. Rowlands, 2 Mees. & W. 149; Houston v. Mills, 1 Moody & R. 325. Now I think it quite clear, that in the enactment of our excise law the legislature looked beyond the mere question of revenue, and intended to prevent some of the evils which are so likely to flow from the traffic in spirituous liquors. If revenue alone had been the object, licenses would have been allowed indiscriminately to all. But the statute forbids a license to any one, whether tavern-keeper or grocer, who is not of good moral character; and he must moreover give bond, with sureties, that his house or grocery shall not become disorderly. Sections 6, 7, 13. These regulations were evidently intended to protect the public, in some degree, against the consequences which might be expected to follow from allowing all persons, at their pleasure, to deal in strong liquors. And although the statute only inflicts a penalty for selling without a license, the contract is illegal, and no action will lie to enforce it. The justice was wrong; and his judgment has been properly reversed by the common pleas. *Judgment affirmed.*

## JOHN BISBEE *v.* MARY McALLEN.

(Supreme Court of Minnesota, 1888. 39 Minn. 143, 39 N. W. 299.)

Action for goods sold and delivered. The defendant pleaded that unsealed weights and measures were used. The reply alleged that no sealed weights or measures were provided in the county of sale, that defendant bought with full knowledge of that fact and that all the goods sold were of the full weight and measure charged therefor. A demurrer to the reply was sustained and the plaintiff appealed.

VANDERBURGH, J.† The question presented for consideration in this case is raised upon the sufficiency of the second defence set up in the answer, where it appears that the goods alleged to have been sold to the defendant, and for the price of which this action is brought, were sold by weight and measurement, and that such weight and measurement were unlawfully ascertained and fixed by certain unsealed measures, scales, and weights, which had never been proved, tested, or sealed, as required by the statute. Under Gen. St. 1878, c. 21, § 11, a sale of goods, wares, and merchandise by any scale-beam, steelyard, weight, or measure, not proved and sealed in accordance with the provisions of that chapter, is made a misdemeanor, and subjects the person making such sale to a penalty of not less than five nor more than one hundred dollars. The provision for a penalty in this section implies a prohibition of such sales. That is to say, if goods are sold by weight or measure, the law absolutely requires that the scales or measures used should be approved by the sealer of weights and measures for the county, as the statute provides.

It stands admitted upon the record, then, in this case, that the sale in question here, as made, was prohibited, and in violation of the statute. The weighing or measuring is not a collateral matter, but is directly involved in the act of selling and the contract of sale. It regulates the quantity to be delivered and the amount to be paid. And where the statute has in view the prevention of fraud by the seller, then, though there be nothing but a penalty, a contract which infringes the statute cannot be upheld. Griffith v. Wells, 3 Denio, 226, and cases; Lewis v. Welch, 14 N. H. 294. Here the intent of the statute is clearly to prevent sales by unproved and unsealed scales or measures, and its object is undoubtedly to protect the public from fraud or imposition by the use of false or inaccurate balances and measurements. It covers all cases of sales by weight or measure, and this case is clearly within it. The doctrine appears to be too well settled to require extended discussion. Brackett v. Hoyt, 29 N. H. 264; Smith v. Arnold, 106 Mass. 269; Woods v. Armstrong, 54 Ala. 150 (25 Am. Rep. 671, notes and cases); Ingersoll v. Randall, 14 Minn. 304 (400). In some cases a remedy has been suggested and recognized outside the prohibit-

† The statement of the pleadings is abbreviated.

ed contract. Pratt v. Short, 79 N. Y. 437, 445. But no such question is involved in this case. In respect to defences of this kind, we adopt the language of the court in Lewis v. Welch, *supra*: "The objection that the contract is illegal as between the parties is never very creditable to him who makes it. But it is not out of favor to him that the objection is sustained, but from regard to the law. The advantage he derived from it is altogether accidental." The supposed hardships of particular cases must yield to the general purposes of the act, and the modification of the law, if any shall be found necessary, must be by the legislature.

*Order affirmed.*[54]

[54] "Frequently a statute imposes a penalty on the doing of an act without either prohibiting it or expressly declaring it illegal or void. In cases of this kind the decisions of the courts are not in harmony. By some courts it is held that an agreement founded on or for the doing of such penalized act is void (9 Cyc. 476, and note 2); in accordance with the view of Lord Holt in an old case:

"'Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibiting words in the statute.' Bartlett v. Vinor, Carth. 251, 252.

"Other courts have held that if, for example, the penalty is imposed for the protection of the revenue, it may be presumed that the legislature only desired to make it expensive to the parties in proportion as it is unprofitable to the revenue. Others have regarded the question as one of legislative intent, and declared the proper rule to be that the courts will look to the language of the statute, the subject-matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if from all these it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold and construe the statute accordingly. Wheeler v. Hawkins, 116 Ind. 515, 19 N. E. 470; Dillon v. Allen, 46 Iowa, 299, 26 Am. Rep. 145; Lindsey v. Rutherford, 17 B. Mon. (Ky.) 245; Coombs v. Emery, 14 Me. 404; Bowditch v. New England Mut. L. Ins. Co., 141 Mass. 292, 4 N. E. 798, 55 Am. Rep. 474; Lewis v. Welch, 14 N. H. 294; Ruckman v. Bergholz, 37 N. J. Law, 437; Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531; Holt v. Green, 73 Pa. 198, 13 Am. Rep. 737; Aiken v. Blaisdell, 41 Vt. 655; Niemeyer v. Wright, 75 Va. 239, 40 Am. Rep. 720; Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759; St. Louis Nat. Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; Barton v. Muir, L. R. 6 P. C. 134.

"As a general rule, a contract founded on an act forbidden by a statute under a penalty is void, although it be not expressly declared to be so; but it does not necessarily follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. The question is in a great measure one of legislative intent, and its determination depends, as in other cases, on the construction of the statute. Niemeyer v. Wright, 75 Va. 239, 40 Am. Rep. 720. Such was the conclusion of another court of high authority. Harris v. Runnels, 12 How. 79, 13 L. Ed. 901, which court notes a distinction between statutes to raise revenue and those which are made for the protection of the public from moral evils, and those, which it is known by experience, society must be guarded from by preventive legislation. The

## MILLWARD *v.* LITTLEWOOD.

(Court of Exchequer, 1850. 5 Ex. 775.)

Assumpsit. Declaration on mutual promises to marry, the plaintiff, an unmarried woman, alleging a subsequent discovery that defend-

court, following Baron Parke's opinion in Cope v. Rowlands, 2 M. & W. 149, says:

"'A statute, containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follows that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void. It is not necessary, however, that the reverse of that should be expressed in terms to exempt a contract from the rule. The exemption may be inferred from those rules of interpretation, to which, from the nature of legislation, all of it is liable when subjected to judicial scrutiny. That legislators do not think the rule one of universal obligation, or that, upon grounds of public policy, it should always be applied, is very certain. * * * It must be obvious, from such diversities of legislation, that statutes forbidding or enjoining things to be done, with penalties accordingly, should always be fully examined, before courts should refuse to give aid to enforce contracts which are said to be in contravention of them.'

"This court has lately applied the rule we have just stated, and with reference to a similar question, arising out of the construction of a town ordinance requiring sewer connections to be made, in Hines v. Norcott, 176 N. C. 123, 96 S. E. 899, where it was said:

"'The case of Courtney v. Parker, 173 N. C. 479 [92 S. E. 324], does not conflict with our decision, and is not an authority in support of the defendant's contention. There the defendant had done the very thing which was, in express terms or by the clearest implication, forbidden by the statute, and which it was unlawful to do, and every time he made a sale in the same manner, he did the same thing which the statute was intended to prohibit, and which it declared should be unlawful and a misdemeanor, punishable by fine and imprisonment. In other words, the statute declared that he should conduct his business in a certain way, and not otherwise, and that he should not conduct it at all "unless" he complied with the provisions of the statute. He did not pursue the prescribed method, but the one denounced, and his act was therefore held to be illegal and his contract tainted by it. That is not our case. There is nothing in the lease transaction which is immoral *per se*, and therefore it is our right to search out the intention of the council and the meaning of the ordinance, in the language of the latter, and discover, if we can, what was its purpose, and not destroy contracts, with perhaps disastrous results, unless we find that to have been the real meaning and object in view. Courtney v. Parker, *supra*, and cases cited therein. The ordinance does not, in terms or by implication, forbid the sale or leasing of premises having no sewer connections, but it is restricted to the injunction that in certain instances the owner should make such connections under a penalty for his failure to do so. There is no inhibition in this contract against the making of such connections, and the owner is perfectly free to make them at any time. There is not even a reference to the matter, one way or another.'" Walker, J., in Price v. Edwards, 178 N. C. 493, 497-499 (1919).

See Uhlmann v. Kin Daw, 97 Ore. 681, 193 Pac. 435 (1920), a decision under a

ant was a married man. At the trial the plaintiff had a verdict and defendant moved to arrest the judgment.

ALDERSON, B.[55] It is unnecessary to decide whether a promise by a man to marry a woman after his wife's death is good, because here it is found as a fact that the plaintiff had no knowledge that the defendant was married. In my opinion the difficulty arises in respect of the promise alleged being a promise to marry within an indefinite time. What was decided by the recent case in the Court of Common Pleas, [Wild v. Harris, 7 C. B. 999,] I think, was rightly decided.

PARKE, B. * * * The promise by the defendant to marry the plaintiff implies, on his part, that he is then capable of marrying, and he has broken that promise at the time of making it. The consideration to support the promise is, that the plaintiff, at the request of the defendant, engaged to marry him within a reasonable time, and therefore she remained unmarried; and that is a sufficient consideration to bind the defendant. And if she discovered, on the day after the defendant's promise, that he was a married man, I should nevertheless say that the consideration would be sufficient.

*Rule refused.*[56]

statute requiring persons transacting business under an assumed name or designation to file a certificate with the county clerk, setting forth both the assumed name or designation and the true names and addresses of the persons. The statute provided that no person or persons carrying on business as aforesaid should maintain an action in any of the courts of the state without alleging and proving the filing of the certificate and that failure to file such certificate should be "*prima facie* evidence of fraud in receiving credit." The penalty clause read: "Any person violating any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $100." The opinion of the court, which was concerned with the effect of the statute on contracts by parties violating the statute, ends: "Our conclusion is that failure to file the certificate affects only the qualification of the person to sue, and that upon filing a certificate the disqualification is removed, and a suit or action may be maintained on a contract made before or after such filing."

[55] The statement of the pleadings is abbreviated, and the opinion of Pollock, C. B., and part of the opinion of Parke, B., are omitted.

[56] "Where the impossibility is known to the promisor, but not known to the promisee, he must be taken to promise absolutely; as where a married man promises to marry a woman, who was then unaware of his being married [citing Wild v. Harris, 7 C. B. 999; Milward v. Littlewood, 5 Exch. 775]." Leake on Contracts, 5 Ed., 483, 484.

In Spiers v. Hunt, [1908] 1 K. B. 720, 723, Phillimore, J., suggests that Milward v. Littlewood, *supra*, rests "upon the ground of estoppel or warranty of capacity."

"Cases have arisen where a married man has deceived a woman into believing that he was unmarried, in which the courts have held that in a suit for damages the defendant is estopped to deny that he was unmarried. This is upon the theory of fraud; that the duty was upon him to know whether he was married or not and not to deceive the other contracting party. * * *

## ROYS *v.* JOHNSON ET AL.

(Supreme Judicial Court of Massachusetts, 1856. 7 Gray, 162.)

METCALF, J.[57] It is agreed by the parties that the plaintiff performed for the defendants the services for which he now seeks to recover payment and that they have not paid him. It is for them, therefore, to show that he is not entitled to recover. This, in our opinion, is not shown by the statement of facts submitted to us. It appears, indeed, from that statement, that the defendants, without a license, set up theatrical exhibitions, in which they employed the plaintiff as an actor; and it follows, of course, that they thereby violated the law, and subjected themselves to punishment. But it does not appear that the plaintiff knew that they had no license. Unless he knew that fact, he is in no legal fault; and where a defendant is the only person who has violated the law, he cannot be allowed to take advantage of his own wrong, to defeat the rights of a plaintiff who is innocent.

In the cases cited by the defendants' counsel, where defences were sustained because the claims were void for illegality, the parties suing knew, or were bound to know, that they or the parties sued were violating or undertaking to violate the law. And this distinguishes all those cases, as well in law as in common justice, from the case at bar. * * * In the present case, we treat the plaintiff as not knowing that the defendant had no license, because the statement of facts does not show that he knew it.

No case is cited in which the courts have permitted the married person to recover." Cornish, J., in Rich v. Fulton, (Neb.), 177 N. W. 175, 176 (1920). (1920).

See Ashley v. Dalton, 119 Miss. 672, 81 So. 488 (1919), where the judge quotes "a minor poet"; Waddell v. Wallace, 32 Okla. 140 (1912); Carter v. Rinker, 174 Fed. 882 (1909).

See, however, Pollock v. Sullivan, 53 Vt. 507 (1881), holding that an action of tort for deceit will lie and implying that assumpsit should not. See also Edward W. Hope, Ignorance of Impossibility as Affecting Consideration, 32 Harv. L. Rev. 679.

Where a married man, known by the woman to be such, agrees to marry her after he gets a divorce from his wife, then even though the divorce suit is pending at the time, the agreement is illegal. Noice v. Brown, 38 N. J. L. 228 (1876), 39 N. J. L. 133 (1876). See, also, Paddock v. Robinson, 63 Ill. 99 (1872); Olson v. Saxton, 86 Ore. 670 (1917); Wilson v. Carnley, [1908] 1 K. B. 729.

But if a divorce has been granted and remarriage for a year or other specified time is forbidden, then even though it is forbidden by statute and not merely by court decree, the agreement, if it is one to marry after the forbidden period ends, is held to be legal. Mitchell v. Clem, 295 Ill. 150 (1920); Buelna v. Ryan, 139 Cal. 630 (1903). Compare Brown v. Odill, 104 Tenn. 250 (1899).

On validity of agreement to marry when one of the parties is already married, see 1 B. R. C. 917, note; 52 L. R. A. 660, note; L. R. A. 1918 B, 68, note; 14 Ann. Cas. 162, note.

[57] Part of the opinion is omitted.

It is ignorance of a fact, and not of the law, that saves the plaintiff's case. He undoubtedly knew, or was bound to know, that unlicensed theatrical exhibitions were unlawful; but he was not bound to know that the defendants had no license and were doing unlawful acts.

*Judgment for the plaintiff.*[58]

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JAMES H. LURTON, PLAINTIFF IN ERROR *v.* WILLIAM GILLIAM AND JAMES C. CHALLEN, DEFENDANTS IN ERROR.

(Supreme Court of Illinois, 1839. 2 Ill. (1 Scam.) 577, 33 Am. Dec. 430.)

Appeal by defendant below from a judgment for plaintiffs. The action was for goods sold as per the following memorandum:

"P. M. Brown & James Lurton

| | |
|---|---|
| To 2½ Yrds. Fine Cloth, $12 | $28.00 |
| Trimmings for Coat | 6.00 |
| | $34.00 |

"If Mr. Douglass is elected to Congress, P. M. Brown is to pay for the cloth; if Mr. Stuart is elected, James Lurton has it to pay." Mr. Stuart was elected.

SMITH, J.[59] * * * From the facts disclosed by the bill of exceptions, it appears that the contract for the cloth, although a contingent one as to the ultimate liability of the one or the other of the parties, was to be absolute, as to the party who should lose the bet. The purchase was made and the credit given, after the consummation of the bet.

It does not appear that the defendants in error were in any way parties to the bet, or encouraged it; and we do not perceive that their contract for the sale and delivery of the cloth, was tainted with a participation in the original agreement between the parties. Their mere knowledge of it could not certainly connect them with it; and having parted with their property under the arrangement, common honesty surely requires that the party at whose instance it was delivered, conformably to his agreement, should be held answerable for the value of the merchandise delivered. Money loaned to be used in

[58] "A statute may declare a contract to be void, and still but one of the parties be guilty of its violation. Enactments of this character are often made for the purpose of protecting one class of men from the oppression and impositions of another class of men; and in such cases the really guilty party is never allowed any relief under the statute or permitted to set up the statute as a defense to relief sought by the other party." Treat, J., in Ferguson v. Sutphen, 8 Ill. 547, 573 (1846).

[59] The statement of facts is abbreviated and parts of the opinion are omitted.

gaming, could heretofore have been recovered back at common law, but it is now prohibited by the statute against gaming.

It is not now necessary to go into the various reasons given for the decisions which have prevailed in courts, relative to gaming contract, because this contract cannot be considered *contra bonos mores,* or against sound policy. * * *

*Judgment affirmed.*[60]

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## TYLER *v.* CARLISLE.

(Supreme Judicial Court of Maine, 1887. 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301.)

PETERS, C. J. The plaintiff claims to recover a sum of money loaned by him while the defendant was engaged in playing at cards. The ruling at the trial was that, if the plaintiff lent the money with an express understanding, intention, and purpose that it was to be used to gamble with, and it was so used, the debt so created cannot be recovered; but otherwise if the plaintiff had merely knowledge that the money was to be so used. Upon authority and principle the ruling was correct. Any different doctrine would, in most instances, be impracticable and unjust. It does not follow that a lender has a guilty purpose merely because he knows or believes that the borrower has. There may be a visible line between the motives of the two. If it were not so, men would have great responsibilities for the motives and acts of others. A person may loan money to his friend,—to the man,—and not to his purpose. He may at the same time disapprove his purpose. He may not be willing to deny his friend, however much disapproving his acts. In order to find the lender in fault, he must himself have an intention that the money shall be illegally used. There must be a combination of intention between lender and borrower,—a union of purposes. The lender must in some manner be a confederate or participator in the borrower's act,—be himself implicated in it. He must loan his money for the express purpose of promoting the illegal design of the borrower, not intend merely to serve or accommodate the man.

[60] See Winchester v. Nutter, 52 N. H. 507 (1872), where the plaintiff sued the "captains" of opposing sides in a squirrel hunt for twenty-four suppers furnished them. The plaintiff had presided at the meeting at which it was arranged that the losing side should pay for the dinners of the winning side, yet was allowed to recover since the arrangement was that the two captains were to engage the suppers and be responsible to the plaintiff for the whole of them and afterwards adjust the matter with the men so that each man on the side that got beat should pay for his own supper and for that of one man on the side that beat. The plaintiff was not a party to the bet, but as chairman of the meeting, knew all about it.

In support of this view many cases might be adduced. A few prominent ones will suffice. Greene v. Collins, 3 Cliff. 494, Fed. Cas. No. 5,755; Gaylor v. Soragen, 32 Vt. 110; Hill v. Spear, 50 N. H. 253; Peck v. Briggs, 3 Denio, 107; McIntyre v. Parks, 3 Metc. (Mass.) 207; Banchor v. Mansel, 47 Me. 58. See Franklin Co. v. Lewiston Sav. Bank, 68 Me. 47.

Nor was the branch of the ruling wrong that plaintiff, even though a participator, could recover his money back if it had not been actually used for illegal purposes. In minor offenses, the *locus penitentiæ* continues until the money has been actually converted to the illegal use. The law encourages a repudiation of the illegal contract, even by a guilty participator, as long as it remains an executory contract, or the illegal purpose has not been put in operation. The lender can cease his own criminal design, and reclaim his money. "The reason is," says Wharton, "the plaintiff's claim is not to enforce, but to repudiate, an illegal contract." Whart. Cont. § 354, and cases there cited. The object of the law is to protect the public,—not the parties. "It best comports with public policy to arrest the illegal transaction before it is consummated," says the court in Stacy v. Foss, 19 Me. 335. See White v. Bank, 22 Pick 181. The rule allowing a recovery back does not apply where the lender knows that some infamous crime is to be committed with the means which he furnishes. It applies only where the minor offenses are involved.

*Exceptions [of plaintiff] overruled.*[61]

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## PEARCE AND ANOTHER *v.* BROOKS.

(Court of Exchequer Chamber, 1866. L. R., 1 Exch. 213.)

Declaration stating an agreement by which the plaintiffs agreed to supply defendant with a new miniature brougham on hire, till the

61 On right to recover back money loaned for the purpose of being used in an illegal transaction, or with knowledge of borrower's intention so to use it, see L. R. A. 1918 C, 247, note. Local statutes should be consulted.

"A., a resident of this state, loans money to B., who gives a mortgage upon land situated in this state as security for the loan; but at A.'s request the mortgage and note are made to run to C., who is a nonresident, and this is done for the purpose of defrauding the state out of the taxes upon the mortgage. A. takes an assignment from C. of the note and mortgage, but does not place the assignment on record until foreclosure is sought. Upon B.'s default, A. commences foreclosure proceedings, and B. defends upon the ground that the contract was and is void as against public policy. Upon these facts the Nevada and Kansas courts have refused to foreclose the mortgage. Drexler v. Tyrrell, 15 Nev. 114; Sheldon v. Pruessner, 52 Kan. 579, 35 Pac. 201, 22 L. R. A. 709. But the decided weight of authority is against the holding of these courts. Crowns v. Forest Land Co., 99 Wis. 103, 74 N. W. 546; Nichols v. Weed Sewing

purchase money should be paid by instalments in a period which was not to exceed twelve months; the defendant to have the option to purchase as aforesaid, and to pay 50*l.* down; and in case the brougham should be returned before a second instalment was paid, a forfeiture of fifteen guineas to be paid in addition to the 50*l.*, and also any damage, except fair wear. Averment, that the defendant returned the brougham before a second instalment was paid, and that it was damaged. Breach, nonpayment of fifteen guineas, or the amount of the damage. Money counts.

Plea 3, to the first count, that at the time of making the supposed agreement the defendant was to the knowledge of the plaintiffs a prostitute, and that the supposed agreement was made for the supply of a brougham to be used by her as such prostitute, and to assist her in carrying on her said immoral vocation, as the plaintiffs when they made the said agreement well knew, and in the expectation by the plaintiffs that the defendant would pay the plaintiffs the moneys to be paid by the said agreement out of her receipts as such prostitute. Issue.

The case was tried before Bramwell, B., at Guildhall, at the sittings after Michaelmas Term, 1865. It then appeared that the plaintiffs were coach-builders in partnership, and evidence was given which satisfied the jury that one of the partners knew that the defendant was a prostitute; but there was no direct evidence that either of the plaintiffs knew that the brougham was intended to be used for the purpose of enabling the defendant to prosecute her trade of prostitution; and there was no evidence that the plaintiffs expected to be paid out of the wages of prostitution.

The learned judge ruled that the allegation in the plea as to the mode of payment was immaterial, and he put to the jury the following questions: 1. Did the defendant hire the brougham for the purpose of her prostitution? 2. If she did, did the plaintiffs know the purpose for which it was hired? The jury found that the carriage was used by the defendant as part of her display, to attract men; and that the plaintiffs knew it was supplied to be used for that purpose. They gave nothing for the alleged damage.

On this finding the learned judge directed a verdict for the defendant, and gave the plaintiffs leave to move to enter a verdict for them for the fifteen guineas penalty.

*M. Chambers*, Q. C., in Hilary Term, obtained a ruled accordingly,

Machine Co., 27 Hun, 200, s. c. 97 N. Y. 650; Callicott v. Allen, 31 Ind. App. 561, 67 N. E. 196; Jones on Mortgages, § 619, and note; Stilwell v. Corwin, 55 Ind. 433, 23 Am. Rep. 672. We think the rule is quite well settled that courts will not hold a contract void as against public policy, unless the contract itself requires that something be done which adversely affects the public welfare, or is forbidden by law, or the consideration is illegal or immoral. Callicott v. Allen, above." Holloway, J., in Murray v. White, 42 Mont. 423, 437-438 (1911).

on the ground that there was no evidence that the plaintiffs knew the purpose for which the brougham was to be used; and that if there was, the allegation in the plea that the plaintiffs expected to be paid out of the receipts of the defendant's prostitution was a material allegation, and had not been proved. Bowry v. Bennet, 1 Camp. 348.

[POLLOCK, C. B., referred to Cannan v. Bryce, 3 B. & A. 179.]

*Digby, Seymour,* Q. C., and *Beresford,* showed cause. No direct evidence could be given of the plaintiffs' knowledge that the defendant was about to use the carriage for the purpose of prostitution; but the fact that a person known to be a prostitute hires an ornamental brougham is sufficient ground for the finding of the jury.

[BRAMWELL, B. At the trial I was at first disposed to think that there was no evidence on this point, and I put it to the jury, that, in some sense, everything which was supplied to a prostitute is supplied to her to enable her to carry on her trade, as, for instance, shoes sold to a street-walker; and that the things supplied must be not merely such as would be necessary or useful for ordinary purposes, and might be also applied to an immoral one; but they must be such as would under the circumstances not be required, except with that view. The jury, by the mode in which they answered the question, showed that they appreciated the distinction; and on reflection I think they were entitled to draw the inference which they did. They were entitled to bring their knowledge of the world to bear upon the facts proved. The inference that a prostitute (who swore that she could not read writing required an ornamental brougham for the purpose of her calling, was as natural a one as that a medical man would want a brougham for the purpose of visiting his patients; and the knowledge of the defendant's condition being brought home to the plaintiffs, the jury were entitled to ascribe to them also the knowledge of her purpose.]

Upon the second point, the case of Bowry v. Bennett, 1 Camp. 348, falls short of proving that the plaintiff must intend to be paid out of the proceeds of the illegal act. The report states that the evidence of the plaintiffs' knowledge of the defendant's way of life was "very slight;" and Lord Ellenborough appears to have referred to the intention as to payment, not as a legal test, but as a matter of evidence with reference to the particular circumstances of the case. The goods supplied there were clothes; without other circumstances there would be nothing illegal in selling clothes to a known prostitute; but if it were shown that the seller intended to be paid out of her illegal earnings, the otherwise innocent contract would be vitiated. Neither is Lloyd v. Johnson, 1 B. & P. 340, cited in the note to the last case, an authority for the plaintiffs, for there part of the contract would have been innocent, and all that the court says is, that it cannot "take into consideration which of the articles were used by the defendant to an improper

purpose, and which were not;" they had no materials for doing so. The present case rather resembles the case of Crisp v. Churchill, cited in Lloyd v. Johnson, 1 B. & P. 340, where the plaintiff was not allowed to recover for the use of lodgings let for the purpose of prostitution. Appleton v. Campbell, 2 C. & P. 347, is to the same effect.

*M. Chambers*, Q. C., and *J. O. Griffiths*, in support of the rule. As to the first point, the expressions of Buller, J., in Lloyd v. Johnson, 1 B. & P. at p. 341, are strongly in the plaintiffs' favor, especially his remarks on the case of the lodgings: "I suppose the lodgings were hired for the express purpose of enabling two persons to meet there." But in this case it is impossible to say that there was any express purpose of prostitution; the defendant might have used the brougham for any purpose she chose, as to take drives, to go to the theatre, or to shop. Even if there were evidence, the jury have not found the purpose with sufficient distinctness. But secondly, the last allegation in the plea is material; the plaintiffs must intend to be paid out of the proceeds of the immoral act. The words of Lord Ellenborough in Bowry v. Bennett, 1 Camp. 348, are very plain; the plaintiff must "expect to be paid from the profits of the defendant's prostitution."

[Bramwell, B. At the trial I refused to leave this question to the jury, but it has since occurred to me that the matter was doubtful. The purpose of the seller in selling is, that he may obtain the profit, not that the buyer shall put the thing sold to any particular use; it is for the buyer to determine how he shall use it. Suppose, however, a person were to buy a pistol, saying to the seller that he means with it to shoot a man and rob him; is the act of the seller illegal, or is it further necessary that he should stipulate to be paid out of the proceeds of the robbery? If the looking to the proceeds is necessary to make the transaction illegal, is it not also necessary that it should be part of the contract that he shall be so paid?]

Suppose a cab to be called by a prostitute, and the driver directed to take her to some known place of ill-fame, could it be said that he could not claim payment?

[Bramwell, B. If he could, this absurdity would follow, that if a man and a prostitute engaged a cab for that purpose, and if, to meet your argument, the driver reckoned on payment, as to the woman, out of the proceeds of her prostitution, the woman would not be liable, but the man would, although they engaged in the same transaction and for the same purpose.]

If the contract is void for this reason, the plaintiffs were entitled to resume possession, and to bring trover for the carriage; a test, therefore, of the question will be, whether in such an action, if the jury found the same verdict as they have found here, on the same evidence, the plaintiffs would be entitled to recover.

[Martin, B. I think they would; and that if the carriage had not been returned in this case, the plaintiffs would, on our discharging this rule, be entitled to determine the contract on the ground of want of reciprocity, and to claim the return of the article.]

POLLOCK, C. B.[62] We are all of the opinion that this rule must be discharged. I do not think it is necessary to enter into the subject at large after what has fallen from the bench in the course of the argument, further than to say that since the case of Cannan v. Bryce, 3 B. & A. 179, cited by Lord Abinger in delivering the judgment of this court in the case of M'Kinnell v. Robinson, 3 M. & W. at p. 441, and followed by the case in which it was so cited, I have always considered it as settled law that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied. If, to create that incapacity, it was ever considered necessary that the price should be bargained or expected to be paid out of the fruits of the illegal act (which I do not stop to examine), that proposition has been overruled by the cases I have referred to, and has now ceased to be law. Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, *Ex turpi causa non oritur actio,* and whether it is an immoral or an illegal purpose in which the plaintiff has participated, it comes equally within the terms of that maxim, and the effect is the same; no cause of action can arise out of either the one or the other. The rule of law was well settled in Cannan v. Bryce, 3 B. & A. 179; that was a case which at the time it was decided, I, in common with many other lawyers in Westminster Hall, was at first disposed to regard with surprise. But the learned judge (then Sir Charles Abbott) who decided it, though not distinguished as an advocate, nor at first eminent as a judge, was one than whom few have adorned the bench with clearer views, or more accurate minds, or have produced more beneficial results in the law. The judgment in that case was, I believe, emphatically his judgment; it was assented to by all the members of the Court of King's Bench, and is now the law of the land. If, therefore, this article was furnished to the defendant for the purpose of enabling her to make a display favorable to her immoral purposes, the plaintiffs can derive no cause of action from the bargain. I cannot go with Mr. Chambers in thinking that everything must be found by a jury in such a case with that accuracy from which ordinary decency would recoil. For criminal law it is sometimes necessary that details of a revolting character should be found distinctly and minutely, but for civil purposes this is not necessary. If evidence is given which is sufficient to satisfy the jury of the fact of the

[62] The opinions of Bramwell, B., Martin, B., and Pigott, B., and some later remarks of Pollock, C. B., are omitted.

immoral purpose, and of the plaintiffs' knowledge of it, and that the article was required and furnished to facilitate that object, it is sufficient, although the facts are not expressed with such plainness as would offend the sense of decency. I agree with my brother Bramwell that the verdict was right, and that the rule must be discharged.

*Rule discharged.*[63]

[63] In Upfill v. Wright, 103 L. T. (N. S.) 834 (1910), the doctrine was extended to deny a recovery for rent to one whose agent, knowing that the defendant was the mistress of a certain man who frequently visited her at the flat and would indirectly pay the rent, had relet the flat to her.

In the United States the courts are divided in opinion as to whether a landlord who leases premises knowing that the lessee will use them to run, or will sublet them to one who will use them to run, a house of prostitution, should be allowed to recover the rent. See 19 L. R. A. (N. S.) 662, note; 39 L. R. A. (N. S.) 1104, note. In Ashford v. Mace, 103 Ark. 114 (1912), recovery was allowed where the landlord was indifferent as to the use. The court said that keeping a bawdy house was not a heinous felony "such as treason, murder, rape, etc." But against recovery, see Dougherty v. Seymour, 16 Colo. 289 (1891); Mitchell v. Campbell, 111 Miss. 806 (1916); Hunstock v. Palmer, 4 Tex. Civ. App. 459, 23 S. W. 294 (1893). See Ralston v. Broady, 20 Ga. 449 (1856). See also Levy & Co. v. Davis, 115 Va. 814 (1914), where the sellers of furniture to one who was to use it in her business of running a bawdy house were denied a recovery because the contract was in and of a business denounced by statute as a crime; and Standard Furniture Co. v. Van Alstine, 22 Wash. 670 (1900), where there was a conditional sale of furniture and house furnishing goods to a prostitute, knowing that she intended to put them to an immoral use and the seller was not allowed to recover them when the buyer defaulted in payments. The court in the case just cited thought that in a conditional sale the seller necessarily participated in or aided the illegal design of the vendee of which he had knowledge. See also C. M. & E. G. Ham v. Wilson (Miss.), 86 So. 298 (1920). Cf. Coburn v. Coburn (Tex. Civ. App.), 211 S. W. 248 (1919). As to sale of goods to keeper or inmate of house of ill fame, see L. R. A. 1917 B, 1168, note.

In Michael v. Bacon, 49 Mo. 474 (1872), the plaintiff was allowed to recover for papering and fitting up a house which he knew was to be used for gambling. On insurance on bawdy house or furniture therein, see 18 L. R. A. (N. S.) 214, note; L. R. A. 1917 B, 257, note.

In Dougherty v. Seymour, *supra*, it was held that the fact that the written lease is silent as to the purposes for which the premises are to be used does not stand in the way of a denial of recovery to the landlord.

In Wilhite v. Roberts, 4 Dana (Ky.), 172, 175 (1836), where the action was debt on a penal bond and defendant pleaded the champerty and maintenance statute, there being no stipulation or recital in the bond evidencing a violation of the statute, Ewing, J., for the court, said:

"Though it be a general rule that nothing can be averred and proved against the stipulations of a written contract, this rule does not apply where the contract is illegal, or against the positive prohibition of a penal statute. * * *

"No instrument is so sacred, when tinctured with illegality or fraud, as to raise it above the scrutiny of parol testimony. And indeed it would be highly impolitic that it should; for if this rule should prevail as applicable to illegal and vicious contracts, it would be an easy matter to place all contracts, however illegal or vicious, above the reach of the law. It would only be necessary for the parties, as is alleged in the case before the court, to have a secret, illegal

## CHESTER H. GRAVES AND OTHERS v. WALTER B. JOHNSON.

(Supreme Judicial Court of Massachusetts, 1892, and 1901. 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, 32 Am. St. Rep. 446, and 179 Mass. 53, 60 N. E. 383, 88 Am. St. Rep. 355.

January 26, 1892.—May 6, 1892.

HOLMES, J. This is an action for the price of intoxicating liquors. It is found that they were sold and delivered in Massachusetts by the plaintiffs to the defendant, a Maine hotel keeper, with a view to their being resold by the defendant in Maine, against the laws of that state. These are all the material facts reported; and these findings we must assume to have been warranted, as the evidence is not reported, so that no question of the power of Maine to prohibit the sales is open. The only question is whether the facts as stated show a bar to this action.

The question is to be decided on principles which we presume would prevail generally in the administration of the common law in this country. Not only should it be decided in the same way in which we should expect a Maine court to decide upon a Maine contract presenting a similar question, but it should be decided as we think that a Maine court ought to decide this very case if the action were brought there. It is noticeable, and it has been observed by Sir F. Pollock, that some of the English cases which have gone farthest in asserting the right to disregard the revenue laws of a country other than that where the contract is made and is to be performed, have had reference to the English revenue laws. Holman v. Johnson, 1 Cowp. 341; Pollock, Con. (5th Ed.) 308. See also M'Intyre v. Parks, 3 Met. 207.

The assertion of that right, however, no doubt was in the interest of English commerce (Pellecat v. Angell, 2 Cr., M. & R. 311, 313), and has not escaped criticism (Story, Confl. Laws, §§ 257, 264, note, 3 Kent Com. 265, 266, and Wharton, Confl. Laws, § 484), although there may be a question how far the actual decisions go beyond what would have been held in the case of an English contract affecting only English laws. See Hodgson v. Temple, 5 Taunt. 181; Brown v. Duncan, 10 B. & C. 93, 98, 99; Harris v. Runnels, 12 How. 79, 83, 84.

Of course it would be possible for an independent state to enforce all contracts made and to be performed within its territory, without regard to how much they might contravene the policy of its neighbors' laws. But in fact no state pursues such a course of barbarous isolation. As a general proposition, it is admitted that an agreement to break the laws of a foreign country would be invalid. Pollock, Con. (5th Ed.) 308. The courts are agreed on the invalidity of a sale when the con-

understanding and to introduce into a written contract, fair upon its face, stipulations that are legal, but highly penal, as a means to enforce a compliance with the terms of the secret illegal bargain. The arm of the law is not so short as to permit such evasions." See 16 Ann. Cas. 388, note; Ann. Cas. 1917 D, 426, note.

tract contemplates a design on the part of the purchaser to resell contrary to the laws of a neighboring state, and requires an act on the part of the seller in furtherance of the scheme. Waymell v. Reed, 5 T. R. 599; Gaylord v. Soragen, 32 Vt. 110; Fisher v. Lord, 63 N. H. 514; Hull v. Ruggles, 56 N. Y. 424, 429.

On the other hand, plainly, it would not be enough to prevent a recovery of the price that the seller had reason to believe that the buyer intended to resell the goods in violation of law; he must have known the intention in fact. Finch v. Mansfield, 97 Mass. 89, 92; Adams v. Coulliard, 102 Mass. 167, 173. As in the case of torts, a man has a right to expect lawful conduct from others. In order to charge him with the consequences of the act of an intervening wrongdoer, you must show that he actually contemplated the act. Hayes v. Hyde Park, 153 Mass. 514, 515, 516.

Between these two extremes a line is to be drawn. But as the point where it should fall is to be determined by the intimacy of the connection between the bargain and the breach of the law in the particular case, the bargain having no general and necessary tendency to induce such a breach, it is not surprising that courts should have drawn the line in slightly different places. It has been thought not enough to invalidate a sale, that the seller merely knows that the buyer intends to resell, in violation even of the domestic law. Tracy v. Talmage, 4 Kernan, 162; Hodgson v. Temple, 5 Taunt. 181. So of the law of another state. M'Intyre v. Parks, 3 Met. 207; Sortwell v. Hughes, 1 Curt. C. C. 244; Green v. Collins, 3 Cliff. 494; Hill v. Spear, 50 N. H. 253. (Dater v. Earl, 3 Gray, 482, is a decision on New York law.)

But there are strong intimations in the later Massachusetts cases that the law on the last point is the other way. Finch v. Mansfield, 97 Mass. 89, 92; Suit v. Woodhall, 113 Mass. 391, 395. And the English decisions have gone great lengths in the case of knowledge of intent to break the domestic law. Pearce v. Brooks, L. R. 1 Ex. 213; Taylor v. Chester, L. R. 4 Q. B. 309, 311.

However this may be, it is decided that when a sale of intoxicating liquor in another state has just so much greater proximity to a breach of the Massachusetts law as is implied in the statement that it was made with a view to such a breach, it is void. Webster v. Munger, 8 Gray 584; Orcutt v. Nelson, 1 Gray, 536, 551; Hubbell v. Flint, 13 Gray, 277, 279; Adams v. Coulliard, 102 Mass. 167, 172, 173. Even in Green v. Collins and Hill v. Spear, the decision in Webster v. Munger seems to be approved. See also Langton v. Hughes, 1 M. & S. 593; M'Kinnell v. Robinson, 3 M. & W. 434, 441; White v. Butt, 3 Cush. 448. If the sale would not have been made but for the seller's desire to induce an unlawful sale in Maine, it would be an unlawful sale on the principles explained in Hayes v. Hyde Park, 153 Mass. 514, and Tasker v. Stanley, 153 Mass. 148. The overt act of selling, which otherwise would be too remote from the apprehended result, an unlawful sale by

some one else, would be connected with it, and taken out of the protection of the law by the fact that that result was actually intended. We do not understand the judge to have gone so far as we have just supposed. We assume that the sale would have taken place, whatever the buyer had been expected to do with the goods. But we understand the judge to have found that the seller expected and desired the buyer to sell unlawfully in Maine, and intended to facilitate his doing so, and that he was known by the buyer to have that intent. The question is whether the sale is saved by the fact that the intent mentioned was not the controlling inducement to it. As the connection between the act in question, the sale here, and the illegal result, the sale in Maine—the tendency of the act to produce the result—is only through the later action of another man, the degree of connection or tendency may vary by delicate shades. If the buyer knows that the sale is made only for the purpose of facilitating his illegal conduct, the connection is at the strongest. If the sale is made with the desire to help him to his end, although primarily made for money, the seller cannot complain if the illegal consequence is attributed to him. If the buyer knows that the seller, while aware of his intent, is indifferent to it, or disapproves of it, it may be doubtful whether the connection is sufficient. Compare Commonwealth v. Churchill, 136 Mass. 148, 150. It appears to us not unreasonable to draw the line as it was drawn in Webster v. Munger, and to say that, when the illegal intent of the buyer is not only known to the seller, but encouraged by the sale as just explained, the sale is void. The accomplice is none the less an accomplice because he is paid for his act. See Commonwealth v. Harrington, 3 Pick. 26.

The ground of the decision in Webster v. Munger is, that contracts like the present are void. If the contract had been valid, it would have been enforced. Dater v. Earl, 3 Gray, 482; M'Intyre v. Parks, 3 Met. 207. As we have said or implied already, no distinction can be admitted based on the fact that the law to be violated in that case was the *lex fori*. For if such a distinction is ever sound, and again if the same principles are not always to be applied, whether the law to be violated is that of the state of the contract or of another state (see Tracy v. Talmage, 4 Kernan, 162, 213), at least the right to contract with a view to a breach of the laws of another state of this Union ought not to be recognized as against a statute passed to carry out fundamental beliefs about right and wrong, shared by a large part of our own citizens. Territt v. Bartlett, 21 Vt. 184, 188, 189. In the opinion of a majority of the court, this case is governed by Webster v. Munger, and we believe that it would have been decided as we decide it, if the action had been brought in Maine instead of here. Banchor v. Mansel, 47 Maine, 58.

*Exceptions [of defendant] sustained.*

March 13, 1901.—May 22, 1901.

HOLMES, C. J.† This is the second time that this case comes before this court. 156 Mass. 211. It is a suit for the price of intoxicating liquors sold here. At the first trial it was found that they were sold with a view to their being resold by the defendant in Maine against the laws of that state; and on that state of facts it was held that the action would not lie. At the second trial it was found that the plaintiff's agent supposed, rightly, that the defendant intended to resell the liquors in Maine unlawfully, but that the plaintiffs and their agent were and were known by the defendant to be indifferent to what he did with the goods, and to have no other motive or purpose than to sell them in Massachusetts in the usual course of business. Seemingly the plaintiffs did not act in aid of the defendant's intent beyond selling him the goods. The judge refused to rule that the plaintiffs' knowledge of the defendant's intent would prevent their recovery, and the case is here again on exceptions.

The principles involved are stated and some of the cases are collected in the former decision. All that it is necessary for us to say now is that in our opinion a sale otherwise lawful is not connected with subsequent unlawful conduct by the mere fact that the seller correctly divines the buyer's unlawful intent, closely enough to make the sale unlawful. It will be observed that the finding puts the plaintiffs' knowledge of the defendant's intent no higher than an uncommunicated inference as to what the defendant was likely to do. Of course the defendant was free to change his mind, and there was no communicated desire of the plaintiffs to co-operate with the defendant's present intent, such as was supposed in the former decision, but on the contrary an understood indifference to everything beyond an ordinary sale in Massachusetts. It may be that, as in the case of attempts (Commonwealth v. Peaslee, 177 Mass. 267; Commonwealth v. Kennedy, 170 Mass. 18, 22), the line of proximity will vary somewhat according to the gravity of the evil apprehended, Steele v. Curle, 4 Dana, 381, 385-388, Hanauer v. Doane, 12 Wall. 342, 446, Bickel v. Sheets, 24 Ind. 1, 4, and in different courts with regard to the same or similar matters. Compare Hubbard v. Moore, 24 La. Ann. 591; Michael v. Bacon, 49 Mo. 474, with Pearce v. Brooks, L. R. 1 Ex. 213. But the decisions tend more and more to agree that the connection with the unlawful act in cases like the present is too remote. M'Intyre v. Parks, 3 Met. 207; Sortwell v. Hughes, 1 Curt. C. C. 244, 247; Green v. Collins, 3 Cliff. 494; Hill v. Spear, 50 N. H. 253; Tracy v. Talmage, 4 Kernan, 162; Distilling Co. v. Nutt, 34 Kan. 724, 729; Webber v. Donnelly, 33 Mich. 469; Tuttle v. Holland, 43 Vt. 542; Braunn v. Keally, 146 Pa. St. 519, 524; Wallace v. Lark, 12 S. C. 576, 578; Rose v. Mitchell, 6 Col. 102; Jameson v. Gregory, 4 Met. (Ky.) 363, 370; Bickel v. Sheets, Hubbard v. Moore, and Michael v. Bacon, *ubi supra*.

† The statement of facts in 179 Mass. 53, is omitted.

Although a different rule was assumed in Suit v. Woodhall, 113 Mass. 391, it will be seen that it equally was assumed by the instructions given at the trial, and that the exceptions and the point decided in that case concerned only the imputation to the plaintiffs of their agent's knowledge. M'Intyre v. Parks never has been overruled. Dater v. Earl, 3 Gray, 482; Webster v. Munger, 8 Gray, 584, 587; Adams v. Coulliard, 102 Mass. 167, 172; Milliken v. Pratt, 125 Mass. 374, 376.

Exceptions to the admission of letters of the plaintiff's agent to them for the purpose of showing what they knew are not argued.

*Exceptions [of defendant] overruled.*[64]

[64] See 15 L. R. A. 834, note; 32 Am. St. Rep. 450, note.

In Corbin et al. v. Houlehan, 100 Me. 246 (1905), where the sellers of intoxicating liquors, bought as the sellers knew, to be sold illegally in Maine, were suing for the unpaid balance of the purchase price, it appeared that the sellers aided the defendant in avoiding the seizure of the liquors by marking the goods, in accordance with a direction of the purchaser contained in the order, in the name of a person other than the purchaser, which name was adopted by him for this purpose, and it was known by the plaintiffs' agent that the name in which the liquors were to be shipped was fictitious, and adopted by the defendant for the purpose of avoiding their seizure, Wiswell, C. J., said:

"Independently of any statute, according to this well-settled principle, the courts of a state would not enforce a contract in behalf of a vendor to recover the purchase price of goods sold by him to a vendee, if the vendor not only had knowledge of the illegal purpose of the purchaser to sell them in violation of the laws of the state to which they were to be transported, but, as well, did some act in furtherance of this illegal purpose. A person should not and would not be allowed to resort to the courts of a state to enforce a contract which he had made for the purpose of violating or evading the laws of that state, or of aiding another to violate, even if the contract was recognized as valid by the laws of the state where it was actually entered into. There has been much discussion in the decided cases as to whether mere knowledge upon the part of a vendor of the illegal intention of the vendee with respect to the use of the goods purchased is sufficient to prevent him from obtaining a remedy in the courts of the state whose laws the vendee intended to violate by an illegal use of the goods purchased, or whether it was necessary, in order to prevent him from being entitled to a remedy in such courts, that he should have participated in the illegal purpose by aiding and facilitating the purchaser in some way. For a very full discussion of this question, see Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205, wherein the court, after a very full review of many authorities upon the question, decided that it was not sufficient that a vendor living in another state, who there sold and delivered intoxicating liquors to a vendee, who resold them in the state of New Hampshire in violation of the laws of that state, had reasonable cause to believe, and did believe, that they were purchased by the vendee with the intention of there reselling them contrary to law, to prevent a recovery of the purchase price in the latter state. See also, Webster v. Munger, 8 Gray (Mass.) 587. But all courts, so far as we are aware, agree that when the vendor not only had knowledge of the illegal use to which the vendee intended to put the goods purchased, but also, in making such sale, did some act in furtherance of this illegal purpose, then he cannot resort to the courts of the state which were intended to be violated to enforce the collection of the purchase

## CHURCH ET AL. *v.* PROCTOR.

(United States Circuit Court of Appeals, First Circuit, 1895. 66 Fed. 240, 13 C. C. A. 426.)

This was an action by Joseph O. Proctor, Jr., against Daniel T. Church and others, to recover damages for breach of a contract. On the trial in the circuit court, the jury gave a verdict for the plaintiff. Defendants bring error.

ALDRICH, J.‡ At the time the parties entered into the contract involved in this controversy, Proctor, the plaintiff below, was engaged in a general fishing business at Gloucester, in the State of Massachusetts, and in preparing and placing on the general market different kinds of fish, and especially in splitting and slivering a fish called "menhaden," and placing the same upon the market; and the defendants, at Tiverton,

price for the goods sold for this illegal purpose" (pp. 252-253).

In Hocking Valley Ry. Co. v. Barbour, 179 N. Y. S. 810, 813 (1920), Smith, J., said: "It is not necessary here to hold that one purchasing goods known to have been contracted to another makes a contract tainted with illegality. Where, however, the contract, as in the case at bar, is to give a bond for the very purpose of inducing the vendor to violate his contract known to have been made, a different question is involved, and the contract comes within the condemnation of the law as one made directly for an illegal purpose, and therefore tainted with illegality. Armstrong v. Toler, 11 Wheat. 258, 6 L. Ed. 468; Rhoades v. Malta Vita Pure Food Co., 149 Mich. 235, 112 N. W. 940; Posner v. Jackson, 223 N. Y. 325, 119 N. E. 573."

In Hanauer v. Doane, 12 Wall. (U. S.) 342, 346-347 (1871), Bradley, J., said: "With whatever impunity a man may lend money or sell goods to another who he knows intends to devote them to a use that is only *malum prohibitum*, or of inferior criminality, he cannot do it without turpitude, when he knows or has every reason to believe that such money or goods are to be used for the perpetration of a heinous crime, and that they were procured for that purpose. In the words of Chief Justice Eyre, in Lightfoot v. Tenant, 1 Bos. & P., 551, 556, 'The man who sells arsenic to one who, he knows, intends to poison his wife with it, will not be allowed to maintain an action on his contract. The consideration of the contract, in itself good, is there tainted with turpitude which destroys the whole merit of it. * * * No man ought to furnish another with the means of transgressing the law, knowing that he intended to make that use of them.' On this declaration, Judge Story remarks: 'The wholesome morality and enlarged policy of this passage makes it almost irresistible to the judgment; and, indeed, the reasoning seems positively unanswerable.' Story, Conf. L., Sec. 253. Can a man furnish another with the means of committing murder, or any abominable crime, knowing that the purchaser procures them and intends to use them for that purpose, and then pretend that he is not a participator in the guilt? Can he wrap himself up in his own selfishness and heartless indifference and say, 'What business is that of mine? Am I the keeper of another man's conscience?' No one can hesitate to say that such a man voluntarily aids in the perpetration of the offense and, morally speaking, is almost, if not quite, as guilty as the principal offender."

‡ Parts of the opinion are omitted.

in the state of Rhode Island, were engaged in the business of catching and supplying menhaden, and possessed superior facilities for so doing. On the 3rd day of August, 1888, at Tiverton, the parties entered into an agreement. * * * By the terms of the contract expressed in writing, Church & Co. in effect agreed to deliver and Proctor in effect agreed to receive, such quantities of menhaden as might be reasonably required in his business, to be delivered and received during the period and at the place and price designated in the contract. * * * The meaning was that one of the parties should receive such quantities as his business required, and the obligation of the other party was to answer such requirements, but in no event to exceed their catch, as their undertaking was subject to the contingencies ordinarily incident to an enterprise of the character of that in which Church & Co. were engaged. * * *

So much as to the face of the contract and its meaning as interpreted with reference to the subject-matter generally, but it is said by Church & Co., that looking further to the subject-matter as disclosed by the record, the contract is altogether void, for the reason that it is against public policy. The ground of this objection, stated generally, is that Proctor, taking advantage of the scarcity of mackerel in 1888, conceived the idea of putting upon the markets generally the menhaden, as a food fish, split and salted, packed in barrels, tubs, pails, and other packages, and variously branded with misleading and deceptive marks and characters, as, for instance, "Alaska Mackerel, for Family Use." Proceeding upon the theory that the facts, if shown, would disclose a contract which would not be upheld, Church & Co. offered evidence to show the character of the marks and brands placed upon the casks and barrels containing the fish, and upon Proctor's objection, this evidence was excluded, subject to exception. At the conclusion of all the evidence in the case, the defendants moved for a verdict "on the ground that it appeared from the plaintiff's testimony that the purpose for which he intended to use and did use the fish which were the subject-matter of the contract sued upon was illegal, and against public policy, as being a fraud and an imposition on the public, and * * * illegal, in being in violation of chapter 114 of the Public Statutes of Rhode Island." The court below refused to direct the verdict, and the defendants excepted.

The record does not clearly show that Proctor's deceptive and unwarrantable purpose existed during the entire period covered by the contract, and for this reason the court below could not have properly directed a verdict upon the ground stated in the motion. We think, however, that Church & Co., under the line of defence disclosed, were entitled to show fully the purpose of Proctor at the time of the contract, the use which he made of the fish furnished, and the manner in which they were placed upon the market, and that the court erred in excluding evidence as to the marks and brands upon the casks and barrels. The evidence excluded was competent and material upon the issue raised by the defence, and would tend to show that the public was being deceived and cheated

through false and misleading brands and characters used for the purpose of advancing the sale of a product beyond that which would result from its true merit.

The point is made that the Rhode Island statute does not apply, for the reason that the evidence shows that the fish in question were designated as "salted fish," while the statute has reference to "pickled fish." This is a distinction which the trade might make, but which, perhaps, the jury would not be required to make, or which, if made, might have been overcome by the jury in view of evidence that the fish were put up for the trade in barrels and casks and in closed packages of various forms. All pickled fish in the ordinary fish business are salted, although all salted fish are not pickled. In view of all the evidence, we cannot say that the jury would not have been warranted in finding that the witnesses in using the term "salted fish" intended to describe the fish in question as pickled. The purpose of the evidence, as to the manner of placing the fish upon the market, was a double one, first, to show that statute of Rhode Island was violated, and, second, to show a scheme which involved a fraud on the consumers of fish as an article of food. As bearing upon the general question whether Proctor's purpose and manner of doing business was such as to render the contract void as against public policy, we think the Rhode Island statute might properly be urged, and that it was material to know whether Proctor's manner of doing business conformed to the statute, or whether it was in plain violation of a statute intended to protect the public generally against fraud and imposition. Chapter 114 of the Public Statutes of Rhode Island, which was in force in 1888, provides, among other things, that "casks for menhaden and herrings shall be of the capacity to hold twenty-eight gallons," and "every cask before being packed or repacked for exportation shall be first searched, examined, and approved by a packer, and shall, when so packed or repacked for exportation, be branded legibly on one head with the kind of fish it contains and the weight thereof, or the capacity of the cask with the first letter of the Christian and the whole of the surname of the packer, the name of the town, and the words Rhode Island, in letters not less than three-fourths of an inch long, to denote that the same is merchantable and in good order for exportation." It is further provided, through section 8 of the same statute, that "every person who shall offer for sale in or attempt to export from the state any pickled fish which have not been approved by a sworn packer, or in casks which are not branded as aforesaid, shall forfeit fifty dollars for each offense." It is manifest that this statute regulating the packing of fish in Rhode Island was intended for the protection of the public generally, not Rhode Island consumers alone, but consumers generally. It was to prevent fraud upon the public, and public policy requires that no action shall be successfully maintained in favor of those who pack and ship food fish in open violation of the wholesome provisions of this statute. It is conceded that the plaintiff below not only did not

conform to the statute, but that the packages were falsely marked. The maxim, "*Ex dolo malo non oritur actio,*" fairly and forcibly applies to such a situation. If, upon a jury trial, the fact should be established that the packages prepared and shipped by Proctor were pickled fish, within the meaning of the Rhode Island statute, then for such time as he was actually engaged, or had the purpose to engage, in packing and shipping pickled fish, without conforming to the provisions of the statute, he would not be entitled to maintain his action for damages resulting from non-delivery of the subject-matter intended to be used in violation of the statute law. Bank v. Owens, 2 Pet. 527, 539; Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884; Forster v. Taylor, 5 Barn. & Adol. 887; Eaton v. Keegan, 114 Mass. 434; Pol. Cont. 322; Curtis v. Leavitt, 15 N. Y. 9; Benj. Sales, § 654.

Looking at the transaction aside from the local statute, and independent of the question whether the packages contained pickled or salted fish, the authorities conform to a wholesome and sound rule of public policy that no cause of action shall arise in behalf of a person engaged in a business which is illegal, or which is a fraud and imposition upon the public, and the law will not uphold or enforce a contract, or aid a party, where the purpose is to cheat and deceive the public generally. We feel bound to recognize the modern public policy indicated by the various statutes, as sustained by judicial authority, designed for the protection of the public, and which, in the interest of health and fair dealing, undertake to regulate traffic in food products. The point is taken that the purpose of Proctor to place this product (innocent of itself) upon the market in an improper manner was not known to Church & Co. at the time of the alleged breach, and that, therefore, the objection is not open to the defence. This is not an answer. The defence of public policy does not proceed so much upon the idea of relief to the defendant as protection to the public, by withholding legal remedy from a party contemplating or practising imposition. It would be a strange rule of law which would extend relief to a *particeps criminis,* and withhold relief from an innocent party who seeks to avail himself of its protection when the imposition is discovered. Cowan v. Milbourn, L. R., 2 Exch. 230; Spotswood v. Barrow, 5 Exch. 110; Holman v. Johnson, Cowp. 341. The wholesome and salutary maxim, "*Ex turpi causa non oritur actio,*" has been so far enlarged that it may now be said that the law will not afford a remedy to a wrongdoer in a scheme to deceive and defraud the public, and this modern doctrine does not depend upon the consideration, or the innocence, or lack of innocence, of the party who seeks to interpose the objection. It becomes a defence, and may be interposed whenever the fraud is discovered. It must be observed, however, that it would not always be enough to avoid a contract for a sale of articles innocent of themselves that the party who acquired them, or sought to acquire them, occasionally used them unlawfully. In order that this doctrine should operate in avoidance of a contract, except where the illegality involves life, or offences of the higher grade, it must appear

that the party acquiring the product intended to use it unlawfully when the contract was made, or when possession was sought, or that he was engaged in a general scheme involving illegality, or the general purpose was to use the product in a deceptive and fraudulent manner. The record shows that the "plaintiff testified that under the arrangement contemplated by him, and the contract made with the defendants, the fish were to be landed at Still's Wharf, at Tiverton, in the State of Rhode Island, and immediately there split and salted, and packed up in barrels, tubs, pails, and other packages, and marked and branded and shipped to fill these orders to various parts of the country, and that all the fish that were actually received by him under this contract with the defendants, and otherwise during the season of 1888, at Tiverton, R. I., were so packed and marked there on the spot," and shipped from that point. It also shows that the barrels, casks, and packages were variously branded "Alaska Mackerel," "Russian Mackerel," "California Mackerel," "Family White Fish," and "Fat Family Silversides." It is obvious that the real object of marking the packages thus was to make the product "appear to be what it was not, and thus induce unwary purchasers,"—Plumley v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. 154,—who could not scrutinize the contents, to buy it as mackerel.

Humanity is entitled to know what it buys and consumes. Government is instituted and maintained, and law is administered, for the protection of the people; and justice influenced by enlightened public policy, and controlled by legal principles, requires that contracts shall not be upheld and enforced for the benefit of a wrongdoer, where the subject-matter thereof is designed to be used in furtherance of a business enterprise which contemplates imposition upon the general public through false, misleading, and deceptive brands and labels, placed upon sealed packages of food products in a manner calculated to deceive, and forward the sale of such articles for what they are not. Looking at the record as a whole, however, it does not clearly and distinctly appear when the plaintiff below entered upon such scheme or business, and for this reason we cannot say there was error in the refusal of the court to direct a verdict for the defendants. If upon any subsequent trial this issue should be raised, and evidence adduced in support thereof, we think the jury should be instructed that no damages can be recovered, and no action maintained, covering any period in which the plaintiff below contemplated, or was actually engaged, in placing upon the market the fish described in the contract, under false, deceptive, and misleading brands, designed to attract and induce trade. During the time he entertained such purpose (Cowan v. Milbourn, L. R., 2 Exch. 230, 236; Materne v. Horwitz, 101 N. Y. 469, 5 N. E. 331), or was actually engaged in such business, the law will not help him.[65] The verdict should

[65] Compare United States v. Dietrich, 126 Fed. 671, 674 (1904), where, in discussing a contract with the United States, lawful when made but which became unlawful by statute as soon as the other party became a Senator of the United

be set aside for the reasons stated, and it becomes unnecessary to consider the other questions raised by the plaintiffs in error.

*Judgment of the circuit court reversed; new trial ordered.*

## SIMON KULLMAN ET AL., RESPONDENTS, *v.* JACOB GREENEBAUM ET AL., APPELLANTS.

(Supreme Court of California, 1891. 92 Cal. 403, 28 Pac. 674, 27 Am. St. Rep. 150.)

The action was brought to recover the sum of eighteen thousand dollars for the conversion by the defendants of mining stocks belonging to the plaintiffs valued at that sum, which the defendants refused to deliver to the plaintiffs upon demand made upon them on the second day of December, 1886. The complaint alleges that thereafter, on the tenth of December, 1886, they were fraudulently induced to sign a pretended composition of the creditors of the defendants, which was fraudulent and void as to them by reason of secret preferences of other creditors, of which the plaintiffs were ignorant, and which they rescinded upon discovery of the fraudulent preferences. The plaintiffs recovered judgment for the whole amount claimed as the value of the stocks. Order denying a new trial. Defendant appealed.

MCFARLAND, J.* The main question in this case is about the validity of a composition deed, by which the respondents and the other creditors of appellants agreed to receive *pro rata* the proceeds of the sale of appellants' assets, and thereupon to release them from all claims and demands. Respondents contend that said agreement is invalid, because a fraudulent preference was given to certain of the creditors who signed it, and the court below so found. The court found, as facts, that some of the creditors at first refused to sign the agreement, and that, to induce them to sign, "some of the relatives and friends of the defendants did pay such creditors the full amount of their several demands, with the knowledge, but without the direction of the defendants, and not out of the assets of the said defendants, nor under any promise or expectation of repayment, and thereby did make a preference of such creditors, and induced them to sign the said composition; and that such creditors did receive a larger proportion or sum than secured by said agreement: of all of which facts the plaintiffs at the time of signing such com-

States, Van Devanter, J., said: "It is well established by the English courts and by the courts of this country, federal and state, that where performance of a contract or agreement, lawful in its inception, becomes unlawful by reason of any subsequent event, the contract or agreement is thereby dissolved or terminated, in so far as it remains executory, and both parties are excused from its further performance." On the effect on a legal contract of a statute subsequently making it illegal, see also 120 Am. St. Rep. 468, note; 10 Ann. Cas. 1024, note.

* Part of the opinion is omitted.

position were ignorant, and upon the discovery thereof notified the defendants," etc.

We think that the ruling of the court below was right, and in line with the current of authorities. The general rule is correctly laid down in Story's Equity Jurisprudence, § 378; and we stated it quite fully in the recent case of O'Brien v. Greenebaum, *ante*, [92 Cal.] p. 104. It is strenuously argued by counsel for appellants that the principle does not apply here, for the reasons that the payments to the preferred creditors were not made by the debtors or their agents; and particularly that the payments were not made out of the debtors' assets,—that is, out of the actual and disposable property which they then had. It is to be noticed, however, that the appellants knew of these secret payments to preferred creditors; and as the utmost good faith is required in such transactions, the appellants can hardly be said to be innocent of the imposition practised upon respondents. But beyond all that, the rule does not, by any means, rest solely upon the participation of the debtor in the fraud, and the diminution of the actual assets. In a composition agreement each creditor is a party as to each other creditor, as well as to the debtor. "Creditors sign upon the consideration that others sign upon the same terms; and if they are deceived, they are misled into an act to which they might not otherwise have assented." (See Story's Eq. Jur., § 379, and notes.) Solinger v. Earle, 82 N. Y., 393, was a case where a brother-in-law (as in the case at bar) had given his note to induce a creditor to sign a composition deed; and in the opinion of the court in that case there is aptly expressed the views which are determinative of the point in question against appellants in the case at bar. The court says: "The agreement between the plaintiff and the defendants, to secure to the latter payment of a part of their debt in excess of the ratable proportion payable under the composition, was a fraud upon other creditors. The fact that the agreement to pay such excess was not made by the debtor, but by a third person, does not divest the transaction of its fraudulent character. A composition agreement is an agreement as well between the creditors themselves as between the creditors and their debtor. Each creditor agrees to receive the sum fixed by the agreement in full of his debt. The signing of the agreement by one creditor is often an inducement to the others to unite in it.[66] If the composition provides for a *pro rata* payment to all the creditors, a secret agreement, by which a friend of the debtor undertakes to pay to one of the creditors more than his *pro rata* share, to induce him to unite in the composition, is as much a fraud upon the other creditors as if the agreement was directly between the debtor and such creditor. It violates the principles of equity and the mutual confidence as between

[66] "A composition agreement is an exception to the rule that payment of part of a liquidated and due debt is not satisfaction for the whole. It is excepted because there is a consideration to each creditor for his agreement to accept less than his claim in full payment. The composition is regarded as an agreement, not merely between the debtor and each creditor, but also between the

creditors upon which the agreement is based, and diminishes the motive of the creditor who is a party to the secret agreement to act in view of the common interest in making the composition. Fair dealing and common honesty condemn such a transaction." * * *

*Judgment and order affirmed.*[67]

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## NATHAN F. HUCKINS *v.* IRA HUNT.

**(Supreme Judicial Court of Massachusetts, 1885. 138 Mass. 366.)**

Contract in two counts. The first count was upon a negotiable promissory note for $217.50, given to the plaintiff by the defendant; the second count was for a like amount, upon an account annexed, for goods sold and delivered by the plaintiff to the defendant before the making of the note. The case was submitted to the superior court, and, after judgment for the defendant, to this court, on appeal, upon agreed facts, the material parts of which appear in the opinion.

MORTON, C. J. The plaintiff does not contend that he is entitled to recover upon the note upon which his first count is founded. The note was given in consideration, and upon the secret agreement, that the plaintiff should execute a deed of composition entered into between the defendant and his creditors, which purported to treat all the creditors equally. The decisions are numerous and uniform that such a note is void. Harvey v. Hunt, 119 Mass. 279, and cases cited.

But he contends that he is entitled to recover the balance of his account, for which the note was given, in the same manner as if he had not executed the composition deed. In other words, his claim is that the law will regard the rights of the parties as if the composition deed and the corrupt agreement by which it was accompanied had never been made.

We do not understand this to be the law. If two persons make an illegal contract, being *in pari delicto,* so long as it remains executory, the law will not aid either party to enforce it; but, so far as it is executed, the law will not lend its aid to either party to relieve him

several creditors. The engagement of each creditor to accept less than his claim is the consideration to each of the others for his like engagement. Each creditor signing has a right to assume that each one is to receive the benefit stipulated in the agreement; that it sets forth truly the terms of composition as to all the parties. Any separate agreement by which one of the creditors secures to himself benefits not conferred on the others, and which agreement is not disclosed to them before they sign the composition, is a fraud upon them." Gilfillan, C. J., in Newell v. Higgins, 55 Minn. 82, 84-85 (1893).

[67] But if the debtor does not know that some one is giving one creditor something extra unknown to the other creditors, the other creditors cannot set aside the composition as fraudulent. Martin v. Adams, 30 N. Y. Supp. 523 (1894).

from the consequences of the illegal contract, or to rescind it. Myers v. Meinrath, 101 Mass. 366. Houston v. Buffinton, 105 Mass. 399; Cranson v. Goss, 107 Mass. 439.

In the case at bar, the plaintiff executed the composition deed and received the amount provided for therein in full satisfaction and payment of his account. This operated as an extinguishment of his debt. The agreement with the defendant that he would pay the full amount of the debt in the future was illegal, and avoided the composition deed as to the other creditors. Partridge v. Messer, 14 Gray (Mass.) 180. But the plaintiff was bound by it, and cannot set up his own illegality to relieve himself from its consequences.

His debt has been discharged and extinguished, and the law leaves the parties in the position in which they have placed themselves, and will not furnish a remedy to either, to undo what has been done. Mallaieu v. Hodgson, 16 Q. B. 689.

*Judgment for the defendant.*[68]

[68] In Frost v. Gage, 3 Allen (Mass.) 560 (1862), a creditor who was a son of the debtor and who had promised his share under the assignment as a fraudulent preference to another creditor who was assignee for the benefit of creditors, all the creditors having released the debtor at the assignee's solicitation on the assignment being made by the debtor, was denied a recovery of his share under the assignment. Bigelow, C. J., for the court, said that while the defendant if he had not been assignee in possession of the assets could not have recovered on the agreement with plaintiff, the latter for a like reason "ought not to be allowed to recover. The fraud in which he participated, and by which he aided in inducing creditors to become parties to the release of their debtor, taints the whole transaction as to him, and deprives him of the right of maintaining an action to enforce in a court of law that part of the agreement of composition to which the secret agreement did not immediately relate. It may be suggested that the application of this rule leads in the present case to the result of leaving in the hands of the defendant, who was equally guilty with the plaintiff, the fruits of the fraud. But this is often the consequence of allowing a party to plead in defense the illegality of a transaction on which a cause of action is founded" (p. 563).

But in some states only the fraudulent preference is void, the composition standing and the fraudulent creditor being allowed to recover upon it, and only when the preference actually is paid to the creditor does the composition become voidable at the election of the other creditors. In Glens Falls Nat. Bank v. Van Nostrand, 85 N. Y. Supp. 50, 51-2 (1903), Spencer, J., said:

"The taking of a secret preference by a creditor joining in a composition agreement does not nullify the composition. The debtor and the preferred creditor both remain bound by its terms. Nonpreferred creditors may rescind if the secret agreement for preference has been executed, but so long as such agreement remains executory it is unenforceable because of its illegality and cannot be employed for any purpose. This is, in substance, the decision of the Court of Appeals in the case of Hanover Nat. Bank v. Blake, 142 N. Y. 404, and must be regarded as the settled law of the land." In 103 App. Div. 598 the judgment was "unanimously affirmed" without opinion. See *accord* Bartlett v. Blaine, 83 Ill. 25 (1876). See also Lobdell v. State Bank of Nauvoo, 180 Ill. 56, 58-59 (1899); White v. Kuntz, 107 N. Y. 518 (1887).

## CHAPTER IX.

## CONTRACTS WITHIN THE STATUTE OF FRAUDS.[1]

SECTIONS 4 AND 17 OF AN ACT FOR PREVENTION OF FRAUDS AND PERJURIES, ST. 29, CAR. II, C. 3 (1677).

IV. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June [1677] no action shall be brought[1] whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed

[1] On the authorship and general interpretation of the statute of frauds, see Crawford D. Hening, The Original Drafts of the Statute of Frauds and Their Authors, 61 U. of P. Law Rev. 283; George P. Costigan, Jr., Has There Been Judicial Legislation in the Interpretation and Application of the "Upon Consideration of Marriage" and Other Contract Clauses of the Statute of Frauds? 14 Ill. L. Rev. 1.

"When the law requires a thing to be recorded, or in writing, or under seal, or attested, these, often, are not requirements of the law of evidence. They are matters of form required, in some cases, as necessary to the constitution of a thing, as in the case of wills and deeds; in some, that the matter may be available as the ground of an action, as in the case of things included in ss. 4 and 17 of the Statute of Frauds. In any case they belong to the substantive law of particular subjects; and when testimony or facts offered in evidence are rejected as not conforming to these or the like requirements, it is the substantive law of the case that excludes them. [Note 1: When a judge says, 'I found my judgment on one of the most useful rules in the law, namely, that when parties have put their contract into writing, that writing determines what the bargain is' (Martin, B., in Langton v. Higgins, 4 H. & N. 402)—he is not stating a rule of evidence. As to the statute of frauds, see Bedell v. Tracy, 65 Vt. 494. As to the requirement of a seal, see Blewitt v. Boorum, 142 N. Y. 357]." Thayer, Preliminary Treatise on Evidence, 390-391 and note 1.

In James v. Smith, [1891] 1 Ch. 384, 386, Kekewich, J., said: "It is no part of my judicial duty to say whether on the whole the statute of frauds has been a beneficial or mischievous statute, as to which I am, of course, aware there have been many opinions. It is quite easy for the advocates on one side or the other to argue in any case from the separate points of view which they hold."

by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

XVII. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth of June no contract for the sale of any goods, wares and merchandizes, for the price of ten pounds sterling[2] or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

### THE STATUTE OF FRAUDS' SECTIONS OF THE AMERICAN UNIFORM SALES ACT.

Sec. 3. Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties.

Sec. 4. (1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars[3] or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf. (2) The provisions of this section apply to every such contract or sale notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit, or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply. (3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

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## SMITH *v.* CARROLL.

**(Supreme Court of Pennsylvania, 1886. 112 Pa. St. 390, 9 Atl. 24.)**

Assumpsit to recover the amount of a certain legacy. The defendant, executor under the will, promised to pay the legacy although the entire personal estate was insufficient to pay the debts of decedent. Judgment for plaintiff. Defendant took a writ of error.

[2] The states usually adopted $50.00 as the amount, but some fixed a lower and some a higher amount even before the Uniform Sales Act was adopted.

[3] The states adopting this act do not all adopt this sum. It varies from $50.00 to $2,500. Local statutes should be consulted.

GREEN, J.[4] We think the radical difficulty in this case is that it is an action against one who is an executor, to hold him personally liable upon a verbal promise to pay a legacy. Since our act of April 26, 1855, (Purd. 724, pl. 4,) the decisions appear to be uniform that such a promise confers no right of action against the executor individually. * * *

In the following cases it was held that the existence of assets, when coupled with a verbal promise only, was not sufficient to impose an individual liability. In Okeson's Appeal, 59 Pa. St. 101, Sharswood, J., said:

"The cases appear to hold that, on a promise by an executor or administrator to pay a legacy or distribute share in consideration of assets, the consideration and promise must be co-extensive. Rann v. Hughes, 7 Term R. 350, note; Pratt v. Humphrey, 22 Conn. 317. However that may be, it is clear that the executor cannot be made liable *de bonis propriis* on an oral promise on the mere consideration of assets. That would be to charge him upon a promise to answer damages out of his own estate, and therefore within the act of April 26, 1855, (P. L. 308.) It has been accordingly held in Hay v. Green, 12 Cush. 282, that a verbal promise by an administrator to pay a distributive share in the estate of a decedent was within the statute of frauds, though there were assets; and in Philpot v. Briant, 4 Bing. 717, a promise, by the executor of an acceptor of a bill of exchange, to pay out of his own estate in consideration of forbearance, is held to be void if not in writing."

In Burt v. Herron, 66 Pa. St. 404, we said:

"To charge the executors, upon their own promise, with proof of assets, the action must have been against them personally, and their promise in writing, by the act of April 26, 1855."

Whether, therefore, there were assets in the hands of the defendant in this case or not, his verbal promise to pay the plaintiff her legacy imposed no personal liability upon him, and no right of action was thereby conferred. * * *

*Judgment reversed.*[5]

[4] The statement of facts is abbreviated and parts of the opinion are omitted.

[5] But in Mackin v. Dwyer, 205 Mass. 472 (1910), where the defendant besides being executor was specific devisee and where the promise to pay the general legacy to the plaintiff, though there was insufficient personalty, was made on condition that plaintiff would refrain from making a contest of the will, Morton, J., for the court said:

"We do not think that the promise comes within the statute. The defendant was, as he contends, executor by virtue of his appointment by the testator when the promise was made (Rand v. Hubbard, 4 Met. 252, 256), but the promise was for his own benefit and was an original and not a collateral undertaking on his part. By reason of the plaintiff's forbearance to contest the will he secured the undisputed confirmation of his title to the real estate which was specifically devised to him, and the plaintiff gave up and lost the opportunity to contest the allowance of the will. To permit the defendant to set

## A. B. SMITH LUMBER CO. *v.* PORTIS BROTHERS.

(Supreme Court of Arkansas, 1919. 140 Ark. 356, 215 S. W. 590.)

Suit by Portis Bros. against the A. B. Smith Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

HUMPHREYS, J.[6] * * * The question is: Was there any legal evidence to support the finding of the court that the undertaking was original? The record disclosed that appellant was a lumber company, and that appellees were merchants; that E. C. Eaker, representing appellant, bought a lot of piling from Charles McRiley; that as a part of the purchase price, he paid McRiley's mercantile account to appellees with a draft on appellant company; that he requested appellee to continue the credit to McRiley as before, as he had made arrangements to buy McRiley's output of piling; that appellee refused to do so without security; that Eaker then told him to let McRiley have goods to the amount of $400 every two weeks and he would pay for them. Charles McRiley gave testimony to the same effect. There was therefore sufficient legal evidence in the record to support the finding of the court that the undertaking on the part of appellant was original.

*No error appearing in the record, the judgment is affirmed.*[7]

up the state of frauds under such circumstances would be to allow him to perpetrate a fraud by means of it. Nelson v. Boynton, 3 Met. 396; Alger v. Scoville, 1 Gray, 391; Browne, St. Frauds (5th ed.), § 212. Moreover the promise of an executor, to come within the statute, must be to pay out of his own estate a debt or obligation primarily due from the estate of the deceased. In the present case the estate of the deceased did not owe and never has owed the plaintiff anything on account of the legacy, for the reason that it was a general one and there were no assets with which to pay it, the personal property being exhausted by the payment of debts and the expenses of administration, last sickness and funeral and of the specific legacies. There was therefore no debt due from the estate to which the defendant's promise as executor could apply, and for this reason also the promise was not within the statute."

See also Bellows v. Sowles, 57 Vt. 164 (1884).

[6] Part of the opinion is omitted.

[7] Certain elementary truths about promises to answer for the debt, default or miscarriage of another are:

(1) There must be a debt or other liability to answer for coexistent with the duty to answer. If, therefore, a novation is accomplished through the new promise, the new promise is not within the statute. Frohardt v. Duff, 156 Ia. 144 (1912); Booth v. Eighmie, 60 N. Y. 238 (1875); Griffin v. Cunningham, 183 Mass. 505 (1903).

"A promise to pay the debt of a third person is not within the statute where it is agreed between the parties, the creditor, debtor and promisor, that the debt shall be extinguished and the creditor shall look only to the promisor for payment upon the new promise. In such case no other person remains liable for the debt but the promisor, and his undertaking is not collateral but original to pay his own debt, and not to answer for the debt of another. There is then what is known in the civil law as a delegation, and the creditor takes a new

## DAVIS *v.* ABELL.

(Court of Appeals of Kentucky, 1919. 185 Ky. 843, 216 S. W. 104.)

Action by C. B. Davis against J. L. Abell for a settlement of partnership affairs and to recover an alleged excess payment. Defendant Abell made his answer a cross petition against T. M. Davis and wife, and a counterclaim against plaintiff. From the judgment rendered plaintiff appeals and defendant J. L. Abell cross-appeals.

SAMPSON, J.[8] In 1911 four men, C. B. Davis, J. L. Abell, W. I. Clark, and T. M. Davis, organized a partnership under the firm style of Smithland Tile Company for the purpose of engaging in the business of manufacturing and selling brick and tile in the town of Smithland. They were equal in the business. C. B. Davis and Abell were solvent

debtor, who is called the delegated debtor." Earl, C., in Meriden Britannia Co. v. Zingsen, 48 N. Y. 247, 250 (1872).

See note in 126 Am. St. Rep. 487, on what, within the meaning of the statute of frauds is a contract to answer for or pay the debt of another.

For the promise to be within the statute it must be collateral and not original, and to be collateral there must be a debt default or miscarriage to which it can be collateral. That may be a voidable contract obligation, like that of an infant in most jurisdictions. Dexter v. Blanchard, 11 Allen (Mass.) 365 (1865); Brown v. Farmers and Merchants Nat. Bank, 88 Tex. 265 (1895). On a guaranty of the contract of a person under disability, see 33 L. R. A. 359, note.

Whether the promise is original or collateral is often a question of fact. See 9 Ann. Cas. 895, note; Ann. Cas. 1915 B, 257, note; 126 Am. St. Rep. 487, note. To be collateral "it is always reducible to this form: 'Deal with X and if he does not pay you, I will.'" Huffcut's 2nd Amer. Ed. of Anson on Contracts, p. 82. If the promisor says, "Deal with X and I will see you paid," some courts treat the promise as original and some as collateral. It would seem to be one or the other as the facts of the case determine. See Pigott, B., in Mountstephen v. Lakeman, L. R. 7 Q. B. 196, 205 (1871). See Lakeman v. Mountstephen, L. R. 7, H. L. 17 (1874). See also, 5 B. R. C. 99, note.

(2) The liability, as in the principal case, may be prospective. That is, the special promise will be within the statute even though it alone induced the creation of the principal debt. Moses v. Norton, 36 Me. 113 (1853); Matthews v. Milton, 4 Yerg. (Tenn.) 576 (1833).

(3) Under "debt, default or miscarriages" are included tort liabilities and, indeed, all civil liabilities. Kirkham v. Marter, 2 B. & Ald. 613 (1819).

(4) The promise to pay the debt is not within the statute if made to the debtor; for the promise to come under the statute must be one to pay the debt of another, and while "another" might have been construed to mean merely another than the promisor it has been construed to mean another than either the promisee or the promisor, and, therefore, the statute applies only to promises made to the person or persons to whom another is answerable. S. Landow & Co. v. Gurian (Conn.), 107 Atl. 517 (1919); Meyer v. Hartman, 72 Ill. 442 (1874); Goetz v. Foos, 14 Minn. 265 (1869); Staver Carriage Co. v. Jones, 32 Okla. 713 (1912); Eastwood v. Kenyon, 11 A. & E. 438 (1840). That is seemingly due to the notion that the mischief sought to be remedied by the statute was perjured claims by creditors that promises had been made to them.

[8] Parts of the opinion are omitted.

while T. M. Davis and Clark had little or no property. T. M. Davis was the son of C. B. Davis, and it appears from the evidence that the son was taken into the partnership at the instance and request of the father, and upon the assurance of the father that the son's obligation incurred by reason of the partnership, and on its account would be assumed and paid by the father. * * *

Appellant's chief contention is that C. B. Davis is not liable for that part of the partnership obligation which was primarily due from his son T. M. Davis, in the absence of a writing to that effect, and he seeks to avoid responsibility for this one-fourth of the debts on the ground that one is not bound for the debt or default of another, unless his undertaking be in writing and signed by the person to be charged, and he cites the statute of frauds. While this is ordinarily the rule, and the statute of frauds is applied in such case, it has no application here, because the indebtedness is that of the firm of which C. B. Davis was a member and as such liable for the entire indebtedness. In other words, the obligations of the firm were the obligations of C. B. Davis, and his promise to pay the debt of the firm was the promise to pay his own debt, and, this being true, it takes the case out of the statute of frauds. The promise of Davis made to the bank and other creditors, appears to be reasonably well established by the evidence and is binding, and it may be enforced, though not in writing and signed by the party to be charged. * * *

*Judgment affirmed in part on the original appeal, and reversed in part on the cross-appeal.*[9]

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## WOLFF & HENRICKS *v.* KOPPEL.

(Supreme Court of New York, 1843. 5 Hill 458.)

Error to the New York C. P., where Koppel sued Wolff & Henricks to recover the price of certain goods alleged to have been sold by the latter as factors acting under a *del credere* commission. The agreement *del credere* was by parol; and one point made in the court below was

[9] "The debt of a partnership is the debt of each of its members, and a new promise by one or more of the partners, made after the dissolution of the firm, to pay a partnership debt, is not, within the meaning of the statute of frauds, a promise to pay the debt of another." Fish, J., in Reid v. Wilson, 109 Ga. 424, 427 (1899). See Staver Carriage Co. v. Jones, 32 Okla. 713 (1912).

"A corporation is, in law, a different person from any of its members. A promise by a stockholder to pay a corporation debt is in every sense a promise to pay the debt of another." Campbell, J., in Hanson v. Donkersley, 37 Mich 184, 186 (1877). See Home Nat. Bank v. Estate of Waterman, 134 Ill. 461 (1890); Richardson Press v. Albright, 224 N. Y. 497 (1918). On an oral promise by stockholder to pay debt of corporation as within the statute of frauds, see 8 A. L. R. 1198, note; Ann. Cas. 1912 B, 222, note; 3 B. R. C. 611, note.

that the defendant's engagement, not being in writing, was void by the statute of frauds. The court held otherwise; and, after judgment in favor of the plaintiff, the defendants sued out a writ of error.

COWEN, J.[10] It is objected that the contract of a factor, binding him in the terms implied by a *del credere* commission, is within the statute of frauds and should, therefore, be in writing. * * * But a guaranty, though by parol is not always within the statute. Perhaps, after all, it may not be strictly correct to call the contract of the factor a guaranty, in the ordinary sense of that word. The implied promise of the factor is merely that he will sell to persons in good credit at the time; and in order to charge him, negligence must be shown. He takes an additional commission, however, and adds to his obligation that he will make no sales unless to persons absolutely solvent; in legal effect, that he will be liable for the loss which his conduct may bring upon the plaintiff, without the onus of proving negligence. The merchant holds the goods, and will not part with them to the factor without this extraordinary stipulation, and a commission is paid to him for entering into it. What is this, after all, but another form of selling the goods? Its consequences are the same in substance. Instead of paying cash, the factor prefers to contract a debt or duty which obliges him to see the money paid. This debt or duty is his own, and arises from an adequate consideration. It is contingent, depending on the event of his failing to secure it through another—some future vendee, to whom the merchant is first to resort. Upon non-payment by the vendee, the debt falls absolutely on the factor. As remarked by Parker, Ch. J., in Swan v. Nesmith, 7 Pick. (Mass.) 220, the form of the action does not seem to be material in such case; that is to say, whether the merchant sue for goods sold, or on the special engagement. The latter is perhaps the settled form; but still the action is, in effect, to recover the factor's own debt. In the late case of Johnson v. Gilbert, 4 Hill (N. Y.) 178, the defendant, in consideration of money paid for him by the plaintiff, assigned a chattel note and guaranteed its payment. In such a case the declaration must be on the guaranty to pay the debt of another; but this is so in form merely. We held that the contract was to pay the defendant's own debt; that it was not a contract to pay as the surety of another. All such contracts and many others are, in form, to pay the debt of another, and so literally within the statute, but without its intent. A promise by A to B, that the former will pay a debt due from the latter, is not within the meaning, though it is within the words. Conkley v. Hopkins, 17 Johns. (N. Y.) 113; Eastwood v. Kenyon, 11 Ad. & Ell. 438. So are a numerous class of cases, where the promise is made in consideration of the creditor relinquishing some lien, fund or security. Theobald, Pr.

[10] Part of the opinion is omitted.

and Surety, 45, and cases cited. The merchant gives up his goods to be sold, and pays a premium. Is not this in truth as much and more than many of those cases require which go on the relinquishment of a security. Suppose a factor agrees by parol to sell for cash, but gives a credit. His promise is virtually that he will pay the amount of the debt he thus makes. Yet who would say his promise is within the statute? The amount of the argument for the defendant would seem to be, that an agent for making sales, or indeed, a collecting agent, cannot, by parol, undertake for extraordinary diligence, because he may thus have the debt of another thrown upon him. But the answer is, that all such contracts have an immediate respect to his own duty or obligation. The debt of another comes incidentally as a measure of damages.

*Judgment affirmed.*[11]

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## CINCINNATI TRACTION CO. *v.* COLE.

**(United States Circuit Court of Appeals, Sixth Circuit, 1919. 258 Fed. 169, 169 C. C. A. 237.)**

Action by James O. Cole and others, as executors of Clinton Crane, partners as C. Crane & Co., against the Cincinnati Traction Company, There was a judgment for plaintiffs, and defendant brings error. Affirmed.

COCHRAN, J.[12] * * * The trial was by jury, and the principal error assigned is the overruling of defendant's motion for a directed verdict. * * *

The motion was based upon two grounds. One was that the promise, the basis of the action, was one to answer for the debt of another, and, not being in writing or evidenced thereby, was void under the Ohio statute of frauds (section 8621, General Code of Ohio), which is in the usual form of such statutes. We proceed to consider this ground before stating the other.

The promise was claimed to have been on or about November 9, 1909. If made at all, the conditions under which it was made were these: The Heffron Construction Company had then nearly completed

[11] This judgment was affirmed by the Court for the Correction of Errors, in Wolff & Henricks v. Koppel, 2 Denio (N. Y.) 368 (1845).

That a *del credere factor's* contract is not within the statute is conceded. Conturier v. Hastie, 8 Exch. 40 (1852). See Sutton & Co. v. Grey, [1894] 1 Q. B. 285. In 3 Williston on Contracts, § 484, the suggestion in the principal case that this is because the guaranty by the agent is a mere incident of the larger transaction is seemingly approved. But see Professor Hening's explanation in note 13, *post*, this chapter.

[12] Parts of the opinion are omitted.

a contract with defendant, made March 30th, previously, by which it was to do certain work on its premises for $15,561.75, of which $9,548.78 had been paid, upon monthly estimates, to an assignee of the Heffron Company, and possibly as much as $2,000 more had been earned, the larger part of which was retained percentage. That company was indebted to plaintiffs in the sum of $2,949.20 for lumber used in that work. Plaintiffs had a right to take out a lien on defendant's premises therefor, which would be unaffected by the assignment or payments thereunder. Section 8334, General Code of Ohio. The defendant, by its contract, had the right to retain out of subsequent payments an amount sufficient to indemnify it against this lien, and, in case of deficiency, had recourse against the Heffron Company and a surety company to make it good.

Plaintiff's evidence tended to show that the making of the promise came about by their refusal to deliver more lumber needed to complete the contract, that it was made in consideration of their promise to continue delivering and not to take out a lien, and that it was to pay plaintiffs, at least conditionally (i. e., if the Heffron Company did not), both for the lumber previously delivered and that thereafter delivered. Thereafter plaintiff delivered lumber which came to $524.71, making the whole amount due them $3,474.06, for the recovery of which the action was brought. * * *

The plaintiff in error bases its contention that the promise sued on was within the statute and hence void, solely upon the fact that, so far as plaintiff's evidence tended to establish the making thereof, it was only a conditional promise; i. e., a promise to pay if the Heffron Company did not. If this did not bring it within the statute, it does not contend that it was within it. The charge of the lower court to the jury presupposed that it was a question for them whether such was the character of the promise. They were told that, if such was its character, there could be no recovery, and that they could find for plaintiffs only in case they determined that the promise was an absolute one; i. e., "to pay—not if the Heffron Company did not pay, but pay anyhow." They were further charged that the written assurance was not sufficient to take the promise out of the statute, for two reasons, to wit, want of authority on the part of the officer of defendant, who had given it, to give it, and the necessity of parol evidence to explain a reference in the letter from plaintiffs, to which it was an answer.

The position of plaintiff in error, that the only promise which plaintiff's evidence tended to establish was a conditional promise, is difficult to combat. The sole witness thereto testified, on cross-examination, that the "precise language" used was, "we will pay this account if Heffron Construction Company does not," and that the language was in substance, "We will see that this account is paid if the Heffron Construction Company does not pay it." His testimony on direct examination is not inconsistent with such having been the language

used, and all other pertinent evidence, apart, perhaps, from the absolute assurance referred to, tended to make out a conditional promise; and we will dispose of the case on the assumption that such was the character of the promise. The plaintiff in error is now so cocksure that, this being so, the promise was within the statute and it was entitled to a directed verdict, that we eliminate every other consideration bearing on its being so entitled on this ground, in order that we may meet it where it has chosen to rest its case. Possibly it was not always of this view, i. e., not until after the lower court had charged that, if such was the character of the promise, there could be no recovery. This may account for its not having requested the peremptory instruction until after the jury had been charged.

The plaintiff in error's contention amounts to this: that every conditional promise to pay the debt of a third person is within the statute. Is this so? To answer this question it is necessary to interpret the statute. A statute may be viewed as a symbol. A symbol has been defined to be "a soul in a body." Rather, perhaps, it should be put that it is a body with a soul. Its phraseology is its body, and its thought is its soul. Sometimes the thought of a statute and its phraseology do not coincide. Where such is the case, it is its thought, and not its phraseology, which is the statute. The sole description of what is covered by the statute here is "a special promise to answer for the debt, default, or miscarriage of another person."[13] We take

[13] Do the words "any special promise" in debt, default or miscarriage clause of section 4 of the statute mean anything different from the words "contract" and "agreement?" It is generally assumed in the cases and text books that they do not, but in an article in 57 U. of P. Law Rev. 611, entitled, A New and Old Reading on the Fourth Section of the Statute of Frauds, Professor Crawford D. Hening insists that they do. He declares that "special promise" means "special assumpsit" (Id., 615), and was used in contradistinction to debt and account. The statute was not meant to prevent the creation of debts without writing, but was meant to prevent the enforcement of oral special promises to answer for the debts of others.

Analyzing the situations to which the guaranty clause of the statute may be applied into (A), promises made when the debt of the other person is contracted and (B), promises made afterwards to pay a pre-existing debt, he resolves them as follows:

In situation (A), if by the oral transaction the defendant became a debtor, the statute had no application, but if he became a special promisor to answer for the credit given to another, i. e., for the debt of another, the statute applied.

In situation (B), where there is a substitution of debtors—a novation—there is a new debt and not a special promise and the statute does not apply. Where there is a debt created against the new party who comes in, even if the old debtor still remains a debtor and is to have his debt paid by the discharge by payment of the newcomer's debt, the same thing, says Professor Hening, should be true.

He says: "In other words, I submit that in the English law of contracts at

it that it is the thought of the statute that it is only a conditional promise to pay the debt of a third person—i. e., to pay it if he does not—that is covered by the statute; for it is only such a promise that is a promise to answer for the debt of another within its meaning. It follows that an absolute promise to pay a debt of a third person is not within the statute. Gibbs v. Blanchard, 15 Mich. 292; National Bank v. State Bank, 93 Iowa, 650, 61 N. W. 1065, 57 Am. St. Rep. 284; Lakeman v. Mount Stephen, L. R. 7 Eng. & Ir. App. 17.

In Wald's Pollock on Contracts (3d Ed. by Williston) p. 170, it is said:

"A promise to be primarily liable, or to be liable at all events,

the date of the statute, there were three species of simple contractual liability, as later set forth in Buller's Nisi Prius, p. 126:

"(1) Accountability, dependent upon a bailment.

"(2) Debt, dependent upon *quid pro quo*, which might arise upon sale or loan or on some act done on request.

"(3) Assumpsit or special promise dependent upon consideration.

"I shall endeavor to show that the practical distinction between these three species of contract was the reason why the English Parliament endeavoring, in 1677, to suppress the perjurous falsification of parol guaranties denounced *parol special promises* or assumpsits, but left untouched parol debts, and parol accountabilities; and finally it is proposed to show that the distinction thus made by the British Parliament should still be preserved between these three species of contract in order to apply the statute today to the effective suppression of perjury" (p. 615).

A perusal of the article is recommended, but one special argument in it should be noted here. In determining whether the new party becomes a debtor the old law, of course, must be regarded. "Before the statute [of frauds] forbearance [to sue plaintiff's debtor or forbearance] in any form whatever [would not give rise to a debt but] was only a consideration. Before the statute forbearance to sue was never known to create a debt" (p. 617). "English courts have ever since 1677 consistently treated cases of forbearance as cases within the statute" (p. 618). "But unfortunately, some American decisions, wholly at variance with the above line of English cases, adopt as a criterion a question of fact requiring due process of judicial telepathy for its determination—whether the defendant's main or only his subordinate purpose was to pay the debt of another; and whether his main or only his subordinate purpose was to subserve some purpose of his own" (p. 621). In a note it is added that many of the cases laying down this main purpose test "will be found on scrutiny to be cases of bailments or receiverships to account" (p. 621, n).

Professor Hening thus justifies the *del credere* agency cases as without the intent of the statute and what the English judges call the property cases, namely, the cases holding "that the surrender of property to the defendant on which the plaintiff has a lien in exchange for the defendant's promise to pay the thus secured debt of a third person is not a special promise to answer for the debt of another within the statute" (p. 632) he explains as either cases where the defendant under the arrangement became a debtor or where he became a bailee to sell and account and so his promise was without the intent of the statute.

See also Charles K. Burdick, Suretyship and the Statute of Frauds, 20 Col. L. Rev. 153; John Delaire Falconbridge, Guarantees and the Statute of Frauds, 68 U. of Pa. L. Rev. 1, 137.

whether any third person is or shall become liable or not, is not within the statute, and need not be in writing."

But it does not follow that, because a conditional promise only is within the statute, every such promise is within it, or, to go back to the phraseology of the statute, that because a promise to answer for the debt of another person only is within the statute that every promise to do so is within it. Whether every such promise is within it depends on its thought; for, as stated, the thought of the statute, and it alone, is the statute. A close observation of its phraseology takes note of the fact that it says nothing whatever as to the person to whom the promise is made. Seemingly, therefore, a promise of the character called for, made to any person, is within it. But, indisputably, such is not the case. Amongst the differences as to what is within the statute there is none here. In the case of Eastwood v. Kenyon, 11 A. & E. 438, it was held that a promise for a sufficient consideration made to the debtor to pay his debt is not within the statute. Lord Denman said:

"The statute applies only to promises made to the person to whom another is answerable."

Wald's Pollock on Contracts (3d Ed. by Williston) p. 170, puts it that a promise is not within the statute "unless it is made to the principal creditor."

The case of Eastwood v. Kenyon, decided in 1840, is the first case in which this question seems to have arisen. The position was not argued out. It was taken *per saltum*. The only possible ground upon which it can be based is that a promise which is not made to the person to whom the third person is answerable—i. e., to the creditor—is not within the thought of the statute. That such a promise is not within its thought suggests that possibly there may be other promises to answer for the debt of a third person which are not within its thought, and hence not covered by the statute. And so we find. The clause of the statute of frauds involved here is the second clause of the original statute of Charles II. The first clause thereof provides that no action shall be brought "whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate." These two clauses are found in juxtaposition in the same section of the Ohio statute, but in the reverse order. This first clause expressly limits the promise covered by it to a promise to answer out of the promisor's own estate. This suggests that it is the thought of the second clause that the promise covered by it is a promise to answer out of the promisor's own estate, and that therefore it does not cover a promise to answer out of the debtor's estate which may be in the promisor's hands. It is so held, and as to this, too, there is no difference of opinion. Throop on Verbal Agreements, § 13, says:

"And there is a class of cases under the second clause, not appearing to depend upon its wording, which bears a very close resemblance with

respect to the principle which governs them, and the facts calling for its application to a corresponding class under the first clause. We refer to those where the promise to pay the debt of another is held to be good without writing, because the promisor held a fund proceeding from the debtor and applicable to the fulfillment of the promise, in contemplation of which the promise was made. The similarity in the situation of the promisor under such circumstances, and that of an executor or administrator having sufficient assets to pay the debt of the decedent, and who, in consideration thereof verbally undertakes to pay it, is very striking. And the principle upon which each description of promise has been held to be without the statute is substantially the same. For while the first clause expressly provides that it shall be applicable only to a promise by the executor or administrator to answer damages out of his own estate, the second manifestly has the same meaning with respect to a liability incurred by one person to answer for the debt, default, or miscarriage of another."

The authorities are numerous to the effect that a promise to answer for the debt of a third person out of such person's funds, in the promisor's hands, is not within the statute. We cite only the authoritative case of Eastbrook v. Gebhart, 32 Ohio St. 415. The third paragraph of the syllabus, which gives the law of the case, is in these words:

"E contracts with S to build a house, and S contracts with G to furnish labor and materials. G refuses to furnish such labor and materials except upon promise, made to him by E that he himself will pay the bill out of the funds coming to S. Held to be a contract not within the statute of frauds, so as to make a writing necessary."

The Supreme Court said:

"The first part of the charge relates to the nature of the alleged promise made by Estabrook. The court told the jury plainly that, if this promise was merely to answer for Showalter's debt, there could be no recovery for want of writing; but if there was a new contract between Gebhart and Estabrook, by which, to induce Gebhart to furnish the labor and material, Estabrook undertook to pay, out of the funds which would be coming to Showalter, that Gebhart furnished the * * * material relying on this promise, which he would not otherwise have done, and that Showalter was irresponsible and assented to this arrangement, then the contract might be enforced."

But this does not exhaust all the possibilities of a promise to answer for the debt of another, not being within the thought of the statute, and hence not within it. We have already noted that the statute says nothing whatever as to the person to whom the promise is made. It is equally silent as to the person by whom it is made. Seemingly, therefore, a promise of the character called for, made by any person, is within the statute. But is this so? Our observation of the statute has brought to our attention that its phraseology is indefinite in three particulars, to wit, as to the person to whom it is made, as to the

estate out of which the promisor is to answer for the debt, and as to the person by whom the promise is made. We have found that, though the statute is indefinite in phraseology in the first two particulars, it is definite in its thought as to each of them. In view of this, one would naturally expect it to be definite, also, in thought in the third particular, thus making it definite in thought all around. And the means of making it is at hand, just as it is at hand in the other two particulars. In the first particular, it consists in the radical difference between the creditor and any other person; and in the second, in such difference between the promisor's own estate and that of the debtor. So in the third particular it consists in the radical difference between a promisor who has no personal concern in the debt of the third person, and one who has such concern therein. Possibly, if one is duly sympathetic, he will sense that it is the thought of the statute that it is a promise made by a person who has no personal concern in the debt, and none other, which is covered by it, just as it was sensed that it was its thought that it was a promise made to the creditor, and none other, which is so covered. And it seems fitting that, if it is only a promise made to the creditor to answer for the debt out of the promisor's own estate that is within the thought of the statute, that it is only such a promise made by one who has no personal concern in the debt that is within its thought. Why should one who has no personal concern in the debt and one who has be placed on the same footing? The object in view in the enactment of the original statute of frauds is thus stated therein:

"For the prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjuries."

The interest prompting a legislature to protect from perjury is not the same in the case of one who has a personal concern in the debt as in that of one who has no such concern therein. Where the promisor has a personal concern in the debt, the making of the promise is not dependent solely on the testimony of witnesses. The fact of having such concern is a corroborating circumstance in support of testimony tending to show the making of the promise. It renders its making more likely.

These circumstances tend to lead one to take the position, independent of authority, that it is only a promise made by one who has no personal concern in the debt that is within the thought of the statute and hence within the statute itself. When we come to tradition, we find numerous decisions, some of which are authoritative as to us, in which the promise involved has been held not to be covered by the statute, which can be, and which, in our judgment, should be, placed on this ground. The personal concern of the promisor in the debt may be either in its creation or in its payment. It is in its creation, if it is made before or at the time of the creation of the debt. It is in

its payment, if made after the creation thereof. The decisions which are authoritative as to us were in cases where the personal concern of the promisor was in the creation of the debt. They are Emerson v. Slater, 22 How. 28, 16 L. Ed. 360; Davis v. Patrick, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826; Crawford v. Edison, 45 Ohio St. 239, 13 N. E. 80. * * *

We know no authoritative case where the promise was made after the creation of the debt and the personal concern of the promisor was in its payment. But numerous cases of this character can be cited, the decision in which that the promise was not within the statute can and should be placed on the ground that, as the promisor had personal concern in the payment of the debt the promise was not within the thought of the statute. We cite but two, to wit, the early case of Williams v. Leper, 3 Burrow, 1886, and that of Landis v. Royer, 59 Pa. 95.

The promise sued on in Williams v. Leper was made to a landlord, who was about to distrain the goods of the tenant for arrears of rent, by one to whom the tenant had conveyed his goods for the benefit of his creditors. That sued on in Landis v. Royer was made to a materialman, who supplied lumber to a contractor in erecting a house for the promisor, and who had a right to take out a mechanic's lien on the building. Judge Sharswood said:

"It was the debt of the defendant's own building, the payment of which could legally be enforced against it; though it may not have been personally his debt, his property was answerable for it, and his engagement to pay was in relief of his property."

Judge Campbell, in the course of his opinion in Corkins v. Collins, 16 Mich. 478, thus put the matter:

"When, by the release of the property from a lien, the party promising to pay the debt is enabled to apply it to his own benefit, so that the release inures to his own advantage, it is quite easy to see that a promise to pay the debt in order to obtain the release may be properly regarded as made on his own behalf, and not on behalf of the original debtor, and any possible advantage to the latter is merely incidental, and is not the thing bargained for. That promise is therefore in no proper sense a promise to answer for anything but the promisor's own responsibility, and need not be in writing."

In cases of this kind the promisor is personally concerned in the payment of the debt, for thereby his property is relieved of it. Possibly there is stronger reason for saying that the promise in cases of this kind is not within the statute than that in cases of the other kind. The ground upon which this may be so is this: According to the phraseology of the statute, the only promise which is within it is one to answer for the debt of another person. This means that the debt shall be solely and exclusively the debt of the third person, and not that of the promisor. Where the creditor has a lien, or the right to

take out a lien, on the property of the promisor to secure the debt, it may be said that in a sense it is not solely and exclusively the debt of the third person, but is also the debt of the promisor. This is so, in that the property of the promisor is obligated to the payment of the debt. If this reasoning is sound, then it can be said that the ground upon which such a promise is not within the statute is that it is not covered by its phraseology.

This, however, cannot be said of the promise in cases of the other kind. But in reality, notwithstanding the creditor has such lien, or the right to take it out, the debt is solely and exclusively the debt of the third person. In no real sense is it the debt of the promisor. The ground, therefore, upon which to place it that the promise is not within the statute, is that which we have set forth. The statute, according to its thought, covers only a promise to answer for the debt of a third person by one who has no personal concern in the debt. It does not cover a promise by one who has a personal concern therein; and in such a case the promisor has such concern. His property is obligated for it, and by its payment will be relieved of the obligation. If, then, such is the true ground thereof, it follows that in any case where the promisor has a personal concern in the debt, whatever may be the basis thereof, the promise is not within the thought of the statute, and hence not within the statute. The decisions in cases of this kind, therefore, that the promise is not within the statute, indirectly uphold the position that the promise in cases of the other kind are not within it.

We have stated that these decisions can and should be placed on the ground that the statute only covers a promise made by a person who had no personal concern in the creation or payment of the debt, as the case may be, the promises involved therein not being so made, but by one who had such concern, not that they were actually placed on this ground.

Indeed it cannot be said that the courts who rendered them were clearly conscious that the decisions could be justified on the reasoning which we have put forth. From the quotations made it will be seen that the ground expressed is that the leading object of the promisors is to subserve some pecuniary or business purpose of the promisor. Sometimes the ground is stated to be that a new consideration or benefit has moved to the promisor; and the fact of personal concern has a tendency to support the contention that the promise was absolute, and not a conditional one, and hence not within the statute on this ground. The decisions themselves have been much criticized, though it is recognized that what they stand for is established law. It has been urged that such promises come within the terms or language of the statute, that to exclude them is judicial legislation and that the rule which they establish is anomalous. It has been suggested that, if the

promisor is to be liable at all, it should not be on the promise, but in quasi contract for the benefit received.

The decisions have also been a source of error in the reasoning on which they have been based, in that it has sometimes been thought that they were authority for the position that, in every case where a consideration moves to the promisor, the promise is within the statute, which is not the case. We would submit that the position that it is the thought of the statute that only a promise by a person who has no personal concern in the creation or payment of the debt to which it relates is within it is reasonable. It cannot be said that a promise by a person who has such concern therein is within the terms or language of the statute. The statute is silent as to the person by whom the promise is made. It is no more within the terms or language thereof than a promise to answer otherwise than out of the promisor's own estate, or than a promise to answer to the debtor or one other than the creditor. The position, therefore, reads no exception into the statute. It is simply one of three limitations on its scope, which one is constrained to put when one passes through its unlimited phraseology to its thought and looks at that phraseology from the other side. And there is nothing in this position that is calculated to lead one into error. Of course, some limitation must be put upon the words "personal concern." The concern must be such as that which existed in the cases cited and others like unto them; i. e., immediate and pecuniary.

If, then, the views here advanced are sound, a full expression of the thought of the statute as to the character of the promise covered by it would be somewhat like this: It is a promise to answer for the debt of another (i. e., to pay if he does not), made to the creditor by one who has no personal concern in the debt, the answering therefor to be out of his own estate.

Wald's Pollock on Contracts (3d Ed. by Williston) p. 169, characterizes the contract to which the statute relates as "a contract of suretyship or guaranty." Ames, in his Lectures on Legal History, p. 95, characterizes it as "guaranty." And such is what we take to be the ordinary conception of a contract of suretyship or guaranty. In order, then, to bring a promise within the statute, it is not sufficient that it is a promise to answer for the debt of another; i. e., to pay his debt if he does not. The promise must also be to the creditor by one who has no personal concern in the debt, and to pay same out of his own estate. Though it may be a conditional promise, if it is not to the creditor, or not by one who has no personal concern in the debt, or is not to pay it out of the promisor's own estate, it is just as much not within the statute as it would have been, had it been, not a conditional, but an absolute, promise.

We come now to apply the legal positions thus advanced to the case in hand. The defendant had a personal concern in the creation of

so much of the debt as was created after the making of the promise, and in so much thereof as had been theretofore created. It had such concern in the creation of the former portion, for it would result from plaintiffs' continuing to deliver lumber, and thereby the completion of the work which the Heffron Company had contracted to do would be furthered. It had such concern in the payment of the latter portion, for thereby its property would be relieved of the lien which plaintiff had a right to take out. Such being the case, the defendant's promise, whatever may have been its character, was not within the statute.

But this is not the only ground upon which it can be said that the promise was not within the statute. To say the least, it was open for the jury to find that the promise was to answer for the debt, not out of its own estate, but out of the Heffron Company's funds. There yet remained to be paid it under the contract over $6,000, of which over $2,000 had been already earned. By the company's contract with defendant it had the right to apply subsequent payments to this indebtedness, and under the contract, and the bond given simultaneously therewith, defendant had recourse against it and the surety company for any deficiency. It must be held, therefore, that this ground of the motion for a peremptory instruction is not well taken. * * *

*Finding none of the assignments well taken, the judgment of the lower court is affirmed.*[14]

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## ALDRICH *v.* AMES.

**(Supreme Judicial Court of Massachusetts, 1857. 9 Gray 76.)**

SHAW, C. J.[15] * * * The case in substance, is, that the plaintiff, at the request of the defendant, and for a valuable consideration, became bail for John A. Crehore, upon which the defendant promised the plaintiff to indemnify and save him harmless.

The ground of defense is, that this was an alleged promise of the defendant to pay the debt of another, and therefore that the action cannot be maintained without an agreement in writing, because it is within the statute of frauds.

The court are of opinion that this ground is wholly untenable. This is a promise by the defendant to another, to pay his debt, or, in other words, to save him from the performance of an obligation which might result in a debt. But it is a promise to the debtor to pay his debt, and thereby to relieve him from the payment of it himself, which is not within the statute of frauds.

[14] On promise to pay debt of another in consideration of relinquishment of lien by promisee as within the statute of frauds, see Ann. Cas. 1913 D, 319, note.

[15] Part of the opinion is omitted.

The theory of the statute of frauds is this; that when a third party promises the creditor to pay him a debt due to him from a person named, the effect of such a promise is to become a surety or guarantor only, and shall be manifested by written evidence. The promise in such case is to the creditor, not to the debtor. For instance, if A, a debtor, owes a debt to B, and C promises B, the creditor, to pay it, that is a promise to the creditor to pay the debt of A. But in the same case, should C, on good consideration, promise A, the debtor, to pay the debt to B and indemnify A from the payment, although one of the results is to pay the debt to B, yet it is not a promise to the creditor to pay the debt of another, but a promise to the debtor to pay his debt.

This rule appears to us to be well settled as the true construction of the statute, well confirmed by authorities. Eastwood v. Kenyon, 11 Ad. & El. 438, and 3 P. & Dav. 276; Harrison v. Sawtel, 10 Johns. (N. Y.) 242; Chapin v. Merrill, 4 Wend. (N. Y.) 657; Chapin v. Lapham, 20 Pick. (Mass.) 467; Alger v. Scoville, 1 Gray (Mass.) 395.

*Exceptions [by defendant] overruled.*

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JOHN HARTLEY, DEFENDANT IN ERROR, *v.* CORNELIUS SANFORD, PLAINTIFF IN ERROR.

(Court of Errors and Appeals of New Jersey, 1901. 66 N. J. L. 627, 50 Atl. 454, 55 L. R. A. 206.)

Action by John Hartley against Cornelius Sandford. Judgment for plaintiff (48 Atl. 1009), and defendant brings error. Reversed.

DIXON, J.[16] The material facts in this case, as disclosed by the record, are that the defendant's son was indebted to M., who desired additional security; that thereupon the defendant applied to the plaintiff to become surety for the son, and promised him that, if he was compelled to pay the debt, he (the defendant) would reimburse him; that accordingly the plaintiff became surety for the son, and subsequently was obliged to pay the debt. This suit was brought upon the promise, which was oral only. It appears that at the trial in the Passaic circuit the jury were instructed to find for the plaintiff if they were satisfied the promise had been made, but the question as to the legal sufficiency of the promise was reserved and certified to the supreme court, which afterwards advised the circuit that the promise was valid, and thereupon judgment was entered on the verdict. * * *

The advice of the supreme court was based upon its opinion that under the adjudications in this state the promise of one person to in-

[16] Parts of the opinion are omitted.

demnify another for becoming surety of a third is not within the statute. The cases cited in that opinion to support this view are Apgar's Adm'rs v. Hiler, 24 N. J. Law, 812; Cortelyou v. Hoagland, 40 N. J. Eq. 1; and Warren v. Abbett (N. J. Sup.) 46 Atl. 575. Of these, the only one of controlling authority here is that of Apgar's Adm'rs v. Hiler, which is a decision of this court. That decision does not sustain the broad proposition for which it was cited. This court there held merely that, between two persons who had signed the same promissory note as sureties for another signer, the oral promise of one surety to indemnify the other was valid. This promise was deemed outside of the statute, because by signing the note the promisor had himself become a debtor, and so his promise to indemnify was to answer for his own debt. In Cortelyou v. Hoagland several stockholders and directors of a corporation had promised to indemnify another stockholder and director for indorsing a corporate note, and Warren v. Abbett was of similar character. In the Cortelyou Case the chancellor rested his decision on Apgar's Adm'rs v. Hiler, which, as above stated, was essentially different and on Thompson v. Coleman, 4 N. J. Law, 216, which was a promise to indemnify a constable for selling under execution goods claimed by an outside party,—a case where the promisee had no redress except on the promise, and therefore clearly outside of the statute. If the decisions in Cortelyou v. Hoagland and Warren v. Abbett are to be supported on prior New Jersey adjudications, such support must be found in the doctrine that where the consideration of a promise to answer for the debt, default, or miscarriage of another is a substantial benefit moving to the promisor, then the statute does not apply. This rule was recognized in Kutzmeyer v. Ennis, 27 N. J. Law, 371, and Cowenhoven v. Howell, 36 N. J. Law, 323. To support those decisions on this rule, it must be held that the payment of a corporate debt is substantially beneficial to the stockholders or directors of the corporation,—a proposition which seems to be denied in other tribunals. Browne, St. Frauds, § 164. In the promise now under consideration there was no such element, and no case has been found in our reports involving the present question. We should therefore decide the matter on principle, or as nearly so as related adjudication will permit.

Looked at as *res nova,* it seems indisputable that the defendant's promise was within the statute. It was to respond to the plaintiff in case the defendant's son should make default in the obligation which he would come under to the plaintiff as soon as the plaintiff became surety for him,—an obligation either to pay the debt for which the plaintiff was to be surety, or to reimburse the plaintiff if he paid it. In this statement of the nature of the promise there is, I think, every element which seems necessary to bring a case within the purview of the statute. The parties, in giving and accepting the promise, contemplated (1) an obligation by a third person to the promisee; (2) that

this obligation should be the foundation of the promise, i. e., that the obligation of the son to the promisee should attach simultaneously with the suretyship of the plaintiff, and thereupon should arise the obligation of the promisor for the fulfillment of the son's obligation; and (3) that the obligation of the promisor should be collateral to that of the son, i. e., if the latter should perform his obligation, the promisor would be discharged, while, if the promisor was required to perform his obligation, that of the son would not be discharged, but only shifted from the promisee to the promisor.

An examination of the cases will show that not many of them are in conflict with this view, when they are free from differentiating circumstances. In the leading case of Thomas v. Cook, 8 Barn. & C. 728, such a circumstance appears in the fact that the promisor was himself a signer of the bond against which he promised to indemnify the promisee, and thus the promise was, in a reasonable sense, to answer for that which, as to the promisee, was the promisor's own debt. On this difference may be explained the decisions in Jones v. Letcher, 13 B. Mon. 368; Horn v. Bray, 51 Ind. 555, 19 Am. Rep. 742; Barry v. Ransom, 12 N. Y. 462; Sanders v. Gillespi, 59 N. Y. 250; Ferrell v. Maxwell, 28 Ohio St. 383, 22 Am. Rep. 393; and others,—resting on the rule applied in Apgar's Adm'rs v. Hiler, 24 N. J. Law, 812. The remark of Bayley, J., in Thomas v. Cook, that a promise to indemnify was not within either the words or the policy of the statute, has caused much of the confusion existing on this subject, but is more than counterbalanced by the observations of Lord Denman in Green v. Cresswell, 10 Adol. & E. 453, and Pollock, C. B., in Cripps v. Hartnoll, 4 Best & S. 414, to the effect that a promise to indemnify may be also an undertaking to answer for the debt or default of another; and that when it is it comes within the operation of the statute. Another circumstance taking cases out of the simple class with which we are now concerned is that mentioned in Kutzmeyer v. Ennis, 27 N. J. Law, 371, 376, viz., the existence of a new consideration beneficial to the promisor, or, as it is sometimes expressed, moving to the promisor. Such cases are Smith v. Sayward, 5 Greenl. 504; Lucas v. Chamberlain, 8 B. Mon. 276; Mills v. Brown, 11 Iowa, 314; Reed v. Holcomb, 31 Conn. 360; Smith v. Delaney, 64 Conn. 264, 29 Atl. 496, 42 Am. St. Rep. 181; Potter v. Brown, 35 Mich. 274; Comstock v. Norton, 36 Mich. 277; Harrison v. Sawtel, 10 Johns, 242, 6 Am. Dec. 337; Sanders v. Gillespie, 59 N. Y. 250; Tighe v. Morrison, 116 N. Y. 263, 22 N. E. 164, 5 L. R. A. 617. Cases of still another character are sometimes cited in support of the statement that contracts to indemnify are outside of the statute, such as Cripps v. Hartnoll, 4 Best & S. 414; Reader v. Kingham, 13 C. B. (N. S.) 344; Anderson v. Spence, 72 Ind. 315, 37 Am. Rep. 162; Keesling v. Frazier, 119 Ind. 185, 21 N. E. 552; Beaman's Adm'rs v. Russell, 20 Vt. 205, 49 Am. Dec. 775. But these judgments rest on the same idea as Thompson v. Coleman, 4 N. J. Law, 216,—that there existed no other liability to the

promisee than that of the promisor, and so manifestly the statute was not applicable. On the other hand, there is sufficient judicial authority for the proposition that an undertaking to indemnify a person for becoming surety for another is, in the absence of any modifying fact, a promise within the statute. Green v. Cresswell, 10 Adol. & E. 453; Simpson v. Nance, 1 Speer, 4; Brown v. Adams, 1 Stew. 51, 18 Am. Dec. 36; Kelsey v. Hibbs, 13 Ohio St. 340; Clement's Appeal, 52 Conn. 464; Bissig v. Britton, 59 Mo. 204, 21 Am. Rep. 379; Nugent v. Wolfe, 111 Pa. 471, 4 Atl. 15, 56 Am. Rep. 291; Draughan v. Bunting, 31 N. C. 10; Hurt v. Ford (Mo.) 44 S. W. 228; and May v. Williams, 61 Miss. 126, 48 Am. Rep. 80,—were decided on this basis. In the case last mentioned, Porter, J., stated the true rules very clearly and concisely.[17]

[17] In May v. Williams, cited in the text, *supra*, the question was whether an oral promise to indemnify one who became surety on a bail bond for another at the request of the promisor was within the debt, default, etc., clause of the statute. Cooper, J., said:

"It cannot be said that the promise to indemnify the surety is made to him as debtor and not as creditor. It is true that both the principal and surety are bound to the fourth person, the state; but the contract of the promisor is not to discharge that obligation. He assumes no duty or debt to the state, nor does he agree with the promisee to pay to the state the debt which may become due to it if default shall be made by the principal in the bond. It is only when the promisee has changed his relationship of debtor to the state and assumed that of creditor to his principal by paying to the state the penalty for which both he and his principal were bound that a right arises to go against the guarantor on his contract. It is to one who is under a conditional and contingent liability that the promise is made; but it is to him as creditor, and not as debtor, that a right of action arises on it. Nor do we think it sufficient to take the case from the operation of the statute that the liability of the principal arises by implication rather than by express contract. The statute makes no distinction between a debt due on an implied and one due by express contract. It is the existence of the debt against the principal and not the manner in which it originates that makes voidable a parol promise by another to become responsible for its payment. Nor are we able to perceive that the contract of the promisee is anterior to that of the principal in the bond. Until the surety assumes responsibility by executing the bond, the agreement of the promisor to indemnify is only a proposition which may be withdrawn by him or declined by the promisee. It is only when the proposition is acted on by the promisee that the contract becomes absolute; but at the very instant that it thus becomes a contract there also springs up an implied contract of the principal to do and perform the same act, *viz.*: to indemnify the surety against loss. It arises at the same moment, exists to the same extent, is supported by the same consideration, broken at the same instant, and is discharged by the same act, whether it be done by the principal in the bond or by the promisee in the contract to indemnify. It is the debt of the principal, and, being his debt, no third person can be bound for its payment unless the contract be evidence by writing. This, we think, is the fair import of the statute, and it ought not to be refined or frittered away."

In Alabama even the promise of one surety to hold his co-surety harmless is held to be within the statute. Posten v. Clem, 201 Ala. 529 (1918), Anderson, C. J., speaking of the rule as "wholesome and salutary as closing the door to

No doubt, there are opposing cases which cannot be explained on any distinguishing circumstances. Such seem to be Chapin v. Merrill, 4 Wend. 657; Jones v. Bacon (N. Y.) 40 N. E. 216; Dunn v. West, 5 B. Mon. 376; Vogel v. Melms, 31 Wis. 306, 11 Am. Rep. 608; and Wildes v. Dudlow, L. R. 19 Eq. 198. But some of these cases merely follow Thomas v. Cook, *ubi supra,* without noticing the distinction which later discussion has justified, while others appear to have been induced by the injustice of a refusal to enforce a promise on the strength of which the promisee incurred his liability, rather than by a ready purpose to execute the will of the legislature. * * *

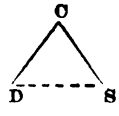
Our conclusion is that the promise proved at the trial was insufficient to sustain the action, that the judgment for the plaintiff should be reversed, and that, in accordance with the reservation at the trial, a verdict and judgment should be entered in favor of the defendant.

*Judgment reversed.*[18]

confusion, fraud and perjury by not permitting co-sureties on notes, bonds and other instruments to promote contests between themselves through oral promises and agreements as to their indemnity and liability" (78 So. at p. 884). But see Ferrell v. Maxwell, 28 Oh. St. 383 (1876) *contra*, although Ohio holds promises to indemnify in general to be within the statute. Kelsey v. Higgs, 13 Oh. St. 340 (1862). See also, *contra*, Rose v. Wollenberg, 31 Ore. 269 (1897). On such contracts between sureties as regards the statute of frauds, see 39 L. R. A. 378, note; 1 A. L. R. 383, note.

[18] There is much confusion in the cases as to contracts of indemnity and the statute of frauds, partly due to faulty analysis and partly to a difference in attitude on the part of courts toward the statute. Some so-called indemnities are clearly within the statute, for it is not the words used but the real nature of the promise and the intent of the legislature that must determine the result. A promise to indemnify one who advances money to a third person by way of loan to that person is clearly within the statute. Benninghoff v. Robbins, 54 Mont., 66 (1917). So is a contract to indemnify an employer from loss through the dishonesty of a servant. Com. v. Hinson, 143 Ky. 428 (1911). But see Quinn-Shepherdson Co. v. United States Fidelity and Guaranty Co., 142 Minn. 428 (1919). In these cases there are three parties, C, the (prospective) creditor, D, the (prospective) debtor, and S, the surety promisor, who is to perform if D does not and who makes his promise to C, the creditor. Logically this situation falls within the statute, and also, by all presumptions of legislative intent, the statute is a defense. The trio in this relation may be thus diagrammed in triangular form:

Figure No. 1.




The broken line represents D's obligation first to exonerate, and then, if exoneration has not taken place, to indemnify S.

But when we come to the situation dealt with in Aldrich v. Ames, reported *ante*, and in the principal case of Hartley v. Sandford, there is more complication, for a fourth party, I, the so-called indemnifier of the surety, appears. There are still C, the (prospective) creditor, D, the (prospective) debtor, and

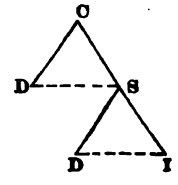
## AMES *v.* FOSTER ET AL.

(Supreme Judicial Court of Massachusetts, 1871. 106 Mass. 400, 8 Am. Rep. 343.)

MORTON, J. The only question involved in this case arises under that clause of the statute of frauds which provides that no action

S, the man who goes on the bond as surety promisor; but if the bond is given in a civil suit (or if it is given in a criminal action and if the prisoner is in the given jurisdiction obligated to indemnify his bail), another trio may materialize as a result of I's promise to save S harmless and to indemnify him if he will go on the bond. The materialization will take place if S, the surety, has to pay C, the obligee original creditor, for forthwith D, the prinicipal debtor will become obligated to reimburse S, the surety, and I, the indemnifier, will be bound to pay S only if D does not pay S. Logically the promise of I, after D fails to reimburse S, is that of a surety for D to S. See the following double triangle diagram:

Figure No. 2.




The broken lines represent as before the obligations first to exonerate and then to indemnify. D in each triangle is the principal debtor. He becomes such in the second triangle only because he fails to pay as debtor in the first, and S has to pay.

But logic does not settle the matter. There still remains the question of legislative intent. Even with reference to the single trio situation, which logically is within the statute whether the promise of the surety is to the creditor or to the debtor, we disregard logic and through a forced construction of the word "another" say that the promise is not within the statute if made to the debtor instead of the creditor. That is on the theory that Parliament intended, and our American legislatures have intended, to remedy the mischief of perjured claims of suretyship only when made by creditors. And that, too, though in many American jurisdictions the creditor, as beneficiary of the promise to the debtor that the promisor will pay the debt to the creditor, may recover against the promisor on the oral promise, despite a plea of the statute of frauds, although he could not have recovered on the promise if it had been made to himself and the statute had been pleaded. See Wood v. Moriarity, reported *ante*, p. 639. See also Eddy v. Roberts, 17 Ill. 505 (1856), where the defendant for a consideration promised the creditor to pay the debtor's debt to the creditor, where, for a different consideration, he promised the debtor to pay it, and where, though the creditor was denied a remedy on the promise to him, he was allowed to recover as beneficiary of the defendant's promise to the debtor despite a plea of the statute of frauds. See 12 Ann. Cas. 1101, note, where the cases are collected. If logic may give way to legislative intent so strikingly in the single trio situation, still more possible, and even more plausible, is the argument that Parliament was legislating for only the single trio situation, and that the double trio situation, as illustrated in the principal case of Hartley v. Sandford, was not meant to be affected by the statute.

shall be brought "to charge a person upon a special promise to answer for the debt, default or misdoings of another, unless the promise, or some memorandum or note thereof, is in writing, and signed by the party to be charged, or his agent." Gen. Sts., c. 105, § 1, cl. 2.

The plaintiffs in the original action claim to hold the defendant upon the ground of an express promise to pay the amount of a debt due the plaintiffs by the owners of the steamer N. P. Banks, for wood and coal furnished prior to October 1, 1868. At this time, McKay & Aldus, of Boston, owned three-fourths of the steamer, and the other fourth was owned by parties in New York. In December, 1868, McKay & Aldus went into bankruptcy, having previously mortgaged their interest to the defendant Ames. In the spring of 1869 the plaintiffs heard that the steamer was to be carried to New York to be sold, and they threatened to attach her, and thereupon Ames promised to pay the bill if they would not attach her.

It is to be observed that Ames was not originally liable upon the bill, being merely a mortgagee. Howard v. Odell, 1 Allen (Mass.) 85. The plaintiffs do not claim that they had a lien upon the vessel. They had no right to attach the interest of McKay & Aldus, who were in bankruptcy. The only legal consideration, therefore, of the defendant's promise, was the forbearance of the plaintiffs to attach the interest of the New York owners. Upon this state of facts, the learned judge who presided at the trial instructed the jury that "if, for the benefit and at the request of Ames, the said Foster gave up or surrendered some advantage which he had, as a means of collecting his debt or the like, and in consideration thereof Ames promised to pay this bill, he would be liable, although the promise was not in writing." We do not think that these instructions, applied to the facts of this case, were correct or sufficient. As we have seen, the only consideration of the defendant's promise was that the plaintiffs forbore to attach the interest of the New York owners; and we are of opinion that the jury should have been instructed that such promise was within the statute of frauds.

The defendant's promise was, in its primary and essential character, a promise to guarantee the debt of another. Its object was, to secure the payment of the old debt, which was not extinguished. The defendant's liability was collateral and contingent, would exist as long as the original debt existed, and would be extinguished whenever the original debtors should pay that debt. It was not in any sense his debt; the original party remained liable; and there is an

**On such a theory, the majority cases can be supported and yet the logic of the minority cases be conceded. The double trio situation, on this theory, is not within the mischief aimed at by the statute.**

**On the application of the statute of frauds to a promise to indemnify, see 6 Ann. Cas. 671, note; Ann. Cas. 1912 A, note; Ann. Cas. 1915 A, 867, note; 42 Am. St. Rep. 187, note; 1 A. L. R. 383, note.**

entire absence of any liability on the part of the defendant or his property, except such as arises from his express promise. Forth v. Stanton, 1 Saund. (6th ed.) 211, note. When all these elements concur, we know of no case in this commonwealth which sanctions the doctrine that such promise loses its character as collateral, and becomes an original promise, because there is a consideration which is beneficial to the promisor.

In Alger v. Scoville, 1 Gray (Mass.) 391, 396, Shaw, C. J., says that "it has been held that when the leading and obvious object of the promisor was to induce the promisee to forego some lien, interest, benefit or advantage held by him, and to transfer that interest, or confer that or some equivalent benefit on the promisor, although the effect may be to discharge neither from an obligation, still it is a new, independent and original contract between the parties, and is not within the statute of frauds required to be in writing."

In Curtis v. Brown, 5 Cush. (Mass.) 488, Shaw, C. J., states that "it is no sufficient ground to prevent the operation of the statute of frauds, that the plaintiff has relinquished an advantage, or given up a lien, in consequence of the defendant's promise, if that advantage has not also directly enured to the benefit of the defendant, so as in effect to make it a purchase by the defendant of the plaintiff. The cases in which it has been held otherwise are those where the plaintiff in consideration of the promise, has relinquished some lien, benefit or advantage for securing or recovering his debt, and where by means of such relinquishment the same interest or advantage has enured to the benefit of the defendant. In such cases, although the result is that the payment of the debt of the third person is effected, it is so incidentally and indirectly, and the substance of the contract is the purchase, by the defendant of the plaintiff, of the lien, right or benefit in question."

It is equally true that it is no sufficient ground for taking the case out of the statute, that the defendant has received some benefit from the consideration of his promise. If this were so, then every promise to guarantee the debt of another, made upon a pecuniary consideration paid by the promisee to the promisor, would be taken out of the statute. In all cases, the question is, whether the promise is in substance a promise to pay the debt of another, or whether it is a promise by the promisor to pay his own debt, the extent of which is measured by the amount due by another.

We think the authorities in this state have gone no further than to decide that a case is not within the statute, where, upon the whole transaction, the fair inference is, that the leading object or purpose and the effect of the transaction was the purchase or acquisition by the promisor from the promisee of some property, lien or benefit which he did not before possess, but which enured to him by reason of his promise, so that the debt for which he is liable may fairly be deemed to be a debt of his own, contracted in such purchase or acquisition. Nelson v. Boyn-

ton, 3 Met. (Mass.) 396; Fish v. Thomas, 5 Gray (Mass.) 45; Burr v. Wilcox, 13 Allen (Mass.) 269; Furbish v. Goodnow, 98 Mass. 296; Browne on St. of Frauds (3d ed.), § 214, c. d.

Applying this test to the facts of this case, it is clear that the promise of the defendant Ames was within the statute. It is true, or probable, that he indirectly received some benefit from the forbearance of the plaintiffs to attach the interest of the New York owners, but the purpose or effect of the transaction was not to transfer to him any lien or advantage. He acquired no rights which he did not before possess, and it is impossible to regard the promise as an original promise founded upon the consideration of a purchase by him. We are of opinion, therefore, that the jury should have been instructed in accordance with the request of the defendant Ames, that the plaintiff upon the facts found was not entitled to recover.

*Exceptions* [*of defendant*] *sustained.*[19]

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## HARBURG INDIA RUBBER COMB COMPANY *v.* MARTIN.

(Court of Appeal. [1902] 1 K. B. 778.)

Appeal from a decision of Mathew, J.

The plaintiffs, a foreign company carrying on business in Germany, were judgment creditors of an English company called the Crowdus Accumulator Syndicate, Limited, of which the defendant was a director and in which he held a large number of shares. He had also financed the syndicate.

The plaintiffs had issued a writ of fi. fa. upon the judgment, which the sheriff had failed to execute, because he could not effect an entry. The defendant then had an interview with a Mr. Winter, the plaintiffs' agent in England, at which he verbally promised Winter that he would indorse two bills of exchange, each for half the amount of the debt, and payable respectively at three and six months. On the faith of this promise Winter withdrew the writ. The action was brought for breach of the defendant's promise.

At the trial Mathew, J., gave judgment for the plaintiffs, holding that s. 4 of the Statute of Frauds did not apply.

In the course of his judgment the learned judge said: "What is the result of the evidence? At the time when the defendant came to Mr. Winter the plaintiffs were in a position to take possession of the goods of the syndicate; they were in a position analogous to that of persons having possession of the goods, and their legal position is recognized

[19] See Carleton v. Floyd, Rounds & Co., 192 Mass. 204 (1906), deemed by the court not to be distinguished in principle from Ames v. Foster. See also Richardson Press v. Albright, 224 N. Y. 497 (1918). See note 9, *ante*, this chapter.

in Williams v. Leper (1766), 3 Burr. 1887 and in Edwards v. Kelly (1817), 6 M. & S. 204. Those cases have been discussed with approval, and very sensible and reasonable cases they are, and in their facts they closely approach the present case. They are discussed in the notes to Forth v. Stanton, 1 Williams' Saund. 209 a. What was the object of the arrangement here? The object was to protect the goods of the syndicate; it was not to pay the debt of another. It is pretty clear that what the defendant suggested was that he should have time to sell all which belonged to the company. If, in fact, the object of the contract was to protect the goods, that would be sufficient to take the case out of the statute.

"But there is another point still more clearly in favor of the plaintiffs, namely, that the promise was given for the purpose of obtaining a direct personal advantage for the defendant himself. He had invested a large sum in the syndicate, and would lose every farthing of it unless time were given for the syndicate to get on its legs. With that object —and I should gather it was the sole object he had in view—he made the promise. That again is a ground for saying that the case is not within the statute of frauds, as is clear from Sutton & Co. v. Grey, [1894] 1 Q. B. 285.

"Under these circumstances it seems to me clear that the statute of frauds does not apply, and my judgment must be for the plaintiffs."

The defendant appealed.

VAUGHAN WILLIAMS, L. J.[20] The material facts of this case are very short. The plaintiffs had supplied goods to a company called the Crowdus Accumulator Syndicate. The syndicate did not pay what was due from them for the goods, and the plaintiffs recovered judgment against them, and placed a writ of fi. fa. in the hands of the sheriff to realize the amount of their judgment. The sheriff found that the works of the syndicate had been stopped and their place of business closed, and he did not take possession. After this there was a meeting between the defendant and Mr. Winter, the plaintiffs' agent. A conversation took place at that meeting, and the jury have found that Mr. Winter's account of it is accurate. To put the result of the conversation shortly, the defendant then verbally promised Mr. Winter that he would indorse some bills for the amount of the judgment debt. It is said that amounted to an oral promise to give a guarantee of the judgment debt owing by the syndicate to the plaintiffs.

It is said on behalf of the defendant that this was a promise by him by word of mouth to make himself answerable for the debt of the syndicate. It is said on behalf of the plaintiffs that this was not a promise to make himself answerable for the debt of another—that is, the syndicate—but that it was a contract of indemnity, by which, I suppose, is meant a new contract in the nature of an original obligation.

[20] Parts of the opinions are omitted.

The question which we have to decide is whether this bargain is "a promise to answer for the debt of another" within s. 4 of the statute of frauds. Mathew, J., has held that it is not. I am sorry to say that I cannot agree with that conclusion. It seems to me that this contract was as plainly as possible a promise by the defendant to make himself answerable for the debt of the syndicate.

Our attention has been called to a great number of cases in which the court has treated various transactions as being outside s. 4. Most of the earlier cases were what I may call "property cases." They were cases in which either the person who made the promise had property which he wished to relieve from liability, or there was property which he wished to acquire. It is not necessary for me to go through those cases, but I cannot agree that the present case comes within any of that class. The defendant's promise was not, as it seems to me, either a new contract of purchase, or a new contract for the release of any property which either was his or in which he had an interest.

Our attention was next called to the exception which has been established by what I may call the "*del credere* cases," beginning with Couturier v. Hastie, 8 Exch. 40, and coming down to Sutton & Co. v. Grey [1894], 1 Q. B. 285. It has been said, and I think truly, that these cases are of a different species from the property cases. I say of a different species, not of a different genus, because I think there is a wider genus, which can be plainly and simply defined, within which both of these species fall. So far as I can see, the authorities have left us with a general rule, which I will attempt to define presently, and each of these two classes of cases falls within that general rule. In each of them, I think, the form of the promise given by the promisor has never been held to be conclusive of the matter. He may, or he may not, promise in terms to answer for the debt of another; but, whether he does so or not, it is the substance, not the form, which is regarded.

Before leaving these instances I wish to mention one other class, which I do not treat as an exception from s. 4, but which, I think, does not come within the section at all. I mean the cases which have been spoken of as "indemnity cases." Of course in one sense all guarantees, whether they come within s. 4 or not, are contracts of indemnity. But the difference between those indemnities which come within the section and those which do not is very shortly thus expressed in the notes to Forth v. Stanton, Williams' Notes to Saunders, ed. 1871, vol. i. p. 234: "These cases establish that the statute applies only to promises made to the person to whom another is already or is to become answerable."

That, to my mind, is an accurate definition of a guarantee or indemnity which comes within s. 4 of the statute, as distinguished from an original liability which is not within the section, and which has no reference to the debt of another, but creates a new liability which is undertaken by the promisor, and has been called in the course of the argument a contract of indemnity. * * *

In my judgment, the circumstances of the present case show plainly that there was a guarantee of the payment of a debt for which the syndicate was primarily liable, and not an original promise by the defendant to keep the plaintiffs indemnified. In my judgment, a contract of indemnity does not come within s. 4, but I think there is nothing to justify us in holding that in the present case the contract is a contract of indemnity. In my opinion, it is a contract of guarantee—"a promise to answer for the debt of another."

I will now go back to those cases which, so far as the words of the contract are concerned, might come within s. 4, but which have been held not to come within it because of the object of the contract. Whether you look at the "property cases" or at the "*del credere* cases," it seems to me that in each of them the conclusion arrived at really was that the contract in question did not fall within the section because of the object of the contract. In each of those cases there was in truth a main contract—a larger contract—and the obligation to pay the debt of another was merely an incident of the larger contract. As I understand those cases, it is not a question of motive—it is a question of object. You must find what it was that the parties were in fact dealing about. What was the subject-matter of the contract? If the subject-matter of the contract was the purchase of property—the relief of property from a liability, the getting rid of incumbrances, the securing greater diligence in the performance of the duty of a factor, or the introduction of business into a stockbroker's office—in all those cases there was a larger matter which was the object of the contract. That being the object of the contract, the mere fact that as an incident to it—not as the immediate object, but indirectly—the debt of another to a third person will be paid, does not bring the case within the section. This definition or rule for ascertaining the kind of cases outside the section covers both "property cases" and "*del credere* cases."

Can we then in the present case find any larger contract? I cannot. It seems to me plain upon the evidence that the only matter which was present to the mind of the defendant, and was presented by him to Mr. Winter, was this: "Will you forbear for a time? Will you give the syndicate, which I believe has a future before it, an opportunity of turning round? I believe that if it has that opportunity, it will do well and will be able to pay you. And to induce you thus to forbear I will give you bills which shall secure the payment at specified periods of the judgment debt, in case the syndicate does not pay you itself." That, I think, is the true effect of the conversation, and it seems to me that was the whole of the contract, and there was neither a purchase nor a *del credere* arrangement, nor anything else beyond that bargain. And the mere fact that the defendant had, as he seems to have done, financed the syndicate to a large extent, and that that was his motive for thus coming forward and bargaining for forbearance, cannot make any difference in the object of the contract. That might have been the motive

which induced him to make himself answerable for the debt of the syndicate, but it was not the object of the contract. The object was simply to obtain the forbearance of the creditors in respect of the debt.

It was suggested that the true definition of cases which do not come within s. 4 should be, not those in which the obligation to pay the debt of another is an incident of a larger contract, but those in which the main object is to secure the promisor's own personal interest. But, I think, if such a definition were adopted, there would be nothing left to come within s. 4, because in every case there must be a consideration for which the promisor bargains to come to him from the promisee. That is as true of mere forbearance as of anything else. If the contract is that the promisor will be answerable for the debt due to the promisee if he will forbear, if the main object is to obtain that forbearance, and the promisor wishes to obtain it, that would be sufficient to take the case out of the statute. In my opinion so to hold would be simply to repeal s. 4. * * *

In my opinion the judgment of Mathew, J., should be reversed, and the appeal allowed. * * *

STIRLING, L. J. * * * In my opinion the decision in Guild & Co. v. Conrad, [1894] 2 Q. B. 885, does not apply. It is, I think, impossible to arrive [here] at the conclusion at which the learned judges arrived in that case, namely, that the defendant's contract was to pay the debt whether the syndicate, of which he was a director, could or could not pay it. In Guild & Co. v. Conrad, it was found that the contract was not to pay if the foreign firm did not pay, because there was no expectation at that time that the foreign firm would be able to pay, but the contract was to provide funds to enable the plaintiffs to meet certain acceptances. In the present case it seems to me that the transaction in contemplation was to give time to the syndicate in the expectation that in the interval they would be placed in funds by which they would be enabled to pay all their debts. The important element corresponding to that which existed in Guild & Co. v. Conrad, namely, the absence of any expectation that the syndicate would ever be able to pay, is here wanting.[21]

[21] In Guild & Co. v. Conrad, [1894] 2 Q. B. 885, the defendant orally promised the plaintiff that if the plaintiff would accept certain bills for a firm in Demerara in which the defendant's son was a partner the defendant would "find funds to enable the plaintiff to meet these acceptances." At the time that defendant made the oral promise there was no expectation that the Demerara firm would be able to pay. The defendant was held liable on the promise despite a plea of the statute of frauds, and Lindley, L. J., said: "The nature of the promise is all-important, because, if it was a promise to pay if the Demerara firm did not pay, then it is void under the statute of frauds as not being in writing. But if, on the other hand, it was a promise to put the plaintiff in funds in any event, then it is not such a promise as is within the statute of frauds." The defendant's promise, as one to pay in any event, was

That being so, we have to consider whether the contract was "to answer for the debt, default, or miscarriage of another person" within the meaning of s. 4 of the statute of frauds. Undoubtedly the decisions run fine in these cases * * *

I come then to Couturier v. Hastie, 8 Ex. 40, in which it was held that a contract by a *del credere* agent was not within the statute. From the judgment of Bowen, L. J., in Sutton & Co. v. Grey, 69 L. T. (N. S.) 354, at p. 355, it is clear that he regarded Couturier v. Hastie as going to the very verge of the law, and he referred to the observations upon it made by Page Wood V.-C. in Wickham v. Wickham, (1855) 2 K. & J. 478, at p. 487. In Sutton & Co. v. Grey, [1894] 1 Q. B. 285, there was a contract between a firm of brokers and the defendant of which the terms were that he should introduce clients to them, and that the plaintiffs should transact business on the Stock Exchange for the clients thus introduced, and that, as between the plaintiffs and the defendant, he should have half the commission earned by the plaintiffs in respect of any transactions by them for any clients introduced by him, and he should pay to the plaintiffs half of any loss which might be incurred by them in respect of those transactions. The plaintiffs claimed to recover from the defendant half the loss which they had incurred in Stock Exchange transactions which they had entered into on behalf of a person who had been introduced to them by the defendant, and it was held that, the defendant having an interest in the transactions equally with the plaintiffs, the principle of Couturier v. Hastie applied. * * *

But, as it seems to me, * * * the word "interest" means some species of interest which the law recognizes. In the present case the defendant had no such interest in the property which was about to be seized by the sheriff. He was a director of the syndicate who had, no doubt, a deep interest, in the popular sense of the word, in its proceedings. He held a large number of shares: I believe he was the largest shareholder in the syndicate. He had also financed the syndicate, but he had nothing in the nature of a charge on their property; he was at the utmost a general creditor of the syndicate.

It has been contended that we ought to read the words "interest in the transaction" in a wide sense, and as importing a "business interest" in the syndicate—that kind of interest which a creditor and a shareholder of a company has in its prospects. To do this would, I think, go a long way to repeal s. 4 of the statute of frauds, and to extend the doctrine of Couturier v. Hastie very much further than I am prepared to extend it.

also referred to as a promise to indemnify. It would seem to be more properly designated as an original promise. For an argument against taking out of the statute such promises to pay irrespective of the liability of the original debtor, see 1 Williston on Contracts, § 456.

For these reasons I think that the appeal ought to be allowed, and the judgment of Mathew, J., reversed.

COZENS-HARDY, L. J. * * * *Primâ facie* the contract falls within s. 4 of the statute, unless it can be brought within some recognized or some logical exception. One great peculiarity is this, that neither the plaintiffs nor the defendant had possession of or had any interest in the goods of the syndicate. But it has been forcibly and most ably argued that the case is brought within the recognized exceptions from the section, because the defendant, though he had no legal right to or interest in the goods, yet had in a business sense an interest in them. It has been argued that we ought to look at the object of the promise which the defendant made, and that if we can come to the conclusion that his object in giving the promise was to secure a benefit for himself, and not to secure forbearance for the syndicate, then we ought to hold that the case is not within the statute at all. I cannot agree with that argument. It seems to me to involve a confusion between object and motive. I cannot doubt that the object of the promise which was made by the defendant was to secure the forbearance of the plaintiffs, for three months and six months, in enforcing the debt due from the syndicate.

If that be so, the authorities do not, as it seems to me, in any way support Mr. Russell's contention. They have been divided conveniently into three classes. The first consists of what have been called "the property cases." I do not think they can be dealt with more accurately, and certainly not more shortly, than they were by Williams, J., in his judgment in Fitzgerald v. Dressler, 7 C. B. (N. S.) at p. 394, where he said: "At the time the promise was made the defendant was substantially the owner of the linseed in question, which was subject to the lien of the original vendors for the contract price. The effect of the promise was neither more nor less than this, to get rid of the incumbrance, or, in other words, to buy off the plaintiffs' lien. That being so, it seems to me that the authorities clearly establish that such a case is not within the statute." And he referred to Williams v. Leper, 3 Burr. 1887; Castling v. Aubert, 2 East. 325; and Anstey v. Marsden, (1804) 1 B. & P. (N. R.) 124.

Then stress has been laid on what have been called "the document cases." Those cases seem to me to stand on an entirely different footing. If I go to a banker or to another person who holds documents as security for a debt, and I ask him to hand over the documents to me on payment of the debt, that is simply a purchase of the security. Although in this way I have become answerable for the debt of another, that is not the main object of the contract.

The third class consists of those cases which have been called "the *del credere* cases." When they are fairly regarded, they seem to me to amount only to this: that a contract, e. g., for the employment of a

*del credere* agent, need not be in writing, although it incidentally involves the answering for a debt of another person. In other words, if the court can find that there is a main contract, the object of which is not to answer for the debt of another, that contract is not within s. 4, even though incidentally it may result in a liability to answer for the debt of another.

For these reasons I agree with the Lords Justices, and think that the appeal ought to be allowed.

*Appeal allowed.*

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MARY E. BAILEY, APPELLANT, *v.* JOSEPH N. MARSHALL.

(Supreme Court of Pennsylvania, 1896. 174 Pa. St. 602, 34 Atl. 326.)

DEAN, J. Whether the debt in controversy be that of him who has assumed to pay it, or of another, is in most cases a question of fact. There can be no precise legal definition of liability under the act of 26th of April, 1885, P. L. 308, which will determine, in all cases, perhaps in but very few, the answerability of him who promises to pay. The act says: "No action shall be brought whereby to charge * * * the defendant upon any special promise to answer for the debt or default of another unless the agreement * * * shall be in writing." This is clearly meant to relieve an alleged guarantor or surety; it was never intended to relieve him who had a personal beneficial interest in the assumption. There cannot be a better construction of this statute than in Nugent v. Wolfe, 111 Pa. 471, where we held, the present chief justice rendering the opinion, that: "It is difficult, if not impossible, to formulate a rule, by which to determine, in every case, whether a promise relating to the debt or liability of a third person is or is not within the statute; but as a general rule, when the leading object of the promise or agreement is to become guarantor, or surety to the promisee for a debt, for which a third party is and continues to be primarily liable, the agreement, whether made before or after or at the time with the promise of the principal, is within the statute, and not binding unless evidenced by writing. On the other hand, when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay, or discharge the debt of another, his promise is not within the statute."

Applying these principles to the facts in the case before us, to what conclusion do they impel us? In September, 1892, Mary E. Bailey held a note against Davis Pennock in sum of $1,000, with power of attorney to confess judgment. At this time, Marshall, the defendant, entered a judgment against Pennock for $5,000, issued execution, and levied on all the real and personal property of Pennock; the amount actually due and payable on his $5,000 judgment did not ex-

ceed, as appeared afterwards from his own statement, $200. The plaintiff was standing there with her judgment ready for entry, on which she could immediately issue execution, seize and bid upon the property; just at this juncture, Marshall, knowing her rights, sent for her and said: "I will stand by thee and see thee is paid every cent if thee says nothing and does nothing." She accepted his proposition, neither entered her judgment nor took any steps to collect. The sheriff's sale went on, and Marshall bought the larger part of the real and personal property, and was credited on his purchase with the amount of his own judgment.

We notice by the testimony that Marshall denies the statement of Mrs. Bailey; we express no opinion as to the credibility of the witnesses; the question is, if the jury believed Mrs. Bailey's testimony, would the court have been warranted in granting the compulsory nonsuit on the ground that the promise was to answer for the debt or default of another? What was the leading object of Marshall in making the promise by which he lured her to inaction? Clearly, it was not to pay Pennock's debt, nor Mrs. Bailey's claim. His sole purpose was to silence her as an antagonistic bidder at the sheriff's sale; this was no benefit to Pennock, the debtor; it was an advantage to Marshall, and he reaped the full fruits of it; she was silenced by his promise, and he got the property at his own figure. His leading object was to subserve his own interest; in fact, he had no other object; having accomplished it, he is now called upon to answer, not for Pennock's debt, but for his own, and if Mrs. Bailey be believed, he ought to pay.

*The decree of the court below entering compulsory nonsuit is reversed, and procedendo awarded.*[22]

[22] "It is frequently said that where the main purpose and object of the promisor is not to answer for the debt of another, but to subserve some pecuniary or business purpose of his own, the promise is not within the statute and need not be in writing. * * * But this general rule was undoubtedly deduced from cases where property was placed in the hands of the promisor, as a fund out of which the promisee was to be paid. Williams v. Leper, 3 Burr. 1886 (1766); Edward v. Kelley, 6 Maule & S. 208 (1817). The promise was a promise to account and not the special promise or assumpsit contemplated by the statute. The courts, however, have gradually come to speak of this as a 'new and beneficial consideration moving toward the promisor' and 'enuring to his benefit,' and so sufficient consideration to take his promise without the statute. They have not kept the fundamental distinction clearly in mind between cases where the promise was to account, with a transfer of property, and a special promise or special assumpsit with sufficient consideration to support a simple contract.

"As a consequence much confusion has arisen under this section of the statute, and while a majority of cases decided under the theory that 'the leading purpose and object of the promisor must be to promote some interest of his own' are cases where property has been transferred and so analogous to Williams v. Leper, *supra*, [citations], still the generality of expressions used is such that the rule has been extended to cases which do not bear the least resemblance to those on which the rule is based [citations]. * * * In Penn-

## MACHINIST *v.* GREEN.

**(Supreme Court of New Hampshire, 1920. 109 Atl. 45.)**

Action by Abraham Machinist against Abraham Green, resulting in verdict for plaintiff, and defendant excepts. Exceptions overruled.

Action for the breach of an oral contract. Trial by the court, and verdict of $200 for the plaintiff.

The defendant excepted to the court's refusal to order a nonsuit and a directed verdict in his favor, upon the ground that the oral contract was a promise to answer for another's debt and within the statute of frauds.

PLUMMER, J. The plaintiff agreed to loan one Garber $1,200 to enable him to purchase of one Plodzik 230 cords of wood. The defendant was a creditor of Plodzik in the sum of $2,500, and was actively interested in collecting it and pressing Plodzik to pay it, and when he learned of the contract between Garber and Plodzik, he made a demand upon Plodzik to have the $1,200 paid to him. The first payment in the sum of $500 for wood delivered was by the plaintiff's check payable at Garber's request to Plodzik's order, and by him indorsed and delivered to the defendant. When all but 30 of the 230 cords of wood had been delivered, Plodzik and the defendant went to the plaintiff, and Plodzik requested him to pay the balance of $700 to the defendant. The plaintiff did not obtain Garber's consent to this payment, but paid the $700 to the defendant, partly in reliance on the representations of Plodzik and the defendant that all of the 230 cords of wood were delivered, and partly in consideration of the defendant's agreement and undertaking that if they were not, they would be, and that he would be responsible for any shortage. The defendant did not know, or even suppose, that the full amount of wood had not been delivered. Garber refused to pay the plaintiff $1,200, but retained $300 until the shortage should be made good, and has never paid it.

The defendant's promise to the plaintiff was made as incidental to and in connection with his efforts to collect his claim against Plodzik.

It is the defendant's contention that his promise to be responsible for any shortage of wood was a promise to answer for the debt of another, and therefore within the statute of frauds. P. S. c. 215, § 2. This position cannot be sustained. The defendant's purpose in making the promise was to induce the plaintiff to pay to him the full balance due upon the wood contract. He was seeking in this manner to collect a

sylvania this 'new and beneficial consideration' is not required; but the leading purpose and object of the promisor must be to subserve some interest of his own." 59 U. of Pa. L. Rev. 577.

On whether an oral promise to pay another's existing debt, made in order to secure a benefit to the promisor, without releasing the original debtor, is within the statute of frauds, see 22 L. R. A. (N. S.) 1077, note; 40 L. R. A. (N. S.) 242, note.

portion of a debt due him from Plodzik. This was his sole object, and to effectuate that purpose he promised the plaintiff, in effect, to indemnify him in case he should suffer loss by reason of the transaction. The promise of the defendant was not made by him for the benefit of another, but for his own benefit.

In determining whether an agreement is within the statute of frauds, "the distinction is between a promise the object of which is to promote the interest of another and one in which the object is to promote the interest of the party making the promise .The former is within the operation of the statute, the latter is unaffected by it." 1 Reed, St. Fr. c. 3, § 70; Calkins v. Chandler, 36 Mich. 324, 24 Am. Rep. 593; Wills v. Cutler, 61 N. H. 405, 409; Janvrin v. Powers, 79 N. H. 44, 104 Atl. 252. Moreover, the oral agreement of the defendant was an original promise, given to the plaintiff, who relied upon it to his injury. It was not a collateral undertaking to answer for the debt or default of another, but was the personal obligation of the defendant to be responsible for any loss that the plaintiff might sustain by complying with the defendant's request.

The consideration for the defendant's promise was the payment of the money to him by the plaintiff, and had no connection with the original transaction. It was an independent valid agreement, entered into by the parties to this action, and was not within the statute of frauds. Allen v. Thompson, 10 N. H. 32; Robinson v. Gilman, 43 N. H. 485; Britton v. Augier, 48 N. H. 420; Provenchee v. Piper, 68 N. H. 31, 36 Atl. 552.

*Exceptions overruled.*

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## PHILPOT *v.* WALCOT.

**(Court of Common Pleas, 1682. 1 Freeman 541.)**

Assumpsit upon mutual promises of marriage. The question was, whether it, being without writing, were not within the Statute of Frauds and Perjuries?

Wyndham was of opinion, that it was not within the words nor meaning of the statute; because this promise is for the marriage itself, and not made in consideration of marriage for some collateral matter.

But the other three judges were against him, that it was within the words, the meaning and the mischief of the statute, and as much a catching promise as any that the Act intended to prevent. *Jud' pro def'* Hil. 33, 34, Car. 2, Rot. 536.[23]

[23] This case was later overruled. In Harrison v. Cage, as reported in 1 Ld. Raym. 386, 387-8, it is stated: "Note, it was ruled in this case at Norfolk Summer Assizes last past by Ward Lord Chief Baron, that this promise had no need to be in writing by the Statute of Frauds, 29 Car. 2, c. 3, s. 4. And

## WELD *v.* WELD ET AL.

(Supreme Court of Kansas, 1905. 71 Kan. 622, 81 Pac. 183, 114 Am. St. Rep. 517.)

Action by Augustus Weld against Judith R. Weld and John W. Kidder. Judgment for defendants. Plaintiff brings error. Affirmed.

BURCH, J. Judith R. Kidder executed and delivered to Augustus Weld her promissory note for a sum of money, and secured its payment by a mortgage upon her real estate. Subsequently she married him, in consideration of his parol agreement that the marriage should operate as a satisfaction of the note. Still later he brought an action against her to recover on the note and to foreclose the mortgage. She pleaded payment, and upon a trial the jury returned a general verdict in her favor, and made answers to special questions as follows:

"Question No. 1. Did the plaintiff and the defendant Judith R. Weld (then Judith R. Kidder), before they were married, and after the note in suit had been given, enter into a parol contract or agreement whereby it was mutually agreed between them that, in consideration the said Judith would thereafter marry the plaintiff, the note in suit should upon such marriage be by the said parties mutually regarded as paid or satisfied? Ans. Yes.

"Question No. 2. If you answer the proceeding question 'yes,' then did the defendant Judith R. Weld, in pursuance of such alleged contract, and as a performance thereof on her part, marry the plaintiff? Ans. Yes."

Judgment was rendered for the defendant for costs. It is now urged that the evidence supporting the plea of payment was inadmissible, because the contract, being oral, is within the statute of frauds, and marriage is not a sufficient part performance to remove the bar, and that the evidence admitted was not sufficient to sustain the verdict.

It is true the statute of frauds provides that no action shall be brought to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which the action is brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him or her lawfully authorized. Gen. St. 1901, § 3174.

Mr. Northey said at the bar, that the statute intended only agreements to pay marriage portions, and that it had often been ruled so by Holt, Chief Justice. *Quod* Holt *non negavit.*" See also Cork v. Baker, 1 Stra. 34.

In many of the American statutes of frauds there is in the "upon consideration of marriage" clause, an express exception from the writing requirement of mutual promise to marry: Stimson's "American Statute Law," I, p. 460. But even in the absence of such express exception, such oral promises are deemed not to be within the statute of frauds. See Clark v. Pendleton, 20 Conn. 495 (1850); Short v. Stotts, 58 Ind. 29 (1877); Withers v. Richardson, 5 T. B. Mon. (Ky.) 94 (1827); Wilbur v. Johnson, 58 Mo. 600 (1875); Cf. Morgan v. Yarborough, 5 La. Ann. 316 (1850).

It is likewise true that authorities may be found to the effect that generally marriage is not a sufficient part performance to avoid the effect of the statute. But there is no question of part performance in this case. The contract was fully executed when the defendant married the plaintiff. Nothing further was to be done by either party to satisfy her obligation. The agreement was not that the plaintiff would after marriage deliver money or property or securities to the defendant in consideration of the marriage, or that he would after marriage execute and deliver to her legal documents affecting her property rights. It simply was that the debt should be paid when they were married.

Some of the evidence on behalf of the defendant as given by different witnesses is as follows: "They were out in the yard, and they came into the house, and he put his hand on her shoulder and said: 'Well, Anna, you needn't worry about the debt; after we are married the debt will be paid.' About three weeks after they were married they came back to our house. She and I were preparing something for dinner. We were in the dining room, and he was outside pitching a tent. He came into the room. He slapped her on the shoulder, and he said to me: 'Anna need not worry no more about the debt; her mortgage is paid.' We were talking, he and I and his wife, about the indebtedness on the place. My recollection is now that he told her that there was no indebtedness on the place. Right then I said to him that to protect Anna, his wife, he ought to cancel the mortgage. He said that would be the first thing to do when they got home." The statute of frauds does not render void the verbal contracts to which it refers. They are valid for all purposes except that of suit. Stout v. Ennis, 28 Kan. 713. The parties may, if they desire, perform them, and, when performed, the statute has no application to them. 29 A. & E. Encycl. of L., 829, 941.

The plaintiff argues the case as if the contract were that he should enter of record a satisfaction of the mortgage. Such, however, was not the tenor of the agreement, and that duty followed, upon demand being made, whenever the debt was paid. Gen. St. 1901, § 4224. Since the parol evidence introduced established a contract fully performed, it was competent. The evidence might perhaps have been made the basis of different conclusions as to the existence of the contract relied upon as a defense to the action. It was therefore properly submitted to the jury for interpretation. The jury has performed its duty in that respect, and the trial judge has approved the result. Hence this court will not interfere.

Other assignments of error all converge in the proposition first discussed above, and need not be separately considered.

The judgment of the district court is affirmed.[24]

[24] Occasionally, as in the principal case, marriage, usually when coupled with other things, is deemed full performance and takes the contract out of the statute both at law and in equity. See Supreme Lodge of Knights of Pythias

## ROSENSTEIN *v.* GOTTFRIED.

(Supreme Court of Minnesota, 1920. 145 Minn. 243, 176 N. W. 844.)

Action by L. S. Rosenstein against Ellen Gottfried. Verdict for plaintiff, and, from a judgment for defendant notwithstanding the verdict, plaintiff appeals. Affirmed.

v. Ferrell, 83 Kans. 491 (1910); Harlan v. Moore, 132 Mo. 483 (1895); Dygert v. Remerschnider, 32 N. Y. 629 (1865); Adams v. Swift, 155 N. Y. Supp. 873 (1915); Flowers v. Kent, Brayton (Vt.) 238 (1817); Child v. Pearl, 43 Vt. 224 (1870). Cf. Blackwell v. Blackwell, 196 Mass. 186 (1907).

In Remington v. Remington, (Colo.), 193 Pac. 550 (1920), an oral contract made before marriage, whereby husband and wife, each of whom had been previously married and had living children, arranged to preserve to themselves the right to dispose of their property and to protect their heirs or the beneficiaries under their wills in their property rights as against any claim which might arise because of the marriage relation was held not to be void under the statute of frauds as promises made in consideration of marriage. The contract was reduced to writing and signed after marriage, and Teller, J., for the court, said:

"It is true that in the recital it is stated that the parties, in consideration of marriage, made the agreement; but the agreement itself shows that it was not so made. Contracts in consideration of marriage provide for the moving of some benefit to one of the parties as an inducement for marrying. There is no such case here presented. The facts show that these parties were arranging to preserve to themselves respectively the right to dispose of the property held before marriage, and to protect their respective heirs, or the beneficiaries under their wills, in their property rights, as against any claim which might arise because of the marriage relation. The words 'in consideration thereof' are not to be construed as indicating that either party was induced to marry the other by reason of these covenants. Indeed, the covenants conflict with such an idea. The parties were agreeing that they would secure nothing from each other through the marriage relation. It is clear that the words 'in consideration thereof' were used to show a situation which would have been properly described by saying that the parties had made the oral agreement in contemplation of marriage.

"Furthermore, it is wholly immaterial, in the view we take of this question, what was the agreement made before marriage. The contract in question, reduced to writing and signed by the parties, is made upon a consideration of mutual promises, and in it each releases to the other all right in or control over the other's property, and likewise waives all right to claim the same under any law of descent. Whatever may be the rule in those states having special statutes limiting the rights of parties during coverture, or in states following the common law, there is no reason why in this state, where woman has been relieved of her disabilities and specifically authorized to contract with any and every one, she cannot make a binding contract during coverture, provided it is free from taint of fraud or duress."

The distinction between contracts in contemplation of marriage and contracts upon or in consideration of marriage is established. Some antenuptial contracts made in contemplation of marriage have been held to be supported by consideration other than the marriage and, therefore, not to be within the statute. Jorden v. Money, 5 H. L. Cas. 185 (1854); Riley v. Riley, 25 Conn. 154 (1856); Rainbolt v. East, Admr., 56 Ind. 538 (1877); Bader v. Hiscox, (Ia.), 174 N. W. 565 (1919); Steen v. Kirkpatrick, 84 Miss. 63 (1904); Nowack v.

HALLAM, J. Plaintiff is in the business of buying and wrecking old buildings. Defendant was the owner of a lot on which was situated a two-story, twelve-room, frame dwelling, on a stone foundation. Plaintiff claims that defendant told him she wanted to dispose of the building for wrecking, that he looked it over and offered her $110.00 for all the material in the building, plaintiff to tear down the building and take material away. Plaintiff gave this further testimony:

"I then asked her if they had any insurance on the building? She told me there was $2,800. I says, 'Now you must carry that insurance

Berger, 133 Mo. 24 (1895); Larsen v. Johnson, 78 Wis. 300 (1890). But see Mallory's Adm'rs v. Mallory's Admr., 92 Ky. 316 (1891); Dienst v. Dienst, 175 Mich. 724 (1913).

Mutual promises to marry not being within the statute, two kinds of promises in consideration of marriage are generally deemed to be, namely, (1) promises to make marriage settlements, and (2) mutual promises to marry with a promise also by one party to convey or devise property to the other. The first kind clearly fall within the statute, but the second kind might easily have been treated as the same as mutual promises to marry. They have not been, however, and, as in general marriage is not regarded as part performance to take the case out of the statute, a writing is essential to recovery on them in the absence of proof of fraudulent intent. If the promisor made the promise with no intent to perform, then whether the contract is an oral antenuptial marriage settlement one or is an engagement contract with a property stipulation as part of it, most courts will give relief. See Peek v. Peek, 77 Cal. 106 (1888); Green v. Green, 34 Kans. 740 (1886). Cf. Jenkins v. Eldridge, 3 Story 181 (1844); Petty v. Petty, 4 B. Mon. (Ky.) 215 (1843); Tepper v. N. Y. Life Ins. Co., 151 N. Y. Supp. 1049 (1915). But see Hackney v. Hackney, 8 Humph. (Tenn.) 452 (1847). In Green v. Green, 34 Kans. 740, 745, Horton, C. J., said that the court acted "upon the well established doctrine that fraud takes any case out of the statute of frauds." In Glass v. Hulbert, 102 Mass. 24, 39 (1869), Wells, J., announced the following *dictum:* "In such cases the marriage, although not regarded as a part performance of the agreement for a marriage settlement, is such an irretrievable change of situation, that, if procured by artifice, upon the faith that the settlement had been, or the assurance that it would be, executed, the other party is held to make good the agreement, and not permitted to defeat it by pleading the statute." And in Colorado and Missouri there has been an inclination to regard marriage as part performance because of its irrevocable nature and of the feeling that the promisee is defrauded by the refusal to perform even if the promise was made with good intent. Moore v. Allen, 26 Colo. 197 (1899); Allen v. Moore, 30 Colo. 307 (1902); Nowack v. Berger, 133 Mo. 24 (1895). In other jurisdictions it is only where what constitutes part performance in the case of contracts for the sale of land has taken place that chancery will enforce the contract for real property marriage settlement despite its upon consideration of marriage feature. See Ungley v. Ungley, L. R. 4 Ch. D. 73 (1876); Surcome v. Pinniger, 3 DeG. M. & G. 571 (1853); Sharman v. Sharman, 67 L. T. (N. S.) 834 (1892); Neale v. Neales, 9 Wall. 1 (1869); Dugan v. Gittings, 3 Gill (Md.) 138 (1845).

For an argument that marriage should be deemed part performance in the case of those mutual promises to marry which also contain a promise by one party to settle property on the other, see 14 Ill. L. Rev. 1, 19-27.

On when a promise is made in consideration of marriage within the statute of frauds, see 10 A. L. R. 321, note.

until we get ready to wreck it, we won't be able to get at it right away'—we had other jobs ahead of it, and she agreed to carry the insurance for me. She asked me then: 'Well, how about the premiums I am paying on this? I am paying that out of my money.'' I says, 'Well, in case of any loss, why then we'll divide with you fifty-fifty, you are to give us 50 per cent. of what you collect.' That was satisfactory to her. * * * So I gave her a $5.00 bill. * * * I rode down to my office, made a report to the bookkeeper that I had bought the building.''

Next day the building burned. Defendant collected $1,603.25 insurance. Plaintiff sues for half the amount after deducting the purchase price. The jury found for plaintiff. The court gave judgment for defendant notwithstanding the verdict.

Plaintiff's first contention is that the agreement, ''rightly construed,'' did not provide for a sale, but was an agreement to perform personal service, in wrecking a building, to be paid for in the material which composed the building, and that since the value of the material exceeded the value of the service, plaintiff was to give back the change in cash. It seems to us that the transaction was not a contract for services but of sale of the building, or of the material in it.

Plaintiff contends that if the agreement is to be construed a sale, it was a sale of fixtures to be removed and was valid though verbal. In other words that it was not a sale of an interest in land, which must, under the statute of frauds, G. S. 1913, § 7002, be evidenced by a writing, but a sale of personal property, governed by the statute of frauds applicable thereto, Laws of 1917, c. 465, § 4 (Gen. St. Supp. 1917, § 6015—4), and since part payment was made, no writing was required. The trial court, on the trial, treated the transaction as a sale of personal property, and instructed the jury that if plaintiff's version of the transaction was true and the $5.00 was paid they should find for plaintiff. On further consideration the court was of the opinion that it was a sale of an interest in land and void because not in writing.

We agree with the conclusion of the trial court. There is much confusion in the decisions as to when a sale of things attached to land, but which are to be removed, is to be considered a sale of land, and when a sale of personal property.

It is quite generally held that a contract to sell things affixed, but which the seller is to detach and pass title after separation, is an executory contract to sell personal property. Wilson v. Fuller, 58 Minn. 149, 59 N. W. 988; 1 Benjamin on Sales, § 133. Some decisions hold that a contract may partake of that nature, if the parties so intend, even though the buyer is to make the separation, and that the fact that the vendee is to make the separation is important only as bearing upon the intent of the parties as to when title is to pass. Wetkopsky v. New Haven Gas Light Co., 88 Conn. 1, 90 Atl. 30, Ann. Cas. 1916 D, 968.[25]

[25] See In re Bloor's Estate (Wash.), 197 Pac. 614 (1921).

Where the negotiation contemplates an immediate transfer of title, there is, as to natural products, such as trees and grasses, a line of well-considered decisions, holding that if the thing sold is to be immediately, or within a reasonable time, severed from the soil, and is not to be left to attain additional strength or increase from the land, the sale is one of personal property and not of an interest in land. Chaflin v. Carpenter, 4 Metc. (Mass.) 580, 38 Am. Dec. 381; Banton v. Shorey, 77 Me. 48; Leonard v. Medford, 85 Md. 666, 37 Atl. 365, 37 L. R. A. 449; Marshall v. Green, L. R. 1 C. P. D. 35.[26]

On the other hand, there are well-considered decisions holding that, inasmuch as such natural products are part of the land, a sale which contemplates the transfer of a present estate or interest is necessarily a sale of an interest in land. Bent v. Hoxie, 90 Wis. 625, 64 N. W. 426; Green v. Armstrong, 1 Denio 550; Stuart v. Pennis, 91 Va. 688, 22 S. E. 509. This court is committed to this doctrine. Herrick v. Newell, 49 Minn. 198, 51 N. W. 819; Kirkeby v. Erickson, 90 Minn. 299, 96 N. W. 705, 101 Am. St. Rep. 411; Kileen v. Kennedy, 90 Minn. 414, 97 N. W. 126; La Plant v. Loveland, 142 Minn. 89, 170 N. W. 920.

[26] The usual distinction as to crops is between *fructus naturales* and *fructus industriales*, the former being treated as land and the latter as goods, for statute of frauds purposes.

As to trees, "the conflict among the American cases on the subject cannot be wholly reconciled. In Massachusetts, Maine, Maryland, Kentucky and Connecticut sales of growing trees, to be presently cut and removed by the vendee, are held not to be within the operation of the fourth section of the statute of frauds. * * * The courts of most of the American states, however, that have considered the question, hold expressly that a sale of growing or standing timber is a contract concerning an interest in lands, and within the fourth section of the statute of frauds. * * *

"In all its other relations to the affairs of men, growing timber is regarded as an integral part of the land upon which it stands; it is not subject to levy and sale upon execution as chattel property; it descends with the land to the heir, and passes to the vendor with the soil. Jones v. Timmons, 21 Ohio St. 596. Coal, petroleum, building stone, and many other substances constituting integral parts of the land, have become articles of commerce, and easily detached and removed, and, when detached and removed, become personal property, as well as fallen timber; but no case is found in which it is suggested that sales of such substances, with a view to their immediate removal, would not be within the statute. Sales of growing timber are as likely to become the subjects of fraud and perjury as are the other integral parts of the land, and the question whether such sale is a sale of an interest in or concerning lands should depend not upon the intention of the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber, is that of realty. This rule has the additional merit of being clear, simple, and of easy application,—qualities entitled to substantial weight in choosing between conflicting principles." Bradbury, J., in Hirth v. Graham, 50 Oh. St. 57, 64-65 (1893). See also, Gibson v. Stalnaker (W. Va.), 106 S. E. 243 (1921).

On the sale of growing trees as a sale of an interest in land within the statute of frauds, see 9 Ann. Cas. 192, note; 18 Ann. Cas. 971, note; Ann. Cas. 1916 A, 243, note; 19 L. R. A. 721, note; 13 L. R. A. (N. S.) 278, note; 128 Am. St. Rep. 875, note.

In the Kirkeby case, but not in the others cited, it was also said that the part of the agreement which gave the vendee the right to enter upon and occupy the vendor's land for the purpose of cutting and removing the grass confers an interest in land. We hesitate to reaffirm this reasoning. The right to enter seems more properly a mere license, effectual until revoked. Herrick v. Newell, 49 Minn. 198, 200, 51 N. W. 819; Volk v. Olsen, 54 Misc. Rep. 227, 104 N. Y. Supp. 415; Whitmarsh v. Walker, 1 Metc. (Mass.) 313.[27] But we approve the result reached, on the ground that the standing grass was real estate, and the sale of it the sale of an interest in land.

There is a difference in principle between trade fixtures of a tenant and either natural products or buildings. Trade fixtures are for most purposes personal property.[28] Some decisions hold generally, in transactions between seller and buyer, that "in applying the statute of frauds, buildings are not classed with forest trees, but with growing crops, nursery trees and fixtures attached to realty." Long v. White, 42 Ohio St. 59. Some hold there can be no difference in principle, between fixtures attached to the building, and the building itself if it is to be severed or torn down and removed. Wetkopsky v. New Haven Gas Light Co., 88 Conn. 1, 90 Atl. 30, Ann. Cas. 1916 D, 968. Some authorities, holding contracts for sale of buildings to be contracts for sale of personalty, limit their reference to houses to be immediately removed. Wetkopsky v. New Haven Gas Light Co., 88 Conn. 1, 90 Atl. 30, Ann. Cas. 1916 D, 968; Tyler on Fixtures, p. 729.

We are not prepared to say there may not be some difference between buildings and natural products, though we might find it difficult to construe the statute as permitting an oral sale of the owner's house but requiring a writing on the sale of a shade tree. We are not prepared to say that there can be no difference between buildings and fixtures

[27] "A license is a permission or authority to enter the land and do certain acts or series of acts, the parties not intending to convey any interest in the land; and it is well settled that such a license need not be in writing, under the statute of frauds. Thus a license to enter land and to cut timber, or to gather the growing crops, is valid though not in writing. Whitmarsh v. Walker, 1 Met. 313." Morton, C. J., in Johnson v. Wilkinson, 139 Mass. 3 (1885).

See City of Berwyn v. Berglund, 255 Ill. 498 (1912); Newton v. Long, 107 Miss. 349 (1914).

[28] As to trade fixtures, see Lee v. Gaskell, 1 I. B. D. 700 (1876); Moody & Jemison v. Aiken, 50 Tex. 65 (1878); South Baltimore Co. v. Muhlbach, 69 Md. 395 (1888). It seems clear, as Professor Williston has contended for years, that while affixed they are real property with a right on the part of the tenant to sever and make them personalty; that a sale by the tenant to the landlord is merely a surrender of the right to sever; and that a contract sale by the tenant to third parties is a contract to transfer the title to them on severance, i. e., as goods, so is a contract to sell goods. Williston on Sales, § 65; 3 Williston on Contracts, § 519. But as Professor Williston there admits: "This distinction has not yet been sufficiently observed by the cases."

attached to them, as for example between a large building of steel, concrete, brick or stone, and hooks on a wall, but whether there are or not, we are of the opinion that there is but one safe or satisfactory rule to apply to such a building as is here involved, namely, a large and substantial two-story frame dwelling built on a permanent stone foundation, not to be immediately removed, and that is to hold that a sale or a contract of sale giving to the buyer a present interest and a right of removal is a sale of an interest in land, which under our statute must be in writing. This we think is in accord with the weight of the authority. Hogsett v. Ellis, 17 Mich. 351; Meyers v. Schemp, 67 Ill. 469; Volk v. Olsen, 54 Misc. Rep. 227, 104 N. Y. Supp. 415; White v. Foster, 102 Mass. 375, 378; Dudley v. Foote, 63 N. H. 57, 56 Am. Rep. 489; Rogers v. Cox, 96 Ind. 157, 49 Am. Rep. 152; Johnston v. Mortgage & Trust Co., 129 Ala. 515, 521, 30 South, 15, 87 Am. St. Rep. 75; Hutchins v. Masterson, 46 Tex. 551, 555, 26 Am. Rep, 286; Lavery v. Pursell, 39 L. R. Ch. Div. 508; Williston on Sales § 66.

We hold that since there was no writing there was no binding contract and plaintiff has no property rights in the building or in the insurance money.

*Judgment affirmed.*[29]

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## HARRIET McCULLOUGH *v.* JANET FINLEY.

**(Supreme Court of Kansas, 1904. 69 Kans. 705, 77 Pac. 696.)**

BURCH, J. James McClaren died in 1869, leaving a will devising to his widow a life-estate in the land in controversy, consisting of an eighty-acre tract, with remainder in fee to his daughters, the plaintiff and the defendant. On March 16, 1874, these sisters orally agreed to divide the land, the plaintiff taking the south forty acres and the defendant the north forty acres, and on the same day the widow conveyed her interest in the respective tracts to her daughters by separate deeds. The husband of the defendant was also named as grantee in the deed to the defendant of her share of the land.

The defendant took possession of her part of the land, and has at all times since been in the actual possession of it, claiming to be the owner; has made lasting and valuable improvements upon it; has paid all taxes assessed against it, and has received all the rents and profits accruing from it since 1874. The plaintiff lived on or near the tract deeded to her for a few years and then sold it, keeping the proceeds as if the land had been her own. She has known since 1874 that her sister claimed the

[29] On contract for the sale of a building as a contract for the sale of realty within the statute of frauds, see Ann. Cas. 1916 D, 970, note. On what amounts to a contract for the sale of land within the meaning of the statute, see 102 Am. St. Rep. 230, note.

exclusive right to the north forty, and throughout the years made no claim upon it of any kind until she commenced this suit, in February, 1902. The devisee of the life-estate died in 1888. The plaintiff now denies that her verbal agreement and her conduct and the conduct of her sister in reliance upon the agreement are sufficient to exclude her from title to, and possession of, the land.

The courts have little forbearance toward claims so destitute of moral and conscientious quality. The statute of frauds was enacted to prevent, and not to foster, injustice, and the rule is settled in this state that possession, the payment of taxes, and permanent improvement under a parol agreement, with knowledge and acquiescence, remove the contract from the operation of the statute. Holmden v. Janes, 42 Kan. 758, 21 Pac. 591; Newkirk v. Marshall, 35 id. 77, 10 Pac. 571; Holcomb v. Dowell, 15 id. 378.[30] Upon the same principle a parol partition acted

[30] "The authorities in this country as to what acts of part performance will be sufficient, in the view of a court of equity, to take an oral contract for the sale or lease of lands out of the statute are not altogether harmonious, and this court has not been disposed to carry the doctrine of part performance quite to the extent to which it has been carried by the decisions of some of the courts. Certain acts of part performance, however, have uniformly been held sufficient. Thus, we have held in many cases, that taking possession of the land with the consent of the vendor, paying the purchase money, and making lasting and valuable improvements, are sufficient acts of part performance to justify the specific performance of an oral contract of purchase. Thorton v. Heirs of Henry, 2 Scam. 218; Updike v. Armstrong, 3 *id.* 564; Stevens v. Wheeler, 25 Ill. 300; Blunt v. Tomlin, 27 *id.* 93; Mason v. Bair, 33 *id.* 194; Fleming v. Carter, 70 *id.* 286; Laird v. Allen, 82 *id.* 43; McNamara v. Garrity, 106 *id.* 384; Gorham v. Dodge, 122 *id.* 528. In other cases it is held that taking possession and paying the purchase money is sufficient. Fitzsimmons v. Allen's Admr., 39 Ill. 440; Temple v. Johnson, 71 *id.* 13; Ferbrache v. Ferbrache, 110 *id.* 210; Ramsey v. Liston, 25 *id.* 114; Shirley v. Spencer, 4 Gilm. (Ill.) 583. In other cases it is held that taking possession and making valuable improvements is sufficient part performance. Keys v. Test, 33 Ill. 316; Kurtz v. Hibner, 55 *id.* 514; Wood v. Thornly, 58 *id.* 464; Langston v. Bates, 84 *id.* 524; Kaufman v. Cook, 114 *id.* 11; Bohanan v. Bohanan, 96 *id.* 591; Bright v. Bright, 41 *id.* 97; Padfield v. Padfield, 92 *id.* 198." Bailey, J., in Morrison v. Herrick, 130 Ill. 631, 640, 641 (1889).

"He [the appellant] invokes the rule that acts relied on as part performance must be referable to and done in pursuance of the contract, and seems to assume that this includes only acts which were stipulated to be done in the contract itself, and as a part thereof. We do not understand this to be the law. While the phrase 'part performance' is commonly used as a short and convenient statement of the general ground upon which verbal agreements regarding real estate are enforced, yet the whole doctrine rests upon the principle of fraud, and proceeds upon the idea that the party has so changed his situation, on the faith of the oral agreement, that it would be a fraud upon him to permit the other party to defeat the agreement by setting up the statute. Hence the term 'part performance' falls far short of expressing the whole doctrine and theory of courts of equity in this matter. The change of situation necessary to create this equitable estoppel must, of course, have been made in reliance upon, and in pursuance of, the oral agreement, and so con-

upon in this case will not be disturbed. Crimmins v. Morrisey, 36 Kan. 447, 13 Pac. 748; Duffey v. Rafferty, 15 id. 9, 13; 21 A. & E. Encycl. of L., 2d ed., 1137 *et seq.*

It is said that the defendant's possession must be referred to the deed from her mother as life-tenant and that she could not hold adversely to her cotenant of the fee. This proposition ignores the agreement between the parties under which the land was divided between them, and under which the plaintiff surrendered all right to the defendant's portion. The cotenancy of the fee was then at an end. The plaintiff no longer held any estate in remainder in the defendant's part of the land, and the defendant was at perfect liberty to take title to the life-interest in her own portion and held the entire estate adversely to the plaintiff.

At the time the agreement to divide the land was made, the defendant lacked a month of being of age. The contract, however, was voidable only and became binding when the defendant failed to disaffirm within a reasonable time after attaining majority. (Gen Stat. 1901, Sec. 4183.)

The case of Love v. Blauw, 61 Kan. 496, 59 Pac. 1059, 48 L. R. A. 257, 73 Am. St. Rep. 334, has no application because the partition in this case was between owners of the fee, and not between life-tenants on one side and remainder-men on the other.

The findings of fact are assailed as unsupported by the evidence. In a few unimportant particulars the court may have embodied in its findings some facts which the record only suggests, but every fact essential to a judgment in favor of the defendant was abundantly sustained.

The facts relied on as an estoppel to the plaintiff's recovery were sufficiently pleaded, and the judgment of the district court is

*Affirmed.*[31]

nected with the performance of the contract that, from the nature of the case, the defendant should understand it was done in reliance upon his agreement. The acts done must be related to and connected with the contract, and the defendant's performance of it. * * * But this change of situation is not confined to doing what the contract stipulated,—that is, 'part performance,' strictly so called." Mitchell, J., in Brown v. Hoag, 35 Minn. 373 (1886).

In a few American jurisdictions, courts of equity refuse to read a part performance exception into the statute. "This court has repeatedly decided that a bill to enforce a parol contract for the sale of land cannot be maintained in this state, and that part performance will not take a parol sale of lands out of the statute of frauds. The statute contains no exceptions in regard to such contracts, and it is not for us to create exceptions where none exist in the statute." Peyton, J., in McGuire v. Stevens, 42 Miss. 724, 732 (1869). "In four states the doctrine of part performance is wholly rejected. These states are Kentucky, Mississippi, North Carolina and Tennessee. But in at least two of those states the vendee under the oral contract may enforce in equity a lien for the purchase-money paid and for the value of his improvements, after accounting for rents and profits." 36 Cyc. 648.

[31] "According to the English authorities and also the decisions in some states, a partition by agreement must, to be valid under the statute of frauds, be in writing. In perhaps a majority of the states, however, a parol partition is upheld when followed by possession by the various tenants of the portions

## JOHN H. DOUGHERTY *v.* HERALD CATLETT.

(Supreme Court of Illinois, 1889. 129 Ill. 431, 21 N. E. 932.)

BAILEY, J.† The only questions presented by this appeal are those arising upon the plea of the statute of frauds. It appears from the declaration that, prior to the date of the contract upon which the suit is brought, the plaintiff and defendant entered into an agreement in writing, by which the defendant, in consideration of a certain sum of money then paid to him by the plaintiff, and of certain other payments thereafter to be made, agreed to convey to the plaintiff certain lands in Vermilion county; that the plaintiff thereupon entered into possession of said lands; that while so in possession he sold an undivided half of the lands to one McCabe, the defendant conveying said undivided half to McCabe at the plaintiff's request; that after such conveyance was made and while the plaintiff was still in possession of the remaining undivided half, the plaintiff and defendant entered into a verbal agreement whereby the plaintiff agreed to sell and surrender to the defendant said undivided half still in his possession, the defendant agreeing, in consideration thereof, to pay the plaintiff the sum of $3,500; that the plaintiff thereupon surrendered to the defendant the possession of said undivided half of said premises, and that the defendant retained the same in his possession, and afterwards sold and conveyed it to a third person, with the plaintiff's knowledge, for the sum of $4,000. The suit is brought to recover of the defendant the consideration of said verbal agreement.

The second section of the statute of frauds of which the defendant seeks by his plea to avail himself is as follows: "No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum

allotted to them,—a view which is based on different ground by different courts. Thus it is stated that such a partition is valid in the case of a tenancy in common because it involves merely a severance of the possession between the various owners, and not a transfer of title, as this is already severed. Sometimes it is stated that a partition will be presumed from the exclusive possession by one tenant of a part of the premises for a considerable length of time. Occasionally the state statute of frauds, applying in terms only to a sale of lands, was held not to include a partition. And sometimes the theory appears to be that one taking part in such a parol partition is estopped to deny its validity as against one who has received his share and erected improvements thereon. A parol partition, followed by the taking of possession of their allotted part by the various cotenants, has been upheld in courts exercising equitable powers on the ground that the partition is in effect an agreement for the mutual transfer of the various interests, and that the taking of possession constitutes such part performance as takes the case out of the statute and authorizes a decree for specific performance." 1 Tiffany on Real Property, 2 Ed., pp. 700-702.

† The statement of facts is omitted.

or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto lawfully authorized in writing signed by such party."

The execution by the defendant to the plaintiff of the written contract of sale alleged in the declaration vested in the plaintiff an equitable interest in the lands therein described, and there can be no doubt that such interest was an interest in or concerning lands within the meaning of said statute. That the statute of frauds embraces equitable as well as legal interests in land is well settled. Browne on Statute of Frauds, § 229. As said by Mr. Justice Story in Smith v. Burnham, 3 Sumner 435, "A contract for the conveyance of lands is a contract respecting an interest in lands. It creates an equitable estate in the vendee in the very lands, and makes the vendor a trustee for him. A contract for the sale of an equitable estate in lands, whether it be under a contract for the conveyance by a third party, or otherwise, is clearly a sale of an interest in lands, within the statute of frauds." See also Richards v. Richards, 9 Gray (Mass.) 313; Hughes v. Moore, 7 Cranch (U. S.) 176; Simms v. Killian, 12 Ired. (N. Car.) 252; Dial v. Crain, 10 Tex. 444; Catlett v. Dougherty, 21 Ill. App. 116; Jevne v. Osgood, 57 Ill. 340.

The plaintiff contends that the acts performed by him under his oral contract to sell and surrender his interest in said lands to the defendant constitute such a performance as should take the case out of the statute. The only act of performance alleged in the declaration is the delivery of possession of the premises sold to the defendant. There is no allegation of any cancellation or surrender of the defendant's contract to convey the lands to the plaintiff on payment of the purchase money, nor is the cancellation of said contract averred, either directly or inferentially. It will therefore be presumed that said contract is still held by the plaintiff as a valid and subsisting legal obligation against the defendant. The averments of the declaration, therefore, as we interpret them, show a partial and not a complete performance.

The doctrine of part performance is a doctrine of equity and does not prevail at law. Mr. Browne, in his Treatise on the Statute of Frauds § 451, says: "It is settled by a long series of authorities, that a part execution of a verbal contract within the statute of frauds has no effect at law to take the case out of its provisions," and in support of this statement a large number of cases are cited in a note. To same effect see 2 Reed on the Statute of Frauds, § 548, and authorities cited in note. The same rule has been frequently announced by this court. Warner v. Hale, 65 Ill. 395; Wheeler v. Frankenthal, 78 id. 124; Creighten v. Sanders, 89 id. 543.

The plaintiff's contention is, that the facts averred in the declaration amount to a rescission of the defendant's contract to convey, and that such rescission, coupled with a delivery of possession, should be held to be tantamount to a complete performance. The difficulty with this view is that no rescission is averred, either directly or inferentially. The

only averment is that the plaintiff had surrendered the possession to the defendant who already had the legal title, and that the defendant subsequently conveyed the land, with the plaintiff's knowledge, to a third person. A surrender of possession did not necessarily involve a rescission of the defendant's contract, since such surrender of possession may be entirely consistent with an intention on his part to retain the defendant's contract with a view of subsequently enforcing it against him. The pleading must be construed most strongly against the pleader and as the declaration contains no averment of a rescission or of any facts from which a rescission must be necessarily implied, it must be presumed that none was made or intended. If the plaintiff relied on the theory of a rescission he should have averred it, and not having done so, he cannot recover upon a theory not supported by his declaration.

We are unable to see that any special force is to be given, in this connection, to the averment that the defendant had conveyed the land to a third person with the plaintiff's knowledge. It might perhaps have been different if such conveyance had been made with the plaintiff's consent and approbation. The legal effect of the conveyance, so long as it does not appear to have been made with the plaintiff's consent, is merely to place it out of the defendant's power to perform his contract to convey the land to the plaintiff, but it has no tendency to work a rescission or cancellation of the contract, or to absolve the defendant from his liability thereon, and this is in no way affected by the mere knowledge of the plaintiff that the conveyance was being made. We are of the opinion that the demurrer to the defendant's plea was properly overruled. The judgment of the appellate court will therefore be affirmed.

*Judgment affirmed.*[32]

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## GRAESER *v.* GORDON ET AL.

(Supreme Court of Iowa, 1920. 179 N. W. 852.)

Action for services rendered resulted in judgment as prayed. The defendants appeal. Affirmed.

LADD, J.[33] The petition alleges that defendants employed plaintiff to obtain an easement over "the south thirty feet of Holcomb Avenue, West, across outlot A, lying between Home Park addition and the east bank of the Des Moines river, now included in the city of Des Moines,

[32] That an oral rescission is invalid under the statute because of the equitable interest in the land in the vendee under the written contract, see Barrett v. Durbin, 106 Ark. 332 (1913); Sanborn v. Murphy, 86 Tex. 437 (1894). But see Eley v. Jones, 101 Kans. 572 (1917).

On rescission of written contract within the statute of frauds by oral agreement, see 9 B. R. C. 443, note; 14 Ann. Cas. 729, note.

[33] Part of the opinion is omitted.

Iowa," to be used in conveying ice from the river to icehouses, and that for services so rendered defendants promised to pay plaintiff the sum of $300; that plaintiff procured the said easement for defendants on conditions approved by them, and demanded judgment accordingly. Defendants interposed a general denial, and pleaded that the contract, if any, was "for the creation, transfer, and conveyance of an interest in real estate," and that the contract was not in writing, and may not be proven orally. * * * Gordon admits in his affidavit "that defendants agreed with plaintiff that they would pay him $300 if he would secure for them from the city access to said river across said strip of ground for any and all purposes whatsoever, and especially for obtaining sand and gravel," but denies any agreement in his testimony, while plaintiff says he undertook to obtain only a right of way for the ice. In either event the contract might have been found to have been for services, and not for the creation or transfer of an interest in land. An agreement to procure a conveyance is not within the statute of frauds. Bannon v. Bean, 9 Iowa 395; Cooley v. Osborne, 50 Iowa 526.[34] The jury might well have found the contract to have been for services such as were rendered, and not for the purchase of an easement. See Miller v. Davis, 175 N. W. 11.

*Affirmed.*[35]

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## JULIUS SPEYER *v.* JOSEPH DESJARDINS ET AL.

(Supreme Court of Illinois, 1892. 144 Ill. 641, 32 N. E. 283, 36 Am. St. Rep. 473.)

BAKER, J.[36] * * * The theory of the bill is that there is a part-

[34] It is a question of fact whether service is contracted for or an interest in land is being bought from the so-called agent. In Cooley v. Osborne an agreement by mortgagees to foreclose the mortgage and convey to another the land so acquired was held not within the statute. Bannon v. Bean, where the agreement was to procure a conveyance of lands by another, may be supported, while Cooley v. Osborne may not.

[35] "The lessees, by the written instrument, agreed to drill and operate for oil, and of what they would thus produce from the wells and thereby severed from the realty, they were to yield and pay to the lessor one-sixth. Hence, when the parties entered into the parol contract as found by the lower court, [namely, that if the lessees, who had given notice of intention to surrender the lease would continue to drill and operate the lands for oil the royalty payable should be one-eighth of the oil produced and saved instead of the one-sixth provided in the lease, with certain increases in royalty in events which did not happen] they were not contracting for an interest in or concerning real estate, but for a division of personal property in proportions different from those named in the written lease. The royalty is an incident to the written instrument as a means of compensation to the lessor for the grant and privileges therein conveyed." Price, J., in Nonamaker v. Amos, 73 Oh. St. 163, 171 (1905).

[36] The statement of facts and parts of the opinion are omitted.

nership between appellant and Desjardins, and that the lots and the buildings erected thereon are partnership property; and the claim of appellant is that the statute of frauds has no application to such a case.

It is well settled that an oral contract by two or more persons to purchase real estate for their joint benefit is within the statute. But it has been a mooted question whether a partnership can be created by parol for the purpose of buying and selling lands for profit. There is a very considerable conflict in the cases upon that question, but the decided weight of authority seems to have answered it in the affirmative. That an agreement for a partnership, for the purpose of dealing and trading in lands for profit, is not within the statute, and that the fact of the existence of the partnership, and the extent of each party's interest, may be shown by parol is now quite generally accepted as the established doctrine. Dale v. Hamilton, 5 Hare 369; Essex v. Essex, 20 Beav. 449; Holman v. McCrary, 51 Ind. 358; Richards v. Grinnell, 63 Iowa 44; Chester v. Dickerson, 54 N. Y. 1; Black v. Black, 15 Ga. 449; Fall River Whaling Co. v. Borden, 10 Cush. (Mass.) 458; Bunnel v. Tainter, 4 Conn. 568; Pennybacker v. Leary, 65 Iowa 220; Gibbons v. Bell, 45 Tex. 417; Perronett v. Pyme, 34 N. J. Eq. 26. * * *

The cases we have cited, and many others, proceed upon the theory that the real estate of a partnership is treated and administered in equity, as between partners and for all the purposes of the partnership, as personal property and partnership assets. From its status in equity, of being stock in trade and partnership assets, it is readily deducible that it is immaterial whether the legal title to the partnership land is in all the partners, or in one, or in some number less than the whole; that it is not material whether the partnership was already established and engaged in its business when the land was acquired and brought into the partnership stock, or whether the partnership was established and the land acquired and put in contemporaneously, or whether the partnership was established for the express and special purpose of dealing in and making profit out of the very land itself which is in question; and that the facts of the existence of the partnership, and that the lands were acquired and used for partnership purposes, being shown by parol, it is immaterial whether such partnership was formed by written articles or by parol. Browne's Stat. Frauds, § 261a.

The doctrine of the cases we have cited, so far as it involves the provisions of the statute of frauds, seems to proceed upon the ground of a trust implied from the relation of co-partnership.

The matter here at issue is a close question and beset with difficulties whichever view is taken. It seems difficult to demonstrate, to a certainty, that the doctrine above stated should prevail and take partnership agreements and partnership property out of the statute, and equally difficult to satisfactorily demonstrate that such agreements are within the statute, as held in Smith v. Burnham, 3 Sum. (U. S.) 437; Bird

v. Morrison, 12 Wis. 138, and other cases.[87] Upon the whole, we are inclined to follow the view which seems to obtain in England and in most of the states of the Union, that partnership agreements and partnership lands, as between the partners and for all partnership purposes, are not within the statute.

The bill in the case at bar shows that the parties agreed to purchase the five lots and erect buildings thereon, each party contributing one-half of the money necessary for the enterprise, the lots and buildings then to be sold, and the profit or loss arising from the enterprise to be divided equally between them. This was manifestly a partnership agreement. The bill then shows that the parties purchased the lots "in pursuance of the agreement," and that, at the same time and as a part of the same transaction, money was raised by placing mortgages on the lots and the purchase price of the lots paid with such money. Whose money, then, was it that was applied in payment of the lots? It is admitted that, by the terms of the partnership agreement, all liabilities that the partners, or either of them, should create in furtherance of the enterprise, were to be, as between the partners, treated and considered as joint liabilities to be met and shared by them in equal shares. This would seem to stamp the money that was received on the mortgages and paid on the lots as partnership money. Since, then, the money, by force of the agreement, was partnership money it follows that, when $3,750 of it was, at the time of the purchase, paid as the purchase money of the lots, a resulting trust at once arose by operation of law, out of the transaction, in favor of the partnership. See Wallace v. Carpenter, 85 Ill. 590.

[87] See also Langley v. Sanborn, 135 Wis. 178 (1908); Huntington v. Burdeau, 149 Wis. 263 (1912).

So in Michigan it has been said, that "A partnership agreement to buy and sell lands generally falls within the statute of frauds. Nester v. Sullivan, 147 Mich. 493, 111 N. W. 85, 1033, 9 L. R. A. (N. S.) 1106. And this is likewise true when but one transaction is involved, and where it may be treated as a joint adventure only. Tuttle v. Bristol, 142 Mich. 148, 105 N. W. 145." Fellows, J., in Morrison v. Meister (Mich.), 180 N. W. 395, 396 (1920).

But a contract between real estate men to divide commissions is different.

"We do not regard the contract as constituting a partnership agreement. It was no more nor less than an agreement between real estate agents to divide and share commissions in certain proportions accruing from the sale of a specific parcel of real estate—an arrangement very common among real estate agents. To hold that this agreement constituted a partnership between the parties would be to say that every agreement between real estate agents for a division of commissions in the event of a sale of a specific parcel of real estate constituted such real estate agents partners—a proposition which we apprehend is without support in reason or authority. Neither did it involve any interest in real estate within the meaning of sections 2302 or 2304, Stats. It created no estate or interest in, nor any trust or power over or concerning, lands, nor was it a contract for the sale of any lands or any interest in land; so that, whether or not it was a partnership agreement, it was not affected by the statute of frauds." Owen, J., in Etscheid v. Thiefenthaler (Wis.), 177 N. W. 887, 888 (1920).

Our conclusion, therefore, is that, without regard to the question whether or not the partnership agreement mentioned in the bill of complaint was in writing, a proper case for the interposition of a court of chancery was stated in the bill, and it was error to sustain the demurrer and dismiss said bill.

The decree is reversed, and the cause is remanded with directions to overrule the demurrer.

*Decree reversed.*[38]

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## STANDIFER ET AL. *v.* COMBS ET AL.

**(Court of Appeals of Kentucky, 1919. 184 Ky. 708, 212 S. W. 921.)**

CLARKE, J.[39] Leslie Standifer filed this action in equity to quiet his title to 150 acres of land lying on First creek in Perry county, Ky.,

[38] In Goldstein v. Nathan, 158 Ill. 641, 64 (1895), Phillips, J., said: "There is a wide distinction, however, in an agreement for one to become interested in the profits of certain land already purchased and owned by another, and an agreement to share in the benefits to be derived from lands to be thereafter acquired. Where lands are purchased by a partnership and paid for with the moneys thereof, or acquired as partnership property in the usual course of business of such partnership, a court of equity may treat such real estate as partnership funds, and, as a consequence, as personal property. This rule grows out of the nature of the partnership relation, and is rendered necessary for the purpose of doing justice between the parties, or between the firm and others doing business and having dealings therewith. (Black v. Black, 15 Ga. 445.) In this case, the land was not purchased by appellant in the name of appellee and the purchase money furnished by appellant. It is not a case of a purchase of lands paid for out of partnership funds and a deed taken to appellee. No partnership funds existed. There was therefore no resulting trust in appellant, and whatever interest he is alleged by the bill to have acquired was by virtue of his contract. The lot was owned by appellee at the time of the contract and paid for by his money, and any interest in the land or the proceeds growing out of the alleged contract cannot be severed and made to apply to the profits as distinct from the land itself. If the appellant acquired an interest in appellee's lot by virtue of his contract, it attached upon the contract being made. If such interest attached and the land had not been sold, the appellant would have been entitled to his moiety therein. Had appellee died before sale, and appellant had an interest in the lot, he would have the right to sell and wind up the partnership affairs. It is only by having acquired an interest in the lot that he could have acquired an interest in the proceeds of the sale. We hold, that where two separate owners of real estate, purchased by their separate funds, enter into a co-partnership with reference to a sale thereof, by a parol contract, such contract is within the statute of frauds. McCormick's Appeal, 57 Pa. St. 54; Vose v. Strong, 144 Ill. 108; Smith v. Burnham, 3 Sum. (U. S.) 435."

On partnership agreements for the purchase and sale of lands as within the statute of frauds, see 16 L. R. A. 745, note; 4 L. R. A. (N. S.) 427, note; 33 L. R. A. (N. S.) 883, note; L. R. A. 1915 A, 521, note; Ann. Cas. 1913 E, 567, note.

[39] Part of the opinion is omitted.

alleging both title to and possession of same as was necessary he should do to maintain the action. Section 11, Kentucky Statutes. * * *

There is no evidence whatever of an actual adverse possession by plaintiff of any part of the land in controversy for any continuous period, but an attempt was made to prove the establishment of an agreed division line between his and Elhanon Combs' lands, and this proof, it is argued by his counsel, is sufficient to establish both his title to and possession of the land up to the division line, including the land in controversy, under authority of Turner v. Bowens, 180 Ky. 755, 203 S. W. 749; Le Moyne v. Hays, 145 Ky. 415, 140 S. W. 552; Rice v. Blair, 161 Ky. 280, 170 S. W. 657; Warden v. Addington, 131 Ky. 296, 115 S. W. 241; and Garvin v. Threlkeld, 173 Ky. 262, 190 S. W. 1092.

These cases are but a few of the many from this court wherein an agreed division line which had been established, marked, and acquiesced in for a considerable length of time by the parties has been upheld, but, as was pointed out in the recent case of Bordes v. Leece, 183 Ky. 146, 208 S. W. 780:

"The result of such an agreement must not be the mere transfer of the lands owned by one party to the other, as this is in contravention of the statute against frauds. The principle upon which such an agreement is upheld and enforced is that the mere establishment of the true dividing line is not a sale or transfer of land by one party to another, and hence not an agreement within the statute of frauds, requiring it to be in writing and signed by the parties to be bound, but is an ascertainment and demarcation of the lands already owned by the parties, and is enforced in the interest of putting an end to controversies."

And as said in Garvin v. Threlkeld, *supra*:

"While the validity of parol agreements to settle disputed boundaries was long resisted on the ground that, in effect, they passed the title to real property without the solemnities required by the statute, it is now settled that, where the dividing line is uncertain and there is a bona fide dispute as to its location, and the parties agree on the dividing line and execute the agreement by marking the line or building a fence thereon, such an agreement is not prohibited by the statute of frauds, nor is it within the meaning of the provisions of the law that regulate the manner of conveying real estate. The reason for the rule is that the parties do not undertake to acquire and to pass the title to real estate, as must be done by written contract or conveyance. They simply by agreement fix and determine the situation and location of the thing that they already own; the purpose being simply by something agreed on to identify their several holdings and to make certain that which they regarded as uncertain."

Plaintiff utterly failed to bring his claim within the rule of these cases, because not only was the evidence in our judgment insufficient upon the question of any agreement upon a division line and its recognition as such by the parties, but there is no evidence whatever of a *bona*

*fide* or any kind of a dispute as to the ownership of this land when it is claimed the asserted division line was agreed upon. Plaintiff neither exhibited nor claimed any title or pretense of title to any of the land now seemingly for the first time in dispute, except a denied parol purchase from Elhanon Combs which he did not plead, and which, if made, was clearly within the statute of frauds and unenforceable. The only acts of ownership of possession he attempted to prove was an occasional cutting of timber on the land.

It is therefore apparent plaintiff failed to prove either title to or possession of the land, and the chancellor did not err in dismissing the petition.

*Wherefore the judgment is affirmed.*[40]

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## JOHN DOYLE *v.* JOHN DIXON.

**(Supreme Judicial Court of Massachusetts, 1867. 97 Mass. 208, 93 Am. Dec. 80.)**

Contract for a breach of an agreement by the defendant as part of the sale of his grocery business at Chicopee.

The defendant requested the judge to rule that the plaintiff could not recover upon an oral agreement not to go into the grocery business in

[40] "Where the dividing line is uncertain, and there is a *bona fide* dispute as to its location between adjoining landowners, who agree on the dividing line and execute the agreement by marking the line or building a fence thereon, * * * such an agreement, followed by possession with reference to the boundary so fixed, is conclusive on the parties, although the possession may not have been for the full statutory period, it being sufficient to show that the dividing line was actually established, and thereafter recognized or acquiesced in by the parties for a considerable time. Garvin v. Threlkeld, 173 Ky. 262, 190 S. W. 1092." Clay, C., in Holbrooks v. Wright, 187 Ky. 732, 220 S. W. 524, 527 (1920).

See "Payne v. McBride, 96 Ark. 168, 131 S. W. 463, Ann. Cas. 1912B, 661, and other cases decided by this court, holding in effect that, the owners of adjoining lands being in dispute as to the dividing line, their oral agreement as to the boundary establishes the line, which, when followed by possession with reference thereto, is conclusive upon them.

"The agreements in cases of this kind do not operate as a conveyance, so as to pass title from one to another, but they proceed upon the theory that the true boundary line is in dispute, and that the agreement serves to fix the true line to which the title of each extends. The parties thereafter hold up to the line as they did before by virtue of their respective deeds. The theory is that the parties have simply by agreement settled the location of their boundary lines, which was in doubt, instead of having the court settle it for them. So when they orally agree upon the line, and the agreement is accompanied by possession to the agreed line, such agreement will be valid and binding." Hart, J., in Sherrin v. Coffman, 143 Ark. 8, 219 S. W. 348, 349 (1920).

On oral agreements as to boundary line as within the statute of frauds, see 8 Ann. Cas. 83, note; 16 Ann. Cas. 150, note; Ann. Cas. 1912 B, 662, note; 102 Am. St. Rep. 246, note. *Cf.* 110 Am. St. Rep. 677, note.

Chicopee within five years, because such agreement was not to be performed within one year from the making thereof and was within the statute of frauds; but the judge ruled the contrary. The defendant alleged exceptions.

GRAY, J.[41] It is well settled that an oral agreement which according to the expression and contemplation of the parties may or may not be fully performed within a year is not within that clause of the statute of frauds which requires any "agreement not to be performed within one year from the making thereof" to be in writing in order to maintain an action. An agreement therefore which will be completely performed according to its terms and intention if either party should die within the year is not within the statute. Thus in Peters v. Westborough, 19 Pick. 364, it was held that an agreement to support a child until a certain age at which the child would not arrive for several years was not within the statute, because it depended upon the contingency of the child's life, and, if the child should die within one year, would be fully performed. On the other hand, if the agreement cannot be completely performed within a year, the fact that it may be terminated, or further performance excused or rendered impossible, by the death of the promisee or of another person within a year, is not sufficient to take it out of the statute. It was therefore held in Hill v. Hooper, 1 Gray, 131, that an agreement to employ a boy for five years and to pay his father certain sums at stated periods during that time was within the statute; for although by the death of the boy the services which were the consideration of the promise would cease, and the promise therefore be determined, it would certainly not be completely performed. So if the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute; but if his death would leave the agreement completely performed and its purpose fully carried out, it is not. It has accordingly been repeatedly held by this court that an agreement not hereafter to carry on a certain business at a particular place was not within the statute, because, being only a personal engagement to forbear doing certain acts, not stipulating for anything beyond the promisor's life, and imposing no duties upon his legal representatives, it would be fully performed if he died within the year. Lyon v. King, 11 Met. 411; Worthy v. Jones, 11 Gray, 168. An agreement not to engage in a certain kind of business at a particular place for a specified number of years is within the same principle; for whether a man agrees not to do a thing for his life, or never to do it, or only not to do it for a certain number of years, it is in either form an agreement by which he does not promise that anything shall be done after his death, and the performance of which is therefore completed with his life. An agreement to do a thing for a certain time may perhaps bind the promisor's representatives, and at

[41] The statement of facts and part of the opinion are omitted.

any rate is not performed if he dies within that time. But a mere agreement that he will himself refrain from doing a certain thing is fully performed if he keeps it so long as he is capable of doing or refraining. The agreement of the defendant not to go into business again at Chicopee for five years was therefore not within the statute of frauds. * * *

*Exceptions overruled.*[42]

[42] See Hill v. Jamieson, 16 Ind. 125 (1861); Foster v. McO'Blenis, 18 Mo. 88 (1853); Erwin v. Hayden (Tex. Civ. App.), 43 S. W. 610 (1897).

The question is whether by dying the promisor would at once go out of business for five years and longer. If he would, then the fact that he might die within the year would keep the contract from coming under the "not to be performed within a year" provision of the statute. But some courts refuse to regard death as so time destroying. See Gottschalk v. Witter, 25 Oh. St. 76 (1874); McGirr v. Campbell, 75 N. Y. Supp. 571 (1902). The principal case seems to accord with common sense.

The leading American case on contracts not to be performed within a year is Warner v. Texas & Pacific Ry. Co., 164 U. S. 418 (1896). That case lays down the rule that if the contract may be performed within the year it does not fall within the statute, even though the parties contemplated a longer life for it. That is the general American view.

"On the first proposition, neither the contract alleged nor the one proven by specific terms nor by necessary implication extended its performance beyond a year. Where this is the case, it does not matter that the parties may have thought or held the opinion that work under the contract might be extended beyond that period. It will not thereby be rendered void under the statute. Reckley v. Zenn, 74 W. Va. 43, 81 S. E. 565; McClanahan v. Coal & Mining Co., 74 W. Va. 543, 82 S. E. 752; Kimmins v. Oldham, 27 W. Va. 258. A contract is not brought within the terms of the statute because it was not expected to be performed within a year, if it is one that under all the circumstances admits of performance within a year. Warren, etc., Mfg. Co. v. Holbrook, 118 N. Y. 586, 23 N. E. 908, 16 Am. St. Rep. 788, and note; Dant v. Head, 90 Ky. 255, 13 S. W. 1073, 29 Am. St. Rep. 369, and note." Miller, P., in Rua v. Bowyer Smokeless Coal Co. (W. Va.), 99 S. E. 213, 216 (1919).

"As early as the case of Peter v. Compton, Skin. 353, [1693] the great majority of the judges declared that where the agreement was to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, there a note in writing is not necessary, for the contingent might happen within a year; but where it appears by the whole tenor of the agreement that it is to be performed after a year, there a note is necessary; otherwise, not. This has been the generally-accepted rule since that case was decided. Parol agreements to do something for an indefinite period which may be terminated within a year are valid. To be within the statute, it must be such an agreement as does not admit of performance, according to its language and intention, within a year from the time it is made.

"The following contracts by parol have been held to be enforceable and not within the statute of frauds: To pay upon the death of a third person. To pay upon the termination of a suit. To pay on the day of the promisor's marriage, * * * To marry upon restoration to health. To pay out of one's estate after death. To pay during life of promisee. To pay during coverture." Van Syckel, J., in Elseman v. Schneider, 60 N. J. L. 291, 292-293 (1897).

A conflict of opinion has developed as to the kind of contract where the parties contemplate more than a year's performance but provide for shortening

## BIRD *v.* BILBY.

(Kansas City Court of Appeals, Missouri, 1919. 202 Mo. App. 212, 215 S. W. 909.)

Suit by Maud Bird against R. I. Bilby. Judgment for plaintiff, and defendant appeals. Affirmed.

it on notice. An example is a contract for two years' service, but the contract to be terminable by either party during the period on three months' notice. The question is whether such a contract is performable within the year as distinguished from destroyable.

That such a contract is within the statute, see Dobson v. Collis, 1 H. & N. 81 (1856); Hanau v. Ehrlich, [1912] A. C. 39 (a decision of the House of Lords affirming [1911] 2 K. B. 1056); Meyer v. Roberts, 46 Ark. 80 (1885); Harris v. Porter, 2 Harr. (Del.) 27 (1835); Wilson v. Ray, 13 Ind. 1 (1859); Biest v. VerSteeg Shoe Co., 94 Mo. App. 137, 70 S. W. 1081; Wagniere v. Dunnell, 29 R. I. 580 (1909). That such a contract is not within the statute, see Roberts v. Rockbottom Co., 7 Metc. (Mass.) 46 (1843); Blake v. Voigt, 134 N. Y. 69 (1893). *Cf.* Weatherford, etc., Co., v. Wood, 88 Tex. 191 (1895).

"If the contract permits its destruction by the parties, that destruction is merely carrying out the terms of the agreement and nothing more." Smith, J., in Johnston v. Bowersock, 62 Kans. 148, 160 (1900). Even in Hanau v. Ehrlich, *supra*, where the question was whether a contract of employment for two years determinable on six months' notice by either party during that period was or was not an agreement not to be performed within a year, Earl Loreburn, L. C., admitted that "If you are to look at the words of this statute without any previous guidance at all, to my mind either construction contended for is possible as a matter of language and pure interpretation of the meaning of language," ([1912] A. C. 39, 41). Lord Atkinson thought "the language of this statute is ambiguous," ([1912] A. C. 39, 42) and Lord Alverstone said that he could "quite see that if there were an absolutely clear slate it might be possible to construe the statute somewhat differently" (id.) but all the judges agreed that the interpretation of the language in Dobson v. Collis, *supra*, [1 H. & N. 81] in 1856, followed frequently since at *nisi prius*, should be reaffirmed.

On contract not to be performed within one year but terminable at option of parties as within the statute of frauds, see 17 Ann. Cas. 207, note; Ann. Cas. 1912 B, 731, note.

On whether a contract which depends upon contingency for performance within a year is within the statute of frauds, see 4 Ann. Cas. 174, note; Ann. Cas. 1916 E, 1136, note; 128 Am. St. Rep. 599, note.

It is, of course, perfectly clear that impossibility of performance demonstrated within the year, as by the death within the year of one contracting to serve more than a year, would not constitute performance within the year to take the case out of the statute.

A question has arisen whether a contract to work for another for a year beginning tomorrow morning can be performed within a year. As the contract will be completed at the end of the day a year from today, it can be and will be performed within the year if parts of the day are not regarded. Some courts so hold. Smith v. Gold Coast Limited, [1903] 1 K. B. 285, 538; Dickson v. Frisbee, 52 Ala. 165 (1875). Others hold the contract within the statute. Billington v. Cahill, 4 N. Y. Supp. 660 (1889). See Raymond v. Phipps, 215 Mass. 559 (1913). Compare the question when a person becomes 21 or 25. Is it the day before his birthday? In re Shurey, [1918] 1 Ch. 263, says yes, and the American cases generally seem to be in accord.

On validity within statute of frauds of a contract for a year's employment

TRIMBLE, J.[48] This is a suit for damages for breach of an oral contract. Plaintiff's husband, William Bird, was foreman on one of defendant's ranches, and on September 27, 1910, was engaged in the digging of a ditch thereon. While so doing, the sides of the ditch caved in and killed him. He left his widow, the plaintiff and several minor children, the youngest of whom was six months old. Plaintiff intended and was about to bring a suit for damages against defendant on the ground that her husband's death was caused by defendant's negligence. Defendant, knowing this, went to plaintiff some two weeks after her husband's death and proposed to her a settlement, offering and agreeing that, if she would not bring a suit or cause him any trouble, he would pay her $20 per month until her youngest child became 18 years of age, a period of 17½ years. He told her such an arrangement would be all right and it would be better for her to get the money in installments this way than to have all the money paid into her hands at once. After making certain that he would "always" pay it to her, that is, that he would pay during the aforesaid time whether the child lived or died, she accepted the offer, and they separated with the clear understanding and agreement that she would not bring her contemplated suit and he would pay her $20 monthly throughout the time above mentioned, a period of 210 months.

Defendant at once began paying her the monthly sums of $20, and continued to do so down to and including the month of February, 1914, a period of 41 months. In the meantime she had married her deceased husband's brother and moved to Minnesota, and defendant sent her the monthly checks for $20 while there and also for a time after their return from that state. Her husband finally went back to Minnesota, and, when she got ready to follow him, defendant refused to continue making the payments, unless, so she says, she would leave her husband, whom defendant considered worthless.

The defendant concedes that he paid her monthly payments down to February, 1914, but denies that there was any agreement between them or settlement of her cause of action, insisting that the payments he made were in the nature of a voluntary "pension" paid by him to help her because she was in need. He also concedes that he refused to continue the payments if she went back to her husband.

At the close of plaintiff's case and at the close of all the evidence, defendant demurred, but was overruled. The jury found a verdict for plaintiff, upon which judgment was rendered, and defendant has appealed.

The main contention is over the question whether the alleged agreement, upon which plaintiff grounds her suit, is within or without that clause of the statute of frauds forbidding an action upon any oral agree-

to commence in the future, see 5 Ann. Cas. 330, note; 138 Am. St. Rep. 611, note.

[48] Parts of the opinion are omitted.

ment "that is not to be performed within one year from the making thereof." Section 2783, R. S. 1909.

An oral contract which neither party can perform within the year is within the statute; and, even though full performance has been made by the complaining party after the expiration of said year, no action can be maintained on the contract. Defendant insists that the contract herein is of this character. He says plaintiff's agreement not to sue for the death of her husband could be fully performed only by refraining from suit throughout the full period of the general statute of limitations, which of course, is more than a year, and that therefore the contract is one which neither party could perform within the year. But plaintiff's cause of action for the death of her husband arose under sections 5426 and 5427, c. 38, R. S. 1909, and was therefore governed by the limitation contained in that chapter, which gives the widow, in case there are minor children, only six months in which to sue, and in no event could a suit be maintained by any one unless brought within a year after the cause of action accrued. Section 5429. Hence the contract in this case clearly contemplated that plaintiff's part thereof would be performed within the year from the date of such contract, which was two weeks subsequent to the date of her husband's death, and this last date was when her cause of action accrued. Manifestly, therefore, the contract herein is one which contemplated that the plaintiff should perform within the year and which the plaintiff did perform in full before the expiration of that time.

Under these circumstances, the question arises: Does full performance by the plaintiff within the year take the case out of the statute and allow her to maintain the suit? This is a question on which the courts of the different jurisdictions do not entirely agree. The great majority of them, however, uphold the doctrine that in such case the statute does not apply. 29 Am. & Eng. Ency. of Law (2d Ed.) 835; 20 Cyc. 291. Such is the English rule, and is the one followed by most of the American states. See cases cited in support of the text in the above authorities, a few of which are: Donnelan v. Read, 3 B. & Add. 899, 110 English Reports, 330;[44] Johnson v. Watson, 1 Ga. 348; MacDonald v.

[44] In Reeve v. Jennings, [1910] 2 K. B. 522, the plaintiff Reeve, a dairyman, brought suit for an injunction against the defendant Jennings, a former employee of the plaintiff, to restrain him from committing breaches of his agreement of service by engaging on his own account in the business of a dairyman. The agreement of service was oral, was made on April 11th, 1908, and was to the effect that the defendant should serve plaintiff at an increased salary stated, but otherwise on the same terms and conditions as those contained in a written agreement of service which the parties had made at the time of a former employment. That previous agreement provided for plaintiff's employment of defendant in plaintiff's trade or business of a dairyman at a stated wage per week for a time not stated, but to be "until this agreement is determined as hereunder provided" and with the clause "This agreement may be determined by either party giving the other one week's notice

Crosby, 192 Ill. 283, 61 N. E. 505; Curtis v. Sage, 35 Ill. 22; Haugh v. Blythe's Ex'rs, 20 Ind. 24; Saum v. Saum, 49 Iowa, 704; Ellicott v. Turner, 4 Md. 476; McClellan v. Sanford, 26 Wis. 595; Washburn v. Dosch, 68 Wis. 436, 32 N. W. 551, 60 Am. Rep. 873; Dant v. Head, 90 Ky. 255, 13 S. W. 1073, 29 Am. St. Rep. 369; Berry v. Doremus, 30 N. J. Law, 399; Langan v. Iverson, 78 Minn. 299, 80 N. W. 1051. See, also, City of Tyler v. Southwestern R. Co., 99 Tex. 491, 91 S. W. 1, 13 Ann. Cas. 911. Some courts seem to require that, after full performance within the year by one party, nothing more must remain to be done by the other party except the payment of money. Whether this applies only to cases wherein such other party might, upon performance, have paid the money within the year, and not to cases where the money could not have been so paid, does not always seem to have been made clear. It may be well to note that in the contract now under consideration plaintiff fully performed within the year and nothing remained for defendant to do except to continue that which he had been doing from the making of the contract, namely, the payment of the installments at the time and throughout the period called for in the contract. But without regard to whether the rulings of some of the courts apply to one or both of the situations above referred to, it is certain that the great majority of them hold that where it is the intention of the parties that one of them should perform within the year, and such party has fully performed within that time, then the other party cannot escape even though he is not to perform, and cannot perform, within the year. A number of states, however, hold to the contrary doctrine, namely, that if the contract is not to be performed by one party within the year, recovery cannot be had against him by the other even though such other party has fully performed and has done so within the year. 29 Am.

in writing to terminate on a Saturday," and under that previous agreement the defendant agreed that he would serve plaintiff until the determination of the agreement and that within 36 months after quitting or being discharged from said service he would not engage in any way in the business of a dairyman within a radius of four miles as the crow flies from plaintiff's place of business. After serving plaintiff from April 11, 1908, to February 6, 1910, the defendant on the latter date left plaintiff's employ and started in the business of dairyman on his own account within four miles of plaintiff's place of business. The sole question in the case was whether the statute of frauds was a defense to plaintiff's suit. The provision of the statute invoked was that part of section 4 relating to agreements "not to be performed within the space of one year from the making thereof." The case was started in the county court and the county court judge held that the statute of frauds provision did not apply to the contract in question and gave judgment for the injunction asked. The defendant appealed and the King's Bench Division held in his favor on the ground that while an agreement in its terms to be performed on one side within a year is not within the statute of frauds, the mere fact that the agreement is capable of being performed by one side within the year is not enough to keep the statute from applying, if it was not the intention of the parties that it should be performed within the year. For an English criticism of the decision, see A. E. Randall, Reeve v. Jennings, 17 Law. Quar. Rev. 80.

& Eng. Ency. of Law 836; Frary v. Sterling, 99 Mass. 461; Dietrich v. Hoefelmeir, 128 Mich. 145, 87 N. W. 111; Broadwell v. Getman, 2 Denio (N. Y.) 87; Lockwood v. Barnes, 3 Hill (N. Y.) 128, 38 Am. Dec. 620; Pierce v. Paine's Estate, 28 Vt. 34. See, also, cases cited under Minority Rule in 13 Ann. Cas. 918.

In Blanton v. Knox, 3 Mo. 342, the Supreme Court of our state held that as the plaintiff's part of the contract was to be performed within the year, and was fully performed (by the delivery of a slave) within that time, the contract was taken out of the statute. The case of Pitcher v. Wilson, 5 Mo. 46, was where under the contract neither party could perform within the year, and, even though plaintiff had fully performed after the year, the court held he could not recover. Instead of overruling the case of Blanton v. Knox, the latter case was distinguished from the former and the decision in the Blanton Case has been followed in a long line of decisions thereafter. Suggett's Adm'r v. Cason's Adm'r, 26 Mo. 221; Self v. Cordell, 45 Mo. 345; Winters v. Cherry, 78 Mo. 344; Smock v. Smock, 37 Mo. App. 56; Mitchell v. Branham, 104 Mo. App. 480, 79 S. W. 739; Bless v. Jenkins, 129 Mo. 647, 31 S. W. 938; Marks v. Davis, 72 Mo. App. 557; Moore v. McHaney, 191 Mo. App. 686, 697, 178 S. W. 258; Denny v. Brown (Sup.) 193 S. W. 552. * * * It follows that the contract in the case at bar is not within the statute concerning contracts not to be performed within the year, and the learned trial court did right in refusing to hold that it was. * * *

When plaintiff settled her original cause of action, it was forever extinguished and could not be revived. Her rights thereafter rested alone upon the new agreement. Simmons v. Globe Printing Co., 209 S. W. 130. The agreement settled the issue of defendant's negligence in the original cause of action between them and neither could reopen and litigate that issue. The evidence offered by defendant in the attempt to show that he was not negligent and would not have been liable in damages for the death of her husband was properly excluded.

This disposes of all the points raised and presented in plaintiff's brief, and, since they are not such as can be sustained, the judgment is affirmed.[45]

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## OKIN *v.* SELIDOR.

**(Court of Errors and Appeals of New Jersey, 1909. 78 N. J. L. 54, 78 Atl. 770, 138 Am. St. Rep. 588.)**

GARRISON, J. Action was brought by the appellee in the District Court to recover the sum expended in repairing a cement sidewalk that had

[45] On validity within the statute of frauds of a contract which is capable of being performed by one party within one year and is so performed, see 13 Ann. Cas. 916, note.

been badly laid by the appellant, who had agreed that the sidewalk should remain in good condition for five years. The making of this oral agreement was established to the satisfaction of the trial court. It was also proved without contradiction that within one year after the making of this agreement it was broken by the upheaval of the sidewalk and that the amount paid by the appellee in the repair of the sidewalk was $165, for which amount judgment was rendered. To reverse this judgment two sections of the statute of frauds are relied upon—first, that the agreement was one concerning an interest in land, and second, that it was not to be performed within one year from the making thereof.

The first ground is entirely untenable. It requires no argument to show that under an agreement to lay a sidewalk the contractor takes no interest in the land and the circumstances relied upon in the present case, viz., that the contractor accepted a lower price upon the condition that he might have the sand excavated in the course of the work, does not bring the agreement within the statute. This was a mere mode of payment, and the sand when excavated and applied to such payment was personal property and not land or any interest therein.

The second ground cannot avail the appellant for the reason that although his agreement covers five years it was not one that was not to be performed within one year and within such period its performance was required. This section of the statute of frauds is cast in this negative form, hence it applies wherever by no contingency covered by the contract the promisor can within one year from the making of his agreement be required to perform it. That was not the case here. The agreement was not that after the first year the sidewalk should be in good condition for four more years, but that it should be in such condition during the first year as well. As to a breach occurring during the first year, this agreement was therefore not one that was not to be performed within one year. The fact that an action for breaches occurring after the first year would be barred by the statute does not enter into the present case in which the cause of action arose within the year. The state of the case shows that the appellee, who was a builder, sold the property after the sidewalk had been laid, warranting the condition of the property for one year. The purchaser, one Butman, immediately notified the appellee that the sidewalk was broken up and was authorized to employ and pay one Jackson to repair it. Butman did this, paying Jackson for his work $165, which he was reimbursed by the appellee, who then brought this suit. Jackson testified at the trial without contradiction that he repaired the sidewalk about eight months after its installation. The appellee's action is not therefore barred by the statute. This result is in accord with the consensus of decisions under this section of the statute, which are collected in Cyc. under the

title "Statute of Frauds," and in 29 Am. & Eng. Encycl. L. 942, under the somewhat less obvious title of "Verbal Agreements."

The judgment of the Second District Court of the city of Newark is affirmed.[46]

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## LYDIA DERBY *v.* GEORGE W. PHELPS.

(Superior Court of Judicature of New Hampshire, 1822. 2 N. H. 515.)

This was an action of assumpsit on a promise of marriage. At the trial here, under the general issue, and a plea of the statute of limitations, the plaintiff proposed to prove, that in A. D. 1811, the defendant, being about to commence the study of his profession, desired the plaintiff to receive his addresses as a suitor, and at the end of about five years, when he expected to be settled in business, to marry him; and that, in pursuance of this offer, his addresses were received, and continued till the defendant's marriage with another lady, in A. D. 1820.

This evidence was objected to, as within the statute of frauds; but having been admitted, a verdict was found for the plaintiff, subject to future consideration on the validity of the above objection.

WOODBURY, J.[47] Our statute "to prevent frauds and perjuries," provides, among other things, "that no action shall be brought whereby to charge any person upon an agreement made upon consideration of marriage, or upon any agreement, that is not to be performed within the space of one year from the time of making it, unless such promise or agreement" "be in writing," etc. 1 N. H. Laws, 178.

The defendant cannot avail himself of the first clause above cited; because, though once decided in Philpott v. Wallet, 3 Lev. 65, that a contract to marry must in all cases be in writing; yet, that decision has since been overruled in Cork v. Baker, 1 Sra. 34, and in Harrison v. Cage and wife, 1 Ld. Ray. 386; Salk. 24; 5 Mod. 411; Bull. N. P. 280; 2 Eq. Ca. Ab. 248; Skin. 196.

This clause of the statute is now held to reach not mutual promises to marry, but only promises for other things made in consideration of marriage. Bac. Ab. "Agreement," C. 3.

But under the other clause of the statute, we apprehend the objection to the evidence must be adjudged fatal. This was an agreement, which by the terms of it was not to be performed till the expiration of about five years; and hence comes within the very teeth of the statute. Had the tenor of the agreement been, that the contract should be fulfilled on a certain event, which might or might not have happened

[46] On agreements not to be performed within a year, see 138 Am. St. Rep. 590, note.

[47] Part of the opinion is omitted.

within a year, but which in fact did not happen till after a year, the agreement would not have been within the statute. 1 Salk. 280; Skin. 326; Stra. 34; Burr. 1278; 1 Bl. Rep. 353; 1 Ld. Ray. 317; Com. Rep. 49; Holt, 326; 3 Salk. 9; 10 John Rep. 244.

But such was not the tenor of it. * * * *New trial.*[48]

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## HIENTZ *v.* BURKHARD.

(Supreme Court of Oregon, 1896. 29 Ore. 55, 43 Pac. 866, 31 L. R. A. 508, 54 Am. St. Rep. 777.)

Action by A. R. Hientz & Co. against Joseph Burkhard. From a judgment of nonsuit, plaintiffs appeal. Reversed.

[48] That mere engagements to marry not to be performed within a year are within the "not to be performed within a year" clause of the statute of frauds, see also Nichols v. Weaver, 7 Kans. 373 (1871); Ullman v. Meyer, 10 Fed. 241 (1882). But *contra*, see Brick v. Gunnar, 36 Hun. 52 (1885); Lewis v. Tapman, 90 Md. 294 (1900).

For cases of interest in which a decision of the point was avoided, see Clark v. Pendleton, 20 Conn. 495 (1850); Paris v. Strong, 51 Ind. 339 (1875); Blackburn v. Mann, 85 Ill. 222 (1877); McConahey v. Griffey, 82 Ia. 564 (1891); Lawrence v. Cooke, 56 Me. 187 (1868); Wilbur v. Johnson, 58 Mo. 600 (1875); Barge v. Haslam, 63 Neb. 296 (1901); Corduan v. McCloud, 87 N. J. L. 143 (1914); Clark v. Reese, 26 Tex. Civ. App. 619, 64 S. W. 783 (1901).

In Ullman v. Meyer, 10 Fed. 241 (1882), the court discusses the effect of the express statutory exception of mutual promises to marry from the New York "in consideration of marriage" clause of the statute of frauds and concludes that "if it had been intended to exclude promises of marriage altogether from the operation of the statute, it could have been plainly evinced by inserting the exception where it would naturally apply to all the classes of promises required to be in writing" (p. 243) and that, since the intention to exclude such promises from the statute was not so evinced the exception contained in the "in consideration of marriage" clause must be limited to that clause.

As was said by McCherry, C. J., in Lewis v. Tapman, *supra*, at p. 300:

"The objects of a contract to marry are totally unlike the purposes to be accomplished by any other contract; the relation it has in view is wholly distinct from the relation which any other contract could contemplate; the capacity of the parties to it to enter into it is far less restricted as to age than in any other agreement; it can only be made between a man and a woman; it has its origin in the natural law, and is the foundation of society. All these considerations indicate that the statute was not designed to embrace it. Why should a contract of this nature be placed in the same category with one for the sale of goods or the performance of labor and be made subject to the provisions of an enactment obviously intended to regulate suits on undertakings relating to the ordinary business and dealings in trade and commerce? Sir [Baron] Frederick Pollock observed in Hall v. Wright, E. B. & E. 793, 'I think that a view of the law which puts a contract of marriage on the same footing as a bargain for a horse or a bale of hay is not in accordance with the general feeling of mankind and is supported by no authority.'"

On promise of marriage as within the statute of frauds' provision as to contracts not to be performed within a year, see L. R. A., 1915 D, 1190, note.

BEAN, C. J. This action was brought to recover damages for the breach of a contract to furnish the ironwork for defendant's building, and comes here on an appeal from a judgment of nonsuit. For the purposes of this appeal, it is sufficient to say that the evidence tended to show that in August, 1894, the plaintiff and defendant entered into an oral contract, by the terms of which the plaintiff was to manufacture, and furnish to the defendant, the ironwork for a brick building about to be erected by him, according to certain plans and specifications, for the sum of $2,825, but that defendant subsequently, and before any work was performed, wrongfully refused to allow plaintiff to proceed with the execution of its contract. The ironwork referred to was not to be of the kind manufactured by the plaintiff in the usual course of business, or for the trade, but of special designs and measurements, suitable only for use in the construction of defendant's building. The court below ruled that the contract was "an agreement for the sale of personal property," within the meaning of subdivision 5, § 785, of Hill's Annotated Laws, and void because not in writing, and this ruling presents the only question to be determined on this appeal.

To determine whether a given contract concerning personal property, which does not exist in specie at the time it is entered into, but must be manufactured and brought into being under the contract, comes within the statute of frauds, is not without difficulty, and the decisions are by no means reconcilable. The chief difficulty in all such cases is encountered in determining when the contract is substantially for the sale of personal property, to be executed in the future, and when for work and labor and material only. If the former, it is within the statute. If the latter, it is not. Thus far the authorities, except in the state of New York, are substantially agreed; but there have been numerous decisions, and much diversity and even conflict of opinion, in relation to a proper rule by which to determine whether a contract is in fact for the sale of personal property, and therefore within the statute, or for work and labor and material furnished, and so without the statute. There appear to be substantially three distinct views upon the statute, which, for convenience, are generally designated as the English, the New York, and the Massachusetts rules, as represented by the decisions of their respective courts. In England, after a long series of cases in which various tests have been suggested, the rule seems to have been settled in Lee v. Griffin, 1 Best & S. 272, that "if the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but, if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered." In that case the action was brought by a dentist to recover £21 for two sets of artificial teeth made for the defendant's testatrix. The court held the contract to be for the sale of chattels, and within the statute. But this decision seems to stand

alone, and is in direct conflict with the previous decisions of the English courts. Towers v. Osborne, 1 Strange, 506; Clayton v. Andrews, 4 Burrows, 2101; Rondeau v. Wyatt, 2 H. Bl. 63; Cooper v. Elston, 7 Term R. 14; Groves v. Buck, 3 Maule & S. 178; Garbutt v. Watson, 5 Barn. & Ald. 613; Smith v. Surman, 9 Barn. & C. 574. It is said to have been the result of Lord Tenderden's act, which expressly extended the statute to all contracts of sale, nothwithstanding the goods "may not at the time of such contract be actually made, procured or produced or fit or ready for delivery, or some act may be required for the making or compelling thereof to render the same fit for delivery." Meincke v. Falk, 55 Wis. 432, 13 N. W. 545; Benj. Sales (6th Ed.) 108. In this condition of the English authorities, we are not prepared to go to the full extent of Lee v. Griffin. It is an extreme case, and, unless the decision was made to conform to Lord Tenderden's act, it antagonizes the opinions of some of the most eminent jurists of England, and is open to the objection that it practically permits the fraud which theoretically the statute seeks to prevent. To say that a contract of a dentist to manufacture and furnish a set of false teeth for his customer is "an agreement for the sale of personal property," within the meaning of the statute, is certainly giving it the widest possible operation, and has not found general recognition in this country, as a correct exposition of the doctrine, although the simplicity of the rule has commended it to many of the judges. In New York the rule prevails that a contract concerning personal property not existing *in solido* at the time of the contract, but which the vendor is to manufacture or put in condition for delivery, such as the woodwork for a wagon, or wheat not yet threshed, or nails to be made from iron belonging to the manufacturer, and the like, is not within the statute. Crookshank v. Burrell, 18 Johns. 58; Downs v. Ross, 23 Wend. 270; Sewall v. Fitch, 8 Cow. 215; Parsons v. Loucks, 48 N. Y. 17; Cooke v. Millard, 65 N. Y. 352; Higgins v. Murray, 73 N. Y. 352. But this rule seems to be peculiar to that state. By the Massachusetts rule the test is not the existence or nonexistence of the commodity at the time of the contract, as in New York, or whether the contract will ultimately result in the transfer of the title of a chattel from the vendor to the vendee, as in England, but whether the article is such as the manufacturer ordinarily produces in the course of business, and for the trade, or as the result of a special order, and for special purposes. If the former, it is regarded as a contract of sale, and within the statute. If the latter, it is held to be essentially a contract for labor and material, and therefore not within the statute. Thus, it is held that an agreement to build a carriage of a certain design is not within the statute (Mixer v. Howarth, 21 Pick. 205), but that a contract to buy a certain number of boxes of candles at a fixed price, which the vendor said he would thereafter finish and deliver, is a contract of sale, to which the statute applies. Gard-

ner v. Joy, 9 Metc. (Mass.) 177. The result of the decisions in that state has recently been stated thus: "A contract for the sale of articles then existing, or such as the vendor, in the ordinary course of his business, manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But, on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute." Ames, J., in Goddard v. Binney, 115 Mass. 450. And this doctrine seems to be the one most widely adopted in this country. As to the latter part of the rule, relating to goods made on special orders, there is little if any conflict in the American cases. Baker, Sales, § 96; 2 Schouler, Pers. Prop. § 443; Brown, St. Frauds, § 308; 8 Am. & Eng. Enc. Law. 707; note to Flynn v. Dougherty, 14 Lawy. Rep. Ann. 230 (Cal.) 27 Pac. 1080; Meincke v. Falk, 55 Wis. 427, 13 N. W. 545; Finney v. Apgar, 31 N. J. Law. 266; Phipps v. McFarlane, 3 Minn. 109 (Gil. 61); Hight v. Ripley, 19 Me. 137; Cason v. Cheely, 6 Ga. 554; Abbott v. Gilchrist, 38 Me. 260. Until legislation shall assert itself more positively,[49] the courts are put to their election as between these three rules, which, though each has its own merits, are not to be reconciled with one another. In the absence of a statute substantially the same as Lord Tenterden's act, we are unwilling to go to the extent of the doctrine of Lee v. Griffin; and in this case it is unnecessary for us to give a preference to either the New York or Massachusetts rule, because the contract in question is valid under either. It would be excluded from the operation of the statute by the rule adopted in New York, because the subject-matter of the contract did not exists *in solido,* or at all, at the time it was made; and it is not within the statute under the Massachusetts rule and the generally accepted American doctrine, because the ironwork was to be manufactured especially for the defendant, and upon his special order, according to a particular design, and was not such as the plaintiffs, in the ordinary course of their business, manufactured for the general trade. It follows that under either view the court below was in error in holding that the contract was void because not in writing. The judgment must therefore be reversed, and a new trial ordered.[50]

[49] It has done so in the Uniform Sales Act. See provision at the beginning of this chapter. New York, having adopted that statute, now has, in consequence, the Massachusetts rule.

[50] On the application of the statute of frauds to contracts involving both the transfer of a chattel and the doing of work and labor, see 19 Ann. Cas. 1292, note; Ann. Cas., 1914 C, 584, note.

"An interesting point is that decided a few months ago in The Prested Miners' Gas Co. v. Garner, [1910] 2 K. B. 776 (54 S. J. 750), where the parties entered into an agreement for the sale of goods which was not to be performed within a year. There was nothing in writing but there had been part acceptance within sec. 4 of the Sale of Goods Act, 1893. The point was whether

## LUKE BALDWIN *v.* AARON D. WILLIAMS.

**(Supreme Judicial Court of Massachusetts, 1841. 3 Metc. 365.)**

WILDE, J.[51] This action [of assumpsit] is founded on an oral contract [whereby plaintiff agreed to indorse to defendant without recourse two notes of one Gardner payable to plaintiff and held by him, and defendant agreed to pay therefor some cash and two other notes] and the question is, whether it is a contract of sale within the statute of frauds. * * *

The agreement of the defendant, as alleged in the declaration, was to pay for the plaintiff's two notes $2,000 in cash, in addition to two other notes; and that this was a contract of sale is, we think, very clear.

The other question is more doubtful. But the better opinion seems to us to be, that this is a contract within the true meaning of the statute of frauds. It is certainly within the mischief thereby intended to be prevented; and the words of the statute, "goods" and "merchandise," are sufficiently comprehensive to include promissory notes of hand. The word "goods" is a word of large signification; and so is the word "merchandise." *"Merx est quicquid vendi potest."*

In Tisdale v. Harris, 20 Pick. 9, it was decided that a contract for the sale of shares in a manufacturing corporation is a contract for the sale of goods or merchandise within the statute; and the reasons on which that decision was founded seem fully to authorize a similar decision as to promissory notes of hand. A different decision has recently been made in England in Humble v. Mitchell, 3 Perry & D. 141, 11 Adol. & E. 207. In that case it was decided that a contract for the sale of shares in a joint-stock banking company was not within the statute of frauds. But it seems to us that the reasoning in the case of Tisdale v. Harris is very cogent and satisfactory; and it is supported by several other cases.[52] * * *

We think the present case cannot be distinguished in principle from Tisdale v. Harris; and upon the authority of that case, taking into consideration again the reasons and principles on which it was decided,

the contract was governed by both statutes or whether the latter only applied. It was held that the agreement fell within both statutes. Consequently in the absence of writing no action could be brought notwithstanding that the provisions of the Sale of Goods Act were satisfied." 31 Can. L. T. 750.

[51] The statement of facts is omitted.

[52] "That contracts for the sale and delivery of shares of stock are subject to the mischief aimed at by the statute, must be admitted. We are of opinion that reason and the weight of authority favor the conclusion that shares of stock in an incorporated company, the shares having been issued, are goods within the meaning of the statute of frauds." Ostrander, J., in Sprague v. Hosie, 155 Mich. 30, 34 (1908). See Spencer v. McGuffin (Ind.), 130 N. E. 407 (1921). The cases are collected in 7 Ann. Cas. 930, note; 18 Ann. Cas. 598, note; Ann. Cas., 1917 C, 991, note.

we are of opinion that the contract in question is within the statute of frauds, and consequently that the motion to set aside the nonsuit must be overruled.[53]

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## LEA *v.* BARBER.

**(Warwick Assizes, 1794. 2 Anstruther, 425, n.)**

*Coram* MACDONALD, C. B. Action for breach of contract. The agreement was to take an assignment of certain leasehold premises, a brick-ground, at 1000*l.* and to buy the stock, which was of much less value, consisting chiefly of half-made bricks, sheds, etc., at a valuation to be fixed by arbitrators. The arbitrators afterwards settled the price; but the defendant refused to complete the purchase. There being no memorandum of the contract, it was admitted to be void as to the land; but the plaintiff's counsel claimed to recover as to the personal property: it was ruled, on the authority of Cooke v. Tombs, [2 Anst. 420] that the agreement, being in its nature entire, could not be severed; and being void as to the land, was void *in toto*.

*The plaintiff was nonsuited.*[54]

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## JOHN TOWNSEND *v.* EDWARD HARGRAVES.

**(Supreme Judicial Court of Massachusetts, 1875. 118 Mass. 325.)**

COLT, J.† The plaintiff relied on an oral contract of sale to the defendant of a quantity of wool in bales then in Boston, and held in store by one Williams. The sale was by sample at the invoice weight for a given price per pound, and the bales were specifically designated and appropriated by the terms of the contract.

[53] In Greenwood v. Law, 55 N. J. L. 168 (1892), in holding an oral contract to assign a mortgage within § 6 of the New Jersey statute, which corresponded to § 17 of the English, Van Syckel, J., said: "The words 'goods, wares and merchandise' in the sixth section, of the statute are equivalent to the term 'personal property' and are intended to include whatever is not embraced by the phrase 'lands, tenements and hereditaments' in the preceding section." The American Uniform Sales Act expressly applies to "goods or choses in action." See the provision *ante*, p. 1233.

[54] But if the part within the statute has been performed, and the statute in the jurisdiction makes the contract not void, but only unenforceable, the statute seemingly ceases to be a defense. Stephenson v. Arnold, 89 Ind. 426 (1883); Negley v. Jeffers, 28 Oh. St. 90 (1875); Rosenberg v. Drooker, 229 Mass. 205 (1918). See Pearsall v. Henry, 153 Cal. 314, 326 (1908).

On a similar problem in the law of trusts, where the courts divide, see 12 Mich. L. Rev. 524, n. 55.

† Parts of the opinion are omitted.

At the time of the great fire of November 9, 1872, a part of the wool had been sent to the railroad station in Boston, and was either there or at the defendant's mill in Maine, or in transit to the mill, and a part remained and was burned in the storehouse of Williams. The defendant denies his liability for the wool burned. * * *

The instructions given by the court applicable to this aspect of the case were not excepted to, and are not reported. It is to be presumed that they were apt and sufficient, unless the specific instructions requested by the defendant should have been given in whole or in part; and that is the remaining question. * * *

In the second request the judge was asked distinctly to rule that an acceptance of part of the wool would not operate upon the contract to render it valid retrospectively, or make the defendant liable to pay for that which had been destroyed by fire. This presents the question whether the date of the acceptance or the date of the agreement will be treated, as between the parties, as the time when the contract was made, and the risk of loss of the goods was cast on the buyer. * * * The decision of it depends upon the construction to be given to that part of the statute applicable to sales of personal property, which is incorporated in Gen. St. c. 105, § 5, and follows, with slight variation, the words of the seventeenth section of the English statute.

The purpose of this celebrated enactment, as declared in the preamble and gathered from all its provisions, is to prevent fraud and falsehood, by requiring a party, who seeks to enforce an oral contract in court, to produce, as additional evidence, some written memorandum signed by the party sought to be charged, or proof of some act confirmatory of the contract relied on. It does not prohibit such contract. It does not declare that it shall be void or illegal, unless certain formalities are observed. If executed, the effect of its performance on the rights of the parties is not changed, and the consideration may be recovered. Stone v. Dennison, 13 Pick. 1; Basford v. Pearson, 9 Allen, 387; Nutting v. Dickinson, 8 Allen, 540. The memorandum required is the memorandum of only one of the parties. The alternative acts of the seventeenth section proceed from one only. They presuppose a contract, and are in affirmance or partial execution of it. They are not essential to its existence, need not be contemporaneous, and are not prescribed elements in its formation. It is declared in the fourth section that no action shall be brought upon the promises therein named, unless some memorandum of the agreement shall be in writing; and in the seventeenth that no contract for the sale of goods "shall be allowed to be good," or, as in our statute, "shall be good and valid," unless the buyer accepts and receives part or gives earnest, or there is some memorandum signed by the parties to be charged, or, as in our statute, by the party to be charged. It is true there is difference in phraseology in these sections; but in view of the policy of the enactment, and the necessity of giving consistency to all its parts, this difference cannot be held to change the

force and effect of the two sections. "Allowed to be good" means good for the purpose of a recovery under it; and the clause in the last part of the latter section, which requires the memorandum to be signed by the party or parties to be charged, implies that the validity intended is that which will support an action on the contract.[55] * * *

In carrying out its purpose, the statute only affects the modes of proof as to all contracts within it. If a memorandum or proof of any of the alternative requirements peculiar to the seventeenth section be furnished, if acceptance and actual receipt of part be shown, then the oral contract, as proved by the other evidence, is established with all the consequences which the common law attaches to it. If it be a completed contract according to common-law rules, then, as between the parties at least, the property vests in the purchaser, and a right to the price in the seller, as soon as it is made, subject only to the seller's lien and right of stoppage *in transitu*.

Many points decided in the modern cases support by the strongest implication the construction here given. Thus, if one party has signed the memorandum, the contract can be enforced against him, though not against the other,—showing that the promise of the other is not wholly void, because it affords a good and valid consideration to support the promise which by reason of the memorandum may be enforced. Reuss v. Picksley, L. R. 1 Exch. 342.

The memorandum is sufficient if it be only a letter written by the party to his own agent, or an entry or record in his own books, or even if it contain an express repudiation of the contract. And this because it is evidence of, but does not go to make, the contract. Gibson v. Holland, L. R. 1 C. P. 1; Buxton v. Rust. L. R. 7 Exch. 1, 279; Allen v. Bennet, 3 Taunt. 169; Tufts v. Mining Co., 14 Allen, 407; Argus Co. v. Albany, 55 N. Y. 495. * * *

And, except that the statute provides that no action shall be brought, there would be no good reason to hold that a memorandum signed,

[55] Some state statutes of frauds declare a contract not evidenced in writing void, and some of the courts accordingly deem a contract within the statute which does not comply with it to be void and not merely unenforceable. See Scott v. Bush, 26 Mich. 418 (1873); Pierce v. Clark, 71 Minn. 114 (1898); Laun v. Pacific Mut. Life Ins. Co., 131 Wis. 555 (1907).

In the case of contracts "void" often means voidable at the election of the party not in default. "The rule is that in a contract 'void' is to be read 'voidable,' if the result of reading it as 'void' would be to enable a party to avail himself of his own wrong to defeat his contract. It may be stated either in the form that if one party is in default it is 'void as against him' or that if one party is in default it is 'voidable at the option of the other party.' The two amount to the same thing. But the contract is not 'void' in favor of or 'voidable at the option of' the party in default. He cannot say that it is void, and has no option of avoiding it in his own wrong." Lord Wrenbury in New Zealand Shipping Co., Ltd. v. Société Des Ateliers et Chautiers de France, [1919] 1 A. C. 1, 15. And in the case of the word void in a state statute of frauds, such a construction seems desirable. See Crane v. Powell, 139 N. Y. 379 (1893).

or an act of acceptance proved, at any time before the trial would not be sufficient. Bill v. Bament, 9 Mees. & W. 36; Tisdale v. Harris, 20 Pick. 9.

In a recent case in the Queen's Bench, a memorandum in writing made by the defendant, after the goods had been delivered to a carrier and been totally lost at sea while in his hands, was held sufficient to take the case out of the statute, and no notice is taken of the fact that the goods were not in existence when the memorandum was furnished. Cloth Co. v. Hieronimus, L. R. 10 Q. B. 140. * * *

It follows that it would have been erroneous to have given the instructions requested. Upon the point closely allied, namely, what effect, if any, the defendant's mistake or ignorance of a material fact, such as the destruction of the rest of the wool, would have on the alleged act of acceptance, we are not required by the terms of the request to pass.

The third and last request was also properly refused for the reasons above given. If the property in the wool passed by the terms of the original agreement, and the contract was taken out of the statute by the subsequent acceptance and receipt, then, as we have seen, as between the parties, the risk of loss was on the defendant at the time of the fire, and the plaintiff may recover the agreed price of the whole.

*Exceptions overruled.*

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## BALDEY AND ANOTHER *v.* PARKER.

**(Court of King's Bench, 1823. 2 Barnewall & Cresswell, 37.)**

Assumpsit for goods sold and delivered. Plea, general issue. At the trial before Abbott, C. J., the following appeared to be the facts of the case. The plaintiffs are linen-drapers, and the defendant came to their shop and bargained for various articles. Separate price was agreed upon for each, and no one article was of the value of 10*l.* Some were measured in his presence, some he marked with a pencil, others he assisted in cutting from a larger bulk. He then desired an account of the whole to be sent to his house, and went away. A bill of parcels was accordingly made out and sent by a shopman. The amount of the goods was 70*l.* The defendant looked at the account, and asked what discount would be allowed for ready money, and was told 5*l.* per cent.; he replied that it was too little, and requested to see the person of whom he bought the goods (Baldey), as he could bargain with him respecting the discount, and said that he ought to be allowed 20*l.* per cent. The goods were afterwards sent to the defendant's house, and he refused to accept them. The Lord Chief Justice thought that this was a contract for goods of more than the value of 10*l.* within the meaning of the seventeenth section of the statute of frauds, and not within any of the exceptions there mentioned, and directed a nonsuit; but gave

the plaintiffs leave to move to enter a verdict in their favor for 70*l.* A rule having accordingly been obtained for that purpose.

ABBOTT, C. J.‡ * * * The first question is, whether this was one entire contract for the sale of all the goods. By holding that it was not, we should entirely defeat the object of the statute. For then persons intending to buy many articles at one time, amounting in the whole to a large price, might withdraw the case from the operation of the statute by making a separate bargain for each article. Looking at the whole transaction, I am of opinion that the parties must be considered to have made one entire contract for the whole of the articles. * * *

HOLROYD, J. I am of the same opinion. The intention of the statute was that certain requisites should be observed in all contracts for the sale of goods for the price of 10*l.* and upwards. This was all one transaction, though composed of different parts. At first it appears to have been a contract for goods of less value than 10*l.*, but in the course of the dealing it grew to a contract for a much larger amount. At last therefore it was one entire contract within the meaning and mischief of the statute of frauds, it being the intention of that statute that where the contract, either at the commencement or at the conclusion, amounted to or exceeded the value of 10*l.* it should not bind unless the requisites there mentioned were complied with. The danger of false testimony is quite as great where the bargain is ultimately of the value of 10*l.* as if it had been originally of that amount. It must therefore be considered as one contract within the meaning of the act. * * * There was neither note nor memorandum in writing; no part of the price was paid, nor was there any such change of possession as that contemplated by the statute. * * *

*Rule discharged.*[56]

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## YOUNG *v.* INGALSBE.

**(Court of Appeals of New York, 1913. 208 N. Y. 503, 102 N. E. 590.)**

Action by William E. Young against Grenville M. Ingalsbe, as executor of Lyman H. Northup, deceased. From a judgment of the Appel-

‡ The opinions of Bayley and Best, JJ., and parts of the opinions of Abbott, C. J., and Holroyd, J., are omitted.

[56] In Weeks v. Crie, 94 Me. 458, 464 (1900), the court said: "If the circumstances are such as to lead to a reasonable supposition that the parties intended that the whole series of transactions should constitute one trade, they may be regarded as one entire contract; otherwise not." See also New Richmond Roller Mills Co. v. Arnquist (Wis.), 174 N. W. 557 (1919). The rule was given an extreme application in Jenness v. Wendell, 51 N. H. 63 (1871). In Bundy

late Division (151 App. Div. 375, 135 N. Y. Supp. 939) modifying and affirming a judgment for defendant entered upon the report of a referee to hear and determine the action, plaintiff appeals. Affirmed.

COLLIN, J. The plaintiff claimed, as a creditor, a sum from the estate of Lyman H. Northup, deceased. The statute of limitations barred his recovery (except as to one item allowed by the judgment of the Appellate Division), unless a transaction between the plaintiff and the deceased constituted a sale by the latter to the former of his interest in certain books and the crediting by the former of the price upon the indebtedness, and prevented its application. The question for our determination is: Did the transaction effect that result?

The transaction as found by the referee was: The plaintiff and the deceased owned, with equal interests, a law library. The deceased was indebted to plaintiff and they, at a stated time, entered into an agreement, wholly unwritten, whereby the plaintiff purchased the interest of the deceased, the purchase price to be applied by the plaintiff upon the indebtedness. Immediately after the time when the agreement was made, the plaintiff accepted of the interest and caused to be pasted upon the backs of the books leather labels with his name printed thereon, took possession, and assumed and still assumes ownership of the books, and gave the deceased credit for the sum of $77 on account of and *pro rata* on the several items of the indebtedness.

The part of the statute of frauds relevant to the transaction is: "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: * * * (6) Is a contract for the sale of any goods, chattels or things in action for the price of fifty dollars or more, and the buyer does not accept and receive part of such goods, or the evidences, or some of them, of such things in action; nor at the time, pay any part of the purchase money." Personal Property Law (Consol. Laws 1909, c. 41) § 31.

The statute made void the verbal agreement in the present case unless there was, subsequent to and in pursuance of it, either the acceptance and receipt by the plaintiff of Northup's interest or the payment by him, at the time the agreement was made, of the purchase price or a part thereof. The rule of the common law that a mere contract for the sale of goods, where nothing remains to be done by the seller before making delivery, transfers the right of property, although the price has not been paid nor the thing sold delivered to the purchaser (Olyphant v. Baker, 5 Denio, 379; Bissell v. Balcom, 39 N. Y. 275), is devitalized by the statute in the cases within its provisions. In those cases the stat-

v. Voelker (Minn.), 175 N. W. 1000 (1920), where the arrangements were several weeks apart it was held for the jury to say whether there was one transaction or two.

ute renders essential to the proof of a valid contract of sale, not only evidence of the verbal contract, but also evidence of a receipt and acceptance by the vendee of a part of the goods or of a payment at the time the oral agreement was made. The contract must be authenticated by a prescribed act of the parties in pursuance and part performance of it. The act may originate with the vendor or vendee; with the vendor if a delivery of part of the goods and their acceptance by the vendee is the ground for validating the contract; with the vendee if part payment is relied upon. In either case the participation and assent of both parties to it is necessary. The receipt of the goods by the vendee implies a delivery by the vendor. Delivery and receipt of the goods without acceptance is insufficient, and payment implies a receipt and acceptance of the consideration by the party to whom it is made. Hawley v. Keeler, 53 N. Y. 114; Pitney v. Glens Falls Ins. Co., 65 N. Y. 6, 26. While the statute does not interdict the establishment of the verbal contract by parol testimony, it guards against the misunderstanding, misconception, or perjury of the parties by requiring proof of the mutual confirmatory act evidencing intelligence and finality concerning it on the part of each. A writing, of course, evidences the contract as to both parties. Where it is omitted, but the vendee has paid part of the price or the vendor has delivered and the buyer has accepted a part of the goods upon the strength of the agreement, those acts furnish unequivocal evidence of the existence of a contract of some sort between them, although its terms and the performance of the attesting act must after all depend upon the recollection of witnesses. The design of the statute requires that neither party can create the evidence which shall prove the unwritten contract as against the other. Shindler v. Houston, 1 N. Y. 261, 49 Am. Dec. 316; Rodgers v. Phillips, 40 N. Y. 519; Hinchman v. Lincoln, 124 U. S. 38, 8 Sup. Ct. 369, 31 L. Ed. 337.

The facts found by the referee in this case do not establish the contract. Upon the part of the deceased there was merely the naked, verbal agreement. He did not by any act or participation in any act subsequent to it assent to or recognize or confirm it. Each act of the plaintiff was individual and independent. His possession of the books, if had at the time of the agreement, was not on the strength of or pursuant to it, but under another and prior arrangement; and, if acquired subsequent to the contract, was without a delivery and through his sole and exclusive act. Under either hypothesis the title of the deceased to the books did not pass to the plaintiff by virtue of a receipt and acceptance because he did no act by which he relinquished his dominion or recognized and confirmed that of the plaintiff over them. Brand v. Focht, 1 Abb. Dec. 185; Marsh v. Rouse, 44 N. Y. 643; Stone v. Browning, 68 N. Y. 598; Rourke v. Bullens, 74 Mass. (8 Gray) 549.

Manifestly the contract was not made valid by the credit given the deceased by the plaintiff and for two reasons: It was not made at the time of the agreement; the deceased was not in any way an actor in re-

gard to it. Hunter v. Wetsell, 57 N. Y. 375, 15 Am. Rep. 508; Brabin v. Hyde, 32 N. Y. 519; Matthiessen & Weichers Refining Co. v. McMahon's Adm'r, 38 N. J. Law, 536.

The judgment should be affirmed, with costs.

*Judgment affirmed.*[57]

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## WALKER *v.* NUSSEY.

(Court of Exchequer, 1847. 16 Meeson & Welsby, 302.)

Debt for goods sold and delivered, and on an account stated. Pleas,—1st, never indebted; 2d, a set-off for goods sold and delivered, and on an account stated. Issues thereon. At the trial, before the undersheriff of Yorkshire, it appeared that, the defendant having sold goods to the plaintiff to the amount of 4*l.* 14*s.* 11*d.*, the defendant, on a subsequent occasion, bought of him a lot of leather, of two sorts by sample. It was then verbally agreed between them, that the 4*l.* 14*s.* 11*d.* due to

[57] For an unfavorable comment on Young v. Ingalsbe, see Francis M. Burdick, A Statute for Promoting Fraud, 16 Col. L. Rev. 273. Since New York has adopted the Uniform Sales Act, part of the statutory difficulty present in the principal case no longer exists in that state.

"Many decisions from other jurisdictions holding that, where personal property is in possession of the buyer at the time of the sale, it is unnecessary for the owner to resume possession thereof in order that actual delivery may be made, are cited. Wilson v. Hotchkiss, 171 Cal. 617, 154 Pac. 1, L. R. A. 1016 F 389, Ann. Cas. 1917 B 570; Godkin v. Weber, 154 Mich. 207, 114 N. W. 924; 117 N. W. 628, 20 L. R. A. (N. S.) 498; Smith v. Bryan, 5 Md. 141, 59 Am. Dec. 104; Reinhart v. Gregg, 8 Wash. 191, 35 Pac. 1075; Snider v. Thrall, 56 Wis. 674, 14 N. W. 814. These cases, however, hold that, where the property is in the possession of the buyer, his conduct touching the same must thereafter be inconsistent with his previous possession as bailee or agent of the seller. Charlotte, etc., R. Co. v. Burwell, 56 Fla. 217, 48 South. 213; Young v. Ingalsbe, 208 N. Y. 503, 102 N. E. 590; Wilson v. Hotchkiss, *supra;* Silkman Lbr. Co. v. Hunholz, 132 Wis. 610, 112 N. W. 1081, 11 L. R. A. (N. S.) 1186, 122 Am. St. Rep. 1008, 3 Ann. Cas. 713. Evidence showing acts of dominion and control thereover by the purchaser inconsistent with the facts upon which his prior possession was based would be sufficient for that purpose. Wilson v. Hotchkiss, *supra.*" Sievins, J., in Deitrick v. Sinnott (Ia.), 179 N. W. 424, 426 (1920).

"All cases admit that the term 'actually receive' found in the statute [the Uniform Sales Act] means the acquisition of possession by the buyer, and whatever difficulties exist in regard to its meaning are largely due to the inherent difficulty of determining what is, in fact, possession." Pattison, J., in Castle v. Swift & Co., 132 Md. 631, 635 (1918).

On acceptance and actual receipt to satisfy the statute of frauds when the goods are in possession of the purchaser at the time of agreement, see 11 L. R. A. (N. S.) 1186, note; 20 L. R. A. (N. S.) 498, note; L. R. A. 1916 F, 393, note. On acceptance of goods to satisfy the statute, see 96 Am. St. Rep. 215, note.

the defendant should go in part payment by him to the plaintiff for the leather. Next day the plaintiff sent in the goods to the defendant, with this invoice:—

"Halifax, Oct. 14th, 1846.

"Mr. William Nussey, bought of Thomas Walker.

| | £ | s. | d. |
|---|---|---|---|
| Dressed hide bellies, 287 at 9*d*. | 10 | 15 | 3 |
| Insole, 376 at 6½ | 10 | 3 | 8 |
| | 20 | 18 | 11 |
| By your account against me | 4 | 14 | 11" |

The defendant returned the goods within two days as inferior to sample, and wrote to the plaintiff to pay him the 4*l*. 14*s*. 11*d*. The plaintiff refused to receive the goods, and brought this action, stating in his particulars of demand, that the action was brought to recover the sum of 16*l*. 4*s*., as the "balance of the following account" (setting out the above invoice).

The undersheriff ruled, that there was nothing to show that the 4*l*. 14*s*. 11*d*. had been given by the defendant in earnest, or part of payment, under 29 Car. II. c. 3, s. 17, and left nothing to the jury, except on the point of acceptance of the goods by the defendant, directing them to find for him if they thought he returned the goods in a reasonable time, without taking to them. The jury found a verdict for the defendant on both issues.

POLLOCK, C. B.[58] * * * There was nothing but one contract, whereas the statute requires a contract, and, if it be not in writing, something besides. The question here is, whether what took place amounted to a giving of earnest or in part of payment at the time of the bargain, the goods bought by the defendant not having been then delivered to him by the plaintiff. Nothing turns on the effect of their subsequent delivery. Had these parties positively agreed to extinguish the debt of 4*l*. odd, and receive the plaintiff's goods *pro tanto* instead of it, the law might have been satisfied, without the ceremony of paying it to the defendant, and repaying it by him. But the actual contract did not amount to that, and there has been no part payment within the statute.

*Rule refused.*[59]

[58] The opinions of Parke, B., Alderson, B., and Platt, B., and part of the opinion of Pollock, C. B., are omitted.

[59] But see Norton v. Davison, [1899] 1 Q. B. 401. See, however, Dow v. Worthen, 37 Vt. 108 (1864); Cotterell v. Stevens, 10 Wis. 422 (1860).

On when § 17 of the statute of frauds is satisfied by part payment, see 125 Am. St. Rep. 393, note.

## GAY *v.* SUNDQUIST.

(Supreme Court of South Dakota, 1919. 42 S. Dak. 327, 175 N. W. 190.)

Action by Thomas C. Gay against Ed Sundquist. From judgment for plaintiff, and an order denying defendant's motion for a new trial, defendant appeals. Judgment and order reversed.

WHITING, J. Appellant assigns error in the trial court's refusal to direct a verdict in his favor. The motion for directed verdict would assume the following facts to be supported by evidence: C., plaintiff, and S., defendant, entered into an oral agreement whereby S. sold to C. a bunch of lambs to be delivered in the future. Under the agreement, the purchase price would be far in excess of $50. At the time of such agreement, C. delivered to, and there was accepted by, S., C.'s check, both parties intending that the proceeds of such check should be applied in part payment of the purchase price of the lambs. There was, however, no evidence to show that such check was delivered and received under an agreement that it was to be an absolute payment of a part of such purchase price. The check was never presented for payment, but, within a few days after the oral agreement, S. advised C. that he (S.) had destroyed the check. The sole question presented by the motion for directed verdict and before us for determination is whether the giving of such check to, and receipt of same by, S. took this oral agreement out of our statute of frauds. Such statute (section 857, Rev. Code 1919) provides that such an oral agreement is invalid unless, "The buyer, at the time of sale, pays a part of the price."

Few authorities are to be found that are directly in point. It seems, however, to be settled by an almost unbroken line of decisions that a check may constitute a sufficient payment to satisfy the statute. 25 R. C. L. 619; 20 Cyc. 252; Hessberg v. Welsh (Sup.) 147 N. Y. Supp. 44; Logan v. Carroll, 72 Mo. App. 613; Groomer v. McMillan, 143 Mo. App. 612, 128 S. W. 285; McLure v. Sherman (C. C.) 70 Fed. 190.

But while the law is as above stated, the courts almost universally hold that the mere giving of a check is not, in the absence of an express or implied agreement to that effect, a payment or discharge of the debt; that from the mere fact that a creditor accepts a check from his debtor, there arises no presumption that he accepts the same in absolute payment; that the presumption is to the contrary; that the debt is not paid until the check is either paid or accepted at the bank on which it is drawn. In short, until proof to the contrary, a payment by check is presumed to be conditional. 21 R. C. L. 60; Nat. Bk. v. Railway Co., 44 Minn. 224, 46 N. W. 342, 9 L. R. A. 263, 20 Am. St. Rep. 566; Nat. Bk. v. McConnell, 103 Minn. 340, 114 N. W. 1129, 14 L. R. A. (N. S.) 616, 123 Am. St. Rep. 336, 14 Ann. Cas. 396; Groomer v. McMillan, *supra;* Hessberg v. Welsh, *supra.* That a payment by

check should not be held to be an absolute payment in the absence of proof of an agreement that it is given and received as such is perfectly clear. The drawer can stop payment, at any time before acceptance or payment by bank, by serving notice on the bank. This follows from the fact that a check does not assign any part of the funds that may be in the bank to the credit of the drawer; and the bank does not become liable to the payee, unless and until the bank accepts or certifies the check. Section 1891, Rev. Code 1919. Furthermore, the bank may, even without right, refuse to honor the check, thus leaving the drawer liable on the original debt. The above facts must be presumed to be known to both parties to the check; and they are also presumed to know that it is within the power of one to make, and of the other to require, an absolute payment. The authorities, almost without exception, hold that, to take an oral contract out of the statute of frauds, the payment must be absolute. The case of McLure v. Sherman, *supra*, is sometimes referred to as supporting the proposition that the giving and receiving of a check in partial payment takes a contract out of the statute of frauds. An examination of the opinion in said case discloses that the court went no further than to hold that a check must be considered to possess a money value and might be a part payment on a contract. Logan v. Carroll is cited by respondent. In that case no question of absolute or conditional payment was raised —it was merely held that, "if a check was accepted as payment, the statute of frauds was satisfied." But the highest court of the same state, in Groomer v. McMillan, *supra*, in no uncertain language has declared that, to take the contract out of the statute, the payment must be absolute. In the Groomer Case the payment was by check. After announcing the legal propositions we have referred to above, the court said:

"The statute requires that there shall be a payment on the price. And it must be remembered that this is a requirement of the law as a matter of public policy, and it can neither be waived nor evaded by the parties. If the creditor accepts something other than money, it must be agreed and understood that it is in absolute payment and discharge of the price. Otherwise the statute is of no force or effect. A seller of personal property desiring to make a valid contract under the provision of the statute of frauds, with a buyer who has no money with him, might expressly agree with the latter to take his check in absolute discharge of that much of the purchase price. But if he did so, he would have to take the risk of getting the money, provided, of course, the buyer had funds and a right to draw the check at the time he delivered it. For if he had no right to draw it, that would be a fraud on the seller, and his agreement to accept it as a discharge of the debt would be avoided."

We commend the reasoning in this last case, the facts of which are on all fours with those of this case, but we refrain from quoting further. We cite in support of the proposition that the payment must

be absolute in order to take the oral contract out of the statute: Hessberg v. Welsh (Sup.) 147 N. Y. Supp. 44; Leonard v. Roth, 164 Mich. 646, 130 N. W. 208; Johnson v. Morrison, 163 Mich. 322, 128 N. W. 243.

*The judgment and order appealed from are reversed.*[60]

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## THE SALMON FALLS MANUFACTURING COMPANY, PLAINTIFF IN ERROR, *v.* WILLIAM W. GODDARD.

(Supreme Court of the United States, 1852. 14 How. 446, 14 L. Ed. 493.)

NELSON, J. This is a writ of error to the Circuit Court of the United States for the district of Massachusetts.

The suit was brought by the plaintiffs in the court below to recover

[60] In Hunter v. Wetsell, 84 N. Y. 549 (1881), under a statute requiring part payment at the time of the contract, payment by a check good when drawn, the check being accepted as payment, was held to be payment at the time it was accepted. Finch, J., said:

"It is admitted that the check was then given, and it cannot be successfully denied that it was both delivered and received as a payment upon the contract-price of the hops, but it is claimed that the check was not, in and of itself, payment, and having been drawn upon a bank, could not have been in fact paid until afterward, and so there was no payment 'at the time' to satisfy the requirements of the statute. It is quite true that a check, in and of itself, is not payment, but it may become so when accepted as such and in due course actually paid. While not money, it is a thing of value, and is money's worth when drawn against an existing deposit which remains until the check is presented. We must assume that the check of the vendee in this case was good when drawn and was duly paid upon presentation in the usual and regular way, for it appears in the possession of the drawers, and they practically assert the fact of its payment by their counter-claim in the action, by which they seek to recover back the money so paid. There was therefore an actual and real payment made by the vendees to the vendor upon the purchase-price of the hops. It is said, however, that the actual payment of the money, as distinguished from the delivery of the check, was not 'at the time' of the contract, but at some later period. We do not know accurately when the check was paid. It may have been the same day. It may have been within a very few moments. It may not have been till the next day. We are not to presume, for the purpose of making the contract invalid, that it was held beyond the natural and ordinary time. In such event it is a very narrow construction to say that the payment was not made at the time of the contract. The purpose and object of the statute should not be forgotten. Its aim is to substitute some act for mere words, to compel the verbal contract to be accompanied by some fact not likely to be mistaken, and so avoid the dangers of treacherous memory or downright perjury. The delivery of the check was such an act. Indeed it would be an entirely reasonable and just construction to say that the delivery of the check and its presentment and payment constituted one continuous transaction, and should be taken as such without reference to the ordinary delay attendant upon turning the check into money. The statute does not mean rigorously, *eo instanti*. It does contemplate that the contract and the payment shall be at the same time, in the sense that they constitute parts of one and the same continuous transaction. We think, therefore, there

the price of three hundred bales of brown, and of one hundred cases of blue drills, which they had previously sold to the defendant.

The contract for the purchase was made with the house of Mason and Lawrence, agents of the plaintiffs, in Boston, on the 19th September, 1850, and a memorandum of the same signed by the parties. A bill of parcels was made out under date of 30th September, stating the purchase of the goods by the defendant, carrying out prices and footing up the amount at $18,565.03; also the terms of payment—note at twelve months, payable to the treasurer of the plaintiffs. This was forwarded to the defendant on the 11th October, and in pursuance of an order from him, the three hundred bales were sent from their establishment at Salmon Falls by the railroad and arrived at the depot in Boston on the 30th October, of which notice was given to the defendant on the same day, and a delivery tendered. He requested that the goods should not be sent to his warehouse, or place of delivery, for the reason as subsequently stated by his clerk, there was no room for storage. The agents of the plaintiffs the next day renewed the tender of delivery by letter, adding that the goods remained at the depot at his risk, and subject to storage, to which no answer was returned. On the night of the 4th November, the railroad depot was consumed by fire, and with it the three hundred bales of the goods in question. The price was to be paid by a note at twelve months, which the defendant refused to give, upon which refusal this action was brought.

The court below, at the trial, held that the written memorandum, made at the time of entering into the contract between the agents of the plaintiffs and the defendant, was not sufficient to take the case out of the statute of frauds, and as there was no acceptance of the goods, the plaintiffs could not recover.

As we differ with the learned judge who tried the cause, as to the sufficiency of the written memorandum, the question upon the statute is the only one that it will be material to notice. The memorandum is as follows:

"Sept. 19,—W. W. Goddard, 12 mos.
300 bales S. F. drills.....7¼
100 cases blue drills.....8¾
Credit to commence when ship sails: not after Dec. 1—delivered free of charge for truckage.
The blues, if color satisfactory to purchasers.

R. M. M.
W. W. G."

was a payment 'at the time,' within the meaning of the statute, and that the contract of sale was valid."

On a check as payment for the purpose of taking a contract out of the statute of frauds, see L. R. A., 1918 B, 902, note.

The statute of Massachusetts on this subject is substantially the same as that of 29 Car. II. c. 3, § 17, and declares that no contract for the sale of goods, etc., shall be valid, etc., "unless some note or memorandum in writing of the bargain be made, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

The word "bargain," in the statute, means the terms upon which the respective parties contract; and in the sale of goods, the terms of the bargain must be specified in the note or memorandum, and stated with reasonable certainty, so that they can be understood from the writing itself, without having recourse to parol proof; for, unless the essential terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the memorandum is not a compliance with the statute.

This brief note of the contract, however, like all other mercantile contracts, is subject to explanation by reference to the usage and custom of the trade, with a view to get at the true meaning of the parties, as each is presumed to have contracted in reference to them. And although specific and express provisions will control the usage, and exclude any such explanation, yet, if the terms are technical, or equivocal on the face of the instrument, or made so by reference to extraneous circumstances, parol evidence of the usage and practice in the trade is admissible to explain the meaning. 2 Kent. C. 556, and n. 3; ibid. 260, and n.; Long on Sales, 197, Ed. 1839; 1 Gale & Davis, 52.

Extraneous evidence is also admissible to show that a person whose name is affixed to the contract acted only as an agent, thereby enabling the principal either to sue or be sued in his own name; and this, though it purported on its face to have been made by the agent himself, and the principal not named. Higgins v. Senior, 8 M. & Wels. 834; Truman v. Loder, 11 Ad. & Ell. 589. Lord Denham observed, in the latter case: "That parol evidence is always necessary to show that the party sued is the party making the contract, and bound by it; whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand, or that of an agent, are inquiries not different in their nature from the question, Who is the person who has just ordered goods in a shop? If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own."

So the signature of one of the parties is a sufficient signing to charge the firm. Soames v. Spencer, 1 D. & R. 32; Long on Sales, 58.

It has also been held, in the case of a sold note which expressed "eighteen pockets of hops, at 100*s*.," that parol evidence was admissible to show that the 100*s*. meant the price per cwt. Spicer v. Cooper, 1 Gale & D. 52; 5 Jurist, 1036.

The memorandum in that case was as follows: "Sold to Waite

Spicer, of S. Walden, 18 pos. Kent hops, as under July 23, 1840; 10 pos. Barlow East Kent, 1839; 8 pos. Springall Goodhurst Kent, 1839, 100*s*. Delivered, JOHN COOPER."

Evidence was admitted on the trial to prove that the 100*s*. was understood in the trade to refer to the price per cwt., and the ruling approved by the King's Bench. Lord Denman put a case to the counsel in the argument to illustrate his view, that bears upon the case before us. Suppose, he said, the contract had been for ten butts of beer, at one shilling, the ordinary price of a gallon—and intimated that the meaning could hardly be mistaken.

Now, within the principles above stated, we are of opinion that the memorandum in question was a sufficient compliance with the statute. It was competent to show, by parol proof, that Mason signed for the firm of Mason and Lawrence, and that the house was acting as agents for the plaintiffs, a company engaged in manufacturing the goods which were the subject of the sale; and also to show that the figures 7¼ and 8¾, set opposite the three hundred bales and one hundred cases of goods, meant seven and a quarter cents, and eight and three quarter cents per yard.[61]

The memorandum, therefore, contains the names of the sellers,[62] and of the buyer—the commodity and the price—also the time of credit

[61] "Oral evidence may be received to show in what sense figures and abbreviations may be used and their meaning may be stated as it was understood between the parties. In this case it was competent to prove by oral testimony what was meant by the parties in stating that the cotton was sold at 19 1/16 basis; this being a term peculiarly known to cotton men in the purchase and sale of cotton." Higgins, J., in King Collie Co. v. Richards (Okla.), 184 Pac. 130, 131 (1919).

"Under this statute we have held that the writing, when alone relied upon to relieve from the bar of the statute, must in itself contain all of the terms of the contract. While we have said that the writing need not be formal, and may contain implied conditions and may use trade terms or abbreviations requiring explanation, without subjecting it to the fault of incompleteness, yet it must be so far complete in itself, after effect is given to the implied conditions and the trade terms and abbreviations are explained, as to show the bargain made. Nut House v. Pacific Oil Mills, 102 Wash. 114, 172 Pac. 841; Wright v. Seattle Grocery Co., 105 Wash. 383, 177 Pac. 818. * * *

"Again it is the rule that where the contract is alleged to consist, as it is in this instance, of an offer on the one side and the acceptance of the offer on the other, the acceptance to constitute a binding contract must be as broad as the offer, any conditions attached to the offer being in the nature of new proposals, which themselves must be accepted to make a binding contract. Olympian-Tribune Pub. Co. v. Byrne, 28 Wash. 79, 68 Pac. 335; Bringham v. American Bridge Co., 39 Wash. 3, 80 Pac. 788; Littell v. Saulsberry, 40 Wash. 550, 82 Pac. 909; Sillman v. Spokane Sav. & Loan Co., 103 Wash. 619, 175 Pac. 296." Fullerton, J., in Coleman v. St. Paul & Tacoma Lumber Co. (Wash.), 188 Pac. 532, 535-6 (1920).

[62] The memorandum must state the name or description of each party to the bargain, (McElroy v. Seery, 61 Md. 389 (1883); see 13 Ann. Cas. 313, note), and must show which is buyer and which is seller. Schwartz v. Vig-

and conditions of the delivery; and, in the absence of any specified time or place of delivery, the law will supply the omission, namely, a reasonable time after the goods are called for, and usual place of business of the purchaser, or his customary place for the delivery of goods of this description.

In respect to the giving of the note, which was to run during the period of the credit, it appears to be the uniform custom of the house of Mason and Lawrence to take notes for goods sold of this description. The defendant was one of their customers, and knew this usage; and it is a presumption of law, therefore, that the purchase was made with reference to it, there being no stipulation to the contrary in the contract of the parties.

We are also of opinion, even admitting that there might be some obscurity in the terms of the memorandum, and intrinsic difficulty in a proper understanding of them, that it would be competent, under the circumstances of the case, to refer to the bill of parcels delivered, for the purpose of explanation. We do not say that it would be a

den, 182 N. Y. Supp. 907 (1920); Frank & Co. v. Eltringham, 65 Miss. 281 (1887).

While the memorandum in Salmon Falls Manufacturing Co. v. Goddard indicates Goddard as the buyer and is signed by the agent of the seller, where is the name of the seller?

"Without considering all the objections that have been urged against the memorandum it is sufficient to say that it is fatally defective in not containing the name of the purchaser or any designation of him whatever. In order to satisfy the statute the memorandum should not only have been signed by the defendant or her authorized agent, and have identified the property to be sold, but should also have contained the name of the other party to the contract, or should have described him with reasonable certainty. This was not done and the memorandum is therefore insufficient." Morton, J., in Lewis v. Wood, 135 Mass. 321 (1891).

"The memorandum contains the names of both parties to the contract, but does not disclose which is seller and which is purchaser. * * * No doubt both names must appear. * * * In this state the rule has been pushed further, so that, even if signed by an agent the principal's name must appear. Mentz v. Newwitter, 122 N. Y. 491. The extension of the rule, however, does not appear to hold in England." Blackmar, J., in Tobias v. Lynch, 182 N. Y. Supp. 643, 644 (1920).

"There can be no doubt that if a written contract is made in this form, 'A. B. agrees to sell Blackacre to C. D. for £1,000,' then E. F., the principal of A. B., can sue G. H., the principal of C. D., on that contract." Sir George Jessel, M. R., in Commins v. Scott, L. R., 20 Eq. 11, 15-16 (1875).

In Carr v. Lynch, [1900] 1 Ch. 613, the other party, not named, was deemed sufficiently described in the following memorandum: "Dear Sir: In consideration of your having this day paid me £50 I hereby agree to give you a further lease for 24 years of the Warden Arms to run immediately after the expiration of the now existing lease."

On the sufficiency within the statute of frauds of a memorandum of sale of lands disclosing that it is signed by one party for an undisclosed principal, see 12 Ann. Cas. 487, note.

note in writing, of itself sufficient to bind the defendant within the statute; though it might be to bind the plaintiff.

It was a bill of sale made out by the seller, and contained his understanding of the terms and meaning of the contract; and having been received by the buyer, and acquiesced in (for the order to have the goods forwarded was given after it was received), the natural inference would seem to be, that the interpretation given was according to the understanding of both parties. It is not necessary to say that this would be the conclusion if the bill differed materially from the written contract; that might present a different question; but we think it is so connected with, and naturally resulting from, the transaction, that it may be properly referred to for the purpose of explaining any ambiguity or abbreviations, so common in these brief notes of mercantile contracts.

A printed bill of parcels, delivered by the seller, may be a sufficient memorandum within the statute to bind him, especially if subsequently recognized by a letter to the buyer. 2 B. & P. 238 D.; 3 Esp. 180. And, generally, the contract may be collected from several distinct papers taken together, as forming parts of an entire transaction, if they are connected by express reference from the one to the others. 3 Ad. & Ell. 355; 9 B. & Cr. 561; 2 ibid. 945; 3 Taunt. 169; 6 Cow. 445; 2 M. & Wels. 660; Long on Sales, 55, and cases.

In the case before us, the bill of parcels is not only connected with the contract of sale, which has been signed by both parties, but was made out and delivered in the course of the fulfillment of it; has been acquiesced in by the buyer, and the goods ordered to be delivered after it was received. It is not a memorandum sufficient to bind him, because his name is not affixed to it by his authority; but if he had subsequently recognized it by letter to the sellers, it might have been sufficient. 2 B. & P. 238; 2 M. & Wels. 653; 3 Taunt. 169.

But although we admit, if it was necessary for the plaintiffs to rely upon the bill as the note or memorandum within the statute, they must have failed, we think it competent, within the principle of the cases on the subject, from its connection with and relation to the contract, to refer to it as explanatory of any obscurity or indefiniteness of its terms, for the purpose of removing the ambiguity.

Take, for example, as an instance, the objection that the price is uncertain, the figures 7¼ and 8¾, opposite the 300 bales and 100 cases of drills, given without any mark to denote what is intended by them.

The bill of parcels carries out these figures as so many cents per yard, and the aggregate amount footed up; and after it is received by the defendant, and with a knowledge of this explanation, he ordered the goods to be forwarded.

We cannot doubt but that the bill, under such circumstances, affords competent evidences of the meaning to be given to this part of the written memorandum. And so, in respect to any other indefinite or

abbreviated item to be found in this brief note of a mercantile contract.

For these reasons, we are of opinion that the judgment of the court below must be reversed, and the proceedings remitted, with directions to award a *venire de novo*.[63]

CURTIS, J.[64] I have the misfortune to differ from the majority of my brethren in this case, and, as the question is one which enters into the daily business of merchants, and at the same time involves the construction of a statute of the commonwealth of Massachusetts, I think it proper to state briefly the grounds on which I rest my opinion.

The first question is, whether the writing of the 19th of September is a sufficient memorandum within the 3d section of the 74th chapter of the revised statutes of Massachusetts. * * *

Does this writing show, upon its face, and without resorting to extraneous evidence, that W. W. Goddard was the purchaser of these goods? I think not. Certainly, it does not so state in terms; nor can I perceive how the fact can be collected from the paper, by any certain intendment. If it be assumed that the sale was made, and that Goddard was a party to the transaction, what is there, on the face of the paper, to show whether Goddard sold or bought? Extraneous evidence that he was the seller would be just as consistent with this writing as extraneous evidence that he was the purchaser. Suppose the fact had been that Mason was the purchaser, and that the writing

[63] In Falletti v. Carrano, 92 Conn. 636 (1918), the memorandum of a sale of flour was: "Sold to James Faletti, 50 bbl. Daisy flour in 98 lot, at 8.90 to be taken from the car, terms, cash. Carrano & Nobile—N. F. R." Roraback, J., for the court, said:

"The defendants also insist that the place of delivery mentioned in the memorandum of sale, which states that it was 'to be taken from the car' is so indefinite that the contract fails to meet the requirement of the statute of frauds. In the absence of any explanation, the meaning of this term is hardly intelligible, but the judge of the court below was not at liberty to pronounce this writing void [as he did] until he had brought to his aid in its interpretation all the light afforded by the collateral facts and circumstances. This could have been done by parol. Kilday v. Schancupp, 91 Conn. 29, 32, 33; Shelinsky v. Foster, 87 Conn. 90, 97. Where an agreement in writing is expressed in technical or incomplete terms, parol evidence may be admissible to explain that which, taken alone, would be unintelligible, when such explanation is not inconsistent with the written terms of the instrument. Thus, if the language of the instrument is applicable to several persons, to several parcels of land, to several species of goods, to several monuments or boundaries, to several writings; or the terms be vague and general, or have divers meanings as 'household furniture,' 'stock,' 'freight,' 'factory prices' and the like; in all these and the like cases, parol evidence is admissible of any extrinsic circumstances, tending to show what person or persons, or what things, were intended by the party, or to ascertain the meaning in any other respect" (92 Conn. at pp. 639-640).

[64] The dissenting opinion of Daniel, J., and small parts of the dissenting opinion of Curtis, J., are omitted.

might be explained by evidence of that fact; it would then be read that Goddard sold to Mason, on twelve months' credit; and this evidence would be consistent with everything which the paper contains, because the paper is wholly silent as to the fact whether he was the seller or purchaser. In Bailey et al. v. Ogden, 3 Johns. 399, an action for not accepting sugars, the memorandum was:

"14 December.

J. Ogden and Co. Bailey and Bogart.

Brown, 12½,

White, 16¼.

60 and 90 days.

Debenture part pay."

Mr. Justice Kent, who delivered the opinion of the court, enumerating the objections to the memorandum, says, no person can ascertain from this memorandum which of the parties was seller and which buyer; and I think it would be difficult to show that the memorandum now in question is any more intelligible in reference to this fact.

Indeed, I do not understand it is supposed that, in the absence of all extraneous evidence, it could be determined by the court, as matter of law, upon an inspection of the paper alone, that Goddard was the purchaser of these goods. The real inquiry is, whether extraneous evidence of this fact is admissible.

Now, it is true, the statute requires only some note, or memorandum, in writing, of the bargain; but I consider it settled that this writing must show who is vendor and who is purchaser. In Champion v. Plumer, 1 B. & P. New Rep. 252, the memorandum contained the name of the vendor, a description of the goods, and their price, and was signed by the vendee; yet, it was held that the vendee could not maintain an action thereon, because it did not appear, from the writing, that he was vendee, though it was clearly proved by parol. * * *

It seems to me that the fact that the defendant was the purchaser is to say the least, as necessary to be stated in the writing as any other fact, and that to allow it to be proved by parol, is to violate the intent of the statute, and encounter the very mischiefs which it was enacted to prevent. * * *

I am aware that a latent ambiguity in a contract may be removed by extraneous evidence, according to the rules of the common law; and that such evidence is also admissible to show what, in point of fact, was the subject-matter called for by the terms of a contract. Bradlee v. Steam P. Co., 13 Pet. 98. So when an act has been done by a person, and it is doubtful whether he acted in a private or official capacity, it is allowable to prove by parol that he was an agent and acted as such. But these cases fall far short of proving that when a statute requires a contract to be in writing, you may prove by parol the fact that the defendant was purchaser, the writing being silent as to

that fact; or that a writing, which does not state who is vendor and who purchaser, does contain in itself the essentials of a contract of sale.

It is one thing to construe what is written; it is a very different thing to supply a substantive fact not stated in the writing. It is one thing to determine the meaning and effect of a complete and valid written contract, and it is another thing to take a writing, which on its face imports no contract, and make it import one by parol evidence. It is one thing to show that a party, who appears by a writing to have made a contract, made it as an agent, and quite a different thing to prove by parol that he made a purchase when the writing is silent as to that fact. The duty and power of the court is a duty and power to give a construction to what is written, and not in any case to permit it to be added to by parol. Least of all when a statute has required the essential requisites of a contract of sale to be in writing, is it admissible, in my judgment, to allow the fact, that the defendant made a purchase, to be proved by parol. If this fact, which lies at the basis of the action and to which every other is but incidental, can be proved by evidence out of the writing signed by the defendant, the statute seems to me to be disregarded.

It has been argued that the bill of parcels, sent to Goddard by Mason and Lawrence, and received by him, may be resorted to for the purpose of showing he was the purchaser. But it is certainly the law of Massachusetts, where this contract was made, and the case tried, as I believe it is of most other states, and of England, that unless the memorandum which is signed contains a reference to some other paper, no paper, not signed by the party to be charged, can be connected with the memorandum, or used to supply any defect therein. This was held in Morton et al. v. Dean, 13 Met. 385, a case to which I shall have occasion more fully to refer hereafter. And in conformity therewith, Chancellor Kent lays down the rule, in 2 Com. 511, and refers to many authorities in support of it. I am not aware that any court has held otherwise.

That this bill of parcels was of itself a sufficient memorandum under the statute, or that it was a paper signed by the defendant, or by any person by him thereunto lawfully authorized, I do not understand to be held by the majority of the court.

Now the memorandum of the 19th September is either sufficient or insufficient, under the statute. If the former, there is no occasion to resort to the bill of parcels to show who was vendor and who purchaser; if the latter, it cannot, consistently with the statute, be made good by another paper not signed, and connected with it only by parol. To charge a party upon an insufficient memorandum, added to by another independent paper, not signed, would be to charge him when there was no sufficient memorandum signed by him, and therefore in direct conflict with the statute. It does not seem to me to be an

answer, to say that the bill of parcels was made out pursuant to the memorandum. If the signed memorandum itself does not contain the essentials of a contract of sale, and makes no reference to any other paper, in no legal sense is any other paper pursuant to it—nor can any other paper be connected with it, save by parol evidence, which the statute forbids. In point of fact, it would be difficult to imagine any two independent papers more nearly connected than a memorandum made and signed by an auctioneer, and the written conditions read by him at the sale. Yet it is settled, that the latter cannot be referred to, unless expressly called for by the very terms of the signed memorandum. Upon what principle does a bill of parcels stand upon any better ground?

The distinction, heretofore, has been between papers called for by the memorandum by express reference, and those not thus called for; this decision, for the first time, I believe, disregards that distinction, and allows an unsigned paper, not referred to, to be used in evidence to charge the purchaser.

In my judgment, this memorandum was defective in not showing who was vendor and who purchaser, and oral evidence to supply this defect was not admissible.

But if this difficulty could be overcome, or if it had appeared on the face of the paper that Goddard was the purchaser, still, in my judgment, there is no sufficient memorandum. I take it to be clearly settled, that if the court cannot ascertain from the paper itself, or from some other paper therein referred to, the essential terms of the sale, the writing does not take the case out of the statute. * * *

The statute, then, requires the essential terms of the sale to be in writing; the credit to be allowed to the purchaser is one of the terms of the sale.

And if the memorandum shows that a credit was to be given, but does not fix its termination, it is fatally defective, for the court cannot ascertain, from the paper, when a right of action accrues to the vendee, and the contract shown by the paper is not capable of being described in a declaration. The rights of the parties, in an essential particular, are left undetermined by the paper. This paper shows there was to be a credit of six months, and contains this clause—"Cr. to commence when ship sails: not after December 1." According to this paper, when is this credit to commence? The answer is, when ship sails, if before December 1. What ship? The paper is silent.

This is an action against Goddard for not delivering his note on twelve months' credit, and it is an indispensable inquiry, on what day, according to the contract, the note should bear date. The plaintiffs must aver, in their declaration, what note Goddard was bound to deliver, and the memorandum must enable the court to say that the description of the notes in the declaration is correct. They attempt this by averring, in the declaration, that the contract was for a note pay-

able in twelve months from the sailing of a ship called "The Crusader," and that this ship sailed on the sixth day of November. But the writing does not refer to the "Crusader;" and if oral evidence were admissible to prove that the parties referred to "The Crusader," this essential term of their contract is derived from parol proof, contrary to the requirement of the statute. It was upon this ground the case of Morton et al. v. Dean, [13 Metc. (Mass.) 385] and many other similar cases, have been decided. In that case, there was a memorandum signed by the auctioneer, as the agent of both parties, containing their names, as vendor and vendee, the price to be paid, and a sufficient description of the property. But it appeared that there were written or printed conditions read at the sale, but not referred to in the memorandum, containing the terms of credit, etc., and therefore that the memorandum did not fix all the essential parts of the bargain, and it was held insufficient.

But, further; even if oral evidence were admissible to show that the parties had in view some particular vessel, and so to explain or render certain the memorandum, no such evidence was offered, and no request to leave that question of fact to the jury was made. Mason, who made the contract with Goddard, was a witness, but he does not pretend the parties had any particular vessel in view, still less that they agreed on "The Crusader" as the vessel, the sailing of which was to be the commencement of the credit. I cannot perceive, therefore, how either of the counts in this declaration is supported by the evidence, or how a different verdict could have lawfully been rendered. * * *

I am authorized to state that Mr. Justice Catron concurs in this opinion.

*Judgment reversed and cause remanded with directions to award a venire facias de novo.*

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## LEWIS *v.* ELLIOTT BAY LOGGING CO.

(Supreme Court of Washington, 1920. 191 Pac. 803.)

Action by B. A. Lewis against the Elliott Bay Logging Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions to dismiss action.

MAIN, J. The purpose of this action was to recover damages for failure to deliver logs which it is claimed the defendant had sold to the plaintiff. The cause was tried to the court and a jury, and resulted in a verdict in favor of the plaintiff in the sum of $241.66. The defendant timely made motions for judgment notwithstanding the verdict and for a new trial, both of which were overruled, and judgment was entered upon the verdict. The defendant appeals. The essential facts may be stated as follows:

The appellant is a corporation organized under the laws of the state of Washington, engaged in the logging business at Dabob, Wash. The respondent is engaged in the business of buying and selling logs. On the 25th day of April, 1917, the respondent visited Dabob, and looked over a boom of logs owned by the appellant, consisting of about 300,000 feet, and had a conversation with the president of the appellant company with reference to purchasing these logs, together with sufficient logs to be brought from the woods to constitute a raft. The logs at the time had not been rafted. Subsequently the 300,000 feet in the boom were rafted with other logs brought from the woods, and in the raft as made up there was approximately 470,000 feet. On the day following the conversation mentioned, one of the trustees of the appellant wrote respondent a letter, which contained the following:

"Having been away from camp the day you was here and Mr. Leber sold fir to you for $7—10—13, * * * so therefore under the condition we let you have fir at $7—10—13 delivered in Everett or Seattle. * * * "

After receipt of this letter, and on April 28, the respondent wrote appellant a letter, containing the following:

"Your letter of the 26th inst. is received, in which you agree to let me have the raft of fir logs to be delivered in Seattle, by you at $7.00, $10.00, and $13.00, * * * and I will take the fir logs as per your offer at the above prices. * * * "

It should be noted that in appellant's letter the subject-matter of the sale is referred to simply as "fir." There is no mention of the quantity. In the respondent's letter for the first time the subject-matter is referred to as "a raft of fir logs." As above stated, the logs were not delivered, and, since the price of logs had advanced, this action was brought for the purpose of recovering damages.

The first question to be determined is whether the letters referred to constitute a sufficient memorandum to satisfy the statute of frauds. One of the essentials of a memorandum under the statute is that it shall designate the subject-matter of the contract.

Considering, first, the letter signed by the appellant, there is no designation therein of the quantity, but the subject of the sale is referred to simply as "fir." The rule as stated in 1 Mechem on Sales, § 437, is that—

"The note or memorandum must also show what goods were sold and in what quantities. This rule requires that the goods shall be set out either by name or by such description as will enable them to be ascertained without other recourse to parol evidence to identify the goods or apply the description of them."

Under this rule it is necessary that the note or memorandum show in "what quantities" the goods are sold. In 25 R. C. L. 648, the rule is stated substantially the same as in Mechem, and is as follows:

"In case of contracts for the sale of goods the memorandum must

designate with reasonable certainty the subject-matter of the sale, and where the sale is of a quantity of a commodity the quantity must be stated with reasonable certainty as well as its kind."

This rule requires that the quantity be designated in the memorandum. The letter written by the appellant, which referred to the subject-matter of the sale as "fir," did not sufficiently designate the quantity. The respondent, however, argues that the two letters should be considered together. It is true that where the memorandum consists of telegrams or letters they may be construed together, providing they are sufficiently connected by reference. In the letter of the respondent the quantity of the subject-matter, namely, "a raft of fir logs," is for the first time designated. Under the authorities above cited this was one of the essentials of the memorandum.

The question then arises, the memorandum of the appellant which is sought to be charged not sufficiently describing the subject-matter, can it be held upon the letter of the respondent which for the first time contains that essential term of the contract? Respondent cites a number of cases upon this question, all of which have been carefully read and considered, but none of them would sustain a holding that the appellant could be charged upon a memorandum which it did not sign, and which designated the quantity, where the writing signed by the appellant did not sufficiently designate the subject-matter in that respect. They are cases where the party sought to be charged signed a memorandum which contained all the essential terms of the contract, and which was simply accepted by the opposite party, or cases where the party sought to be charged had accepted the terms as they were written by the opposite party. They are therefore not applicable to the facts in the case now before us.

The respondent also cites a number of authorities to sustain his contention that the word "fir" as used in the letter of the appellant was a sufficient designation of the subject-matter, and that oral testimony was admissible for the purpose of showing that that word referred to a raft of logs and the quantity thereof. In all the cases cited, with possibly one exception which will be specially noticed, the memorandum contained language which made the quantity reasonably certain. It cannot be said that simply the word "fir" bears any relation to the quantity. We have not overlooked the rule that the situation of the parties and the surrounding circumstances at the time when the contract was made may be shown for the purpose of applying the contract to the subject-matter, but this rule does not go to the extent of permitting an essential term of the memorandum to be shown by oral testimony. The case of Brewer v. Horst & Lachmund Co., 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240, is probably the most closely in point of any case cited by respondent, but that case, when carefully read, is distinguishable. There a telegram to a hop dealer by his agent, stating "bought thirteen at eleven five-eighths net you; confirm

purchase by wire," with the reply by the dealer to the effect that, "We confirm purchase eleven five-eight cents, like sample," was held to constitute a sufficient memorandum, since it was shown by parol evidence that according to the custom of the hop business the words were understood by the parties to mean an agreement to purchase a certain quantity of hops, of a certain grade, for a certain price. There is no showing in the present case that the word "fir," according to the custom of the business, had any particular meaning. The case of Wright v. Seattle Grocery Co., 105 Wash. 383, 177 Pac. 818, is cited and relied on by both parties, but that case does not discuss or determine the question here involved. There the memorandum designated the subject-matter as "1 car" of flour, and it was held that the parol evidence was admissible to explain what the term "1 car" of flour meant, and that the price agreed upon was in full for that quantity. There is nothing in that case which would sustain a holding that, where a memorandum does not sufficiently designate the subject-matter, in that it does not fix the quantity with reasonable certainty, this fact may be shown by oral evidence.

The judgment will be reversed, and the cause remanded, with directions to the superior court to dismiss the action.[65]

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## PEARLBERG *v.* LEVISOHN ET AL.

(Supreme Court, Appellate Term, Second Department, 1920. 112 Misc. 95, 182 N. Y. Supp. 615.)

Action by Morris Pearlberg against Julius Levisohn and another, copartners trading as Julius Levisohn & Son. Judgment for plaintiff, and defendants appeal. Affirmed.

CROPSEY, J.[66] * * * The defendants are manufacturers of clothing, and from them the plaintiff ordered some goods. The memorandum is made on a printed form taken from the order book of the defendants. At the head of it is the name of defendants' firm, with the statement that they are manufacturers of clothing. The printed part of the form contains a place for the date, order number, name of purchaser, di-

[65] See Burley-Winter Pottery Co. v. Onken Bros. & West Co. (Wyo.), 183 Pac. 747 (1919), where a written order for 1 car of "stoneware as per orders shown for same," there being no other orders for stoneware offered in evidence, was held insufficient because the subject-matter of the contract was too indefinite.

On the necessity that a memorandum within the statute of frauds shall contain the terms of sale, see 9 Ann. Cas. 1060, note. On the necessity of a written acceptance of a written offer to constitute a sufficient memorandum under the statute, see Ann. Cas., 1913 A, 1041, note.

[66] Parts of the opinion are omitted.

rections for time and method of shipment, terms, etc., and below are columns showing the lot, style, and quantity of the different sized garments ordered, with the prices. This order has written on it the date, the name of the plaintiff, who was the purchaser, and a detailed description of the lot, style, and quantity, giving the different sizes and the different prices. All this writing was made by one of the defendants, and the paper was then given to the plaintiff; the defendants keeping a carbon copy of it for their use.

It is manifest that this is a memorandum of an agreement to sell to the plaintiff the goods specified at the prices named. All the necessary terms of a contract and all the terms of the agreement actually made appear on the face of the memorandum. It does not state the terms or the time of delivery, but there was no agreement as to either, and there need be none to make a valid agreement. The plaintiff was permitted to testify, over objection, that at the time he gave the order the defendants said the goods would be delivered in two or three weeks. But this was not a part of the agreement. The order is dated May 24, 1919, and the plaintiff told the defendants he wanted the goods for his fall trade, he being in the retail clothing business, so he had no need of them in two or three weeks; and the plaintiff did not attempt to hold the defendants to a delivery within that period. When the goods were not received, he visited the defendants several times, and finally, after two months had elapsed, the defendants told him the goods had been sold to others. Thereafter this action was brought. It is admitted that the prices of the suits went up after the order was placed, though there is a dispute as to the amount of the advance.

The memorandum does not contain any signature of the defendants, either in ink or pencil; but the printed firm name appears at the top of it, and it is contended by defendants that this is not a signing within the meaning of the statute. The statute does not specify any particular form of signing. It merely requires that the party to be charged shall have signed the memorandum. It has been held that cross mark is a good signature (Zacharie v. Franklin, 12 Pet. 151, 161-162, 9 L. Ed. 1035); also initials (Barry v. Coombe, 1 Pet. 640, 7 L. Ed. 295; Salmon Falls Mfg. Co. v. Goddard, 14 How. 446, 14 L. Ed. 493); even numerals, when used with the intention of constituting a signature (Brown v. Butchers' & Drovers' Bank, 6 Hill, 443, 41 Am. Dec. 755); and a typewritten name or imprint made by a rubber stamp has the same effect (Landeker v. Co-operative Bldg. Bank, 71 Misc. Rep. 517, 130 N. Y. Supp. 780; Degginger v. Martin, 48 Wash. 1, 4, 92 Pac. 674); and this is equally true, though the typewriting or stamp impression be made by another, if the person to be charged has directed it (Deep River National Bank's Appeal, 73 Conn. 341, 346, 47 Atl. 675).[67]

[67] "Proof that the letters containing the alleged acknowledgments were dic-

These and similar cases establish the rule that any name or symbol used by a party with the intention of constituting it his signature, or which is adopted by the party as his signature, is sufficient; and from this it necessarily follows that the party's name printed on the memorandum fully satisfies the statute, if it is shown to have been adopted by him as his signature. This has been the law in England for more than a century, and has been followed quite generally in this country. Saunderson v. Jackson, 3 Esp. 180; Schneider v. Norris, 2 M. & S. 286; Evans v. Hoare, 1 Q. B. 593, 596;[68] Hucklesby v. Hook, 82 L. T. N. S. 117; Cohen v. Wolgel, 107 Misc. Rep. 505, 176 N. Y. Supp. 764; Drury v. Young, 58 Md. 546, 553, 554, 42 Am. Rep. 343. See other cases in note, 37 L. R. A. (N. S.) 352. It has even been held that the name of a party printed on the loose cover of his order book is sufficient. Jones Brothers v. Joyner, 82 L. T. N. S. 768.[69] There

tated by the deceased to a stenographer and were, by the latter, at the direction of the deceased, typewritten and signed with the deceased's name by means of a rubber stamp, was proof (1) that they were writings (Henshaw v. Foster, 9 Pick. 312, 318), since 'typewriting is a substitute for and the equivalent of writing'; (2) that they were made by the deceased, since he directed them to be made and adopted them after they were made, by directing them to be stamped with his name; and (3) that they were signed by him, since in the absence of any express or implied requirement of law that one shall subscribe a writing with his own hand he may properly sign it by means of such a stamp used by himself or by another at his direction. Schneider v. Norris, 2 M. & S. 286; Streff v. Colteaux, 64 Ill. App. 179; National Accident Soc. v. Spiro, 47 U. S. App. 293; Hamilton v. State, 103 Ind. 96; Chapman v. Limerick, 56 Me. 390; Dreutzer v. Smith, 56 Wis. 292." Hall, J., in Deep River Natl. Bank's Appeal, 73 Conn. 341, 345 (1900). On signature made otherwise than by writing in ink, see 1 A. R. C. 156, note. On signing by mark, see 22 L. R. A. 370, note. On printed or stamped signature, see 37 L. R. A. (N. S.) 352, note; Ann. Cas. 1913 B, 663, note. On signature with a lead pencil, see 8 A. L. R. 1339, note.

[68] In Evans v. Hoare the address of the firm at the head of a letter prepared by its clerk for the plaintiff to sign as a binding memorandum was held to be a signature there by the firm. See Kilday v. Schancupp, 91 Conn. 29 (1916), where the memorandum prepared by the defendant began: "Sold to J. Schancupp" and he was held to have signed it at the beginning.

On the place of signature, see L. R. A., 1917 A 153, note.

But in Guthrie v. Anderson, 47 Kans. 383, 389-390 (1891), where the memorandum recited that "the undersigned, husband and wife, owners * * * hereby bargain and sell the same to W. W. Guthrie," etc., Horton, C. J., said:

"The writing or memorandum was prepared by Mr. Guthrie, and his name appears in the body of the instrument as the party to whom the Andersons agreed to sell. But this is not equivalent to the instrument being signed by Mr. Guthrie. * * * If Mr. Guthrie had signed his name at the bottom or the top or anywhere upon the memorandum after it had been written or prepared or directed his name to be so written for acknowledgment, then it might be held that such a signature would satisfy the statute. But his name only appears * * * in the body of the instrument as one of the terms or a part thereof."

[69] In Jones Bros. v. Joyner the names of the plaintiffs were not found as

is nothing in conflict with this holding in James v. Patten, 6 N. Y. 9, 55 Am. Dec 376, and similar cases, for they only decide that under a statute requiring the memorandum to be "subscribed" there had to be a manual signing of it at the end. But even these cases, so far as they say there must be a signature made by hand, have been seriously questioned. Landeker v. Co-operative Bldg. Bank, 71 Misc. Rep. 517, 130 N. Y. Supp. 780.

Where the statute (like the present form of ours) merely required that the memorandum be signed and not subscribed, it is complied with if the signature appears upon any part of the paper. Merritt v. Clason, 12 John. 102, 7 Am. Dec. 286, affirmed as Clason v. Bailey, 14 John. 484; New England, etc., Co. v. Standard Worsted Co., 165 Mass. 328, 331, 43 N. E. 112, 52 Am. St. Rep. 516; Barry v. Coombe, 1 Pet. 640, 7 L. Ed. 295. And the signing by one partner binds the firm. Salmon Falls Mfg. Co. v. Goddard, 14 How. 446, 455, 14 L. Ed. 493; Hughes v. Gross, 166 Mass. 61, 43 N. E. 1031, 32 L. R. A. 620, 55 Am. St. Rep. 375. * * *

The judgment should be affirmed, with costs.

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## WILLIAM F. JOHNSON, PLAINTIFF IN ERROR *v.* JOHN C. DODGE, DEFENDANT IN ERROR.

(Supreme Court of Illinois, 1856. 17 Ill. 433.)

SKINNER, J. This was a bill in equity, for specific performance of a contract for the sale of land.

The bill and proofs show that one Iglehart, a general land agent,

signatures, but as parties. On the leather cover in which removable memorandum books were slipped was stamped "James Jones." The stamped name was deemed part of the memorandum written in the removable memorandum book to supply the names of plaintiffs as sellers. If defendant had been suing, would it have served as a signature?

In Pearce v. Gardner, [1897] 1 Q. B. 688, where the "Dear Sir" of the address of a letter was read with the address on the envelope to make the memorandum required by the statute of frauds, Chitty, L. J., said (p. 691): "It is a matter of common knowledge that formerly letters were written on one sheet of paper, which was folded up and indorsed with the name and address of the person to whom it was sent. Subsequently, about 1840, adhesive envelopes were introduced, and since then the old method has to some extent come into use again as a combination of letter and adhesive envelope. In my opinion, it would be contrary to good sense to hold that there is any distinction between the effect produced by these three methods of sending a letter. The letter and its contents reached the plaintiff, and it seems to me that there is no difficulty in dealing with the whole as one document. It is suggested that this would be to introduce the mischief against which the statute was intended to provide; but the answer to this objection is that it has long been established that parol evidence is admissible to connect separate documents." Pearce v. Gardner was followed in Last v. Hucklesby, [1914] W. N. 157 (C. A.).

executed a contract in writing in the name of Dodge, the respondent, for the sale of certain land belonging to Dodge, to one Walters, and received a portion of the purchase money; that Walters afterwards assigned the contract to Johnson, the complainant; a tender of performance on the part of Walters, and on the part of Johnson, and a refusal of Dodge to perform the contract. The answer of Dodge, not under oath, denies the contract and sets up the statute of frauds as a defence, to any contract to be proved. The evidence, to our minds, establishes a parol authority from Dodge to Iglehart to sell the land, substantially according to the terms of the writing. It is urged against the relief prayed, that Iglehart, upon a parol authority to sell, could not make for Dodge a binding contract of sale, under the statute of frauds; that the proofs do not show an authority to Iglehart to sign the name of Dodge to the contract, and therefore that the writing is not the contract of Dodge; that the writing not being signed by the vendee is void for want of mutuality; that no sufficient tender of performance on the part of complainant is proved, and that the proof shows that the authority conferred was not pursued by the agent. Equity will not decree specific performance of a contract founded in fraud, but where the contract is for the sale of land, and the proof shows a fair transaction and the case alleged is clearly established, it will decree such performance.

In this case, the contract, if Iglehart had authority to make it, is the contract of Dodge and in writing; and it is the settled construction of the statute of frauds, that the authority to the agent need not be in writing, and by this construction we feel bound. 1 Parsons on Con. 42, and cases cited; Doty v. Wilder, 15 Ill. 407; 2 Parsons on Con. 292, 293, and cases cited; Saunders' Pl. and Ev. 541, 542, 551; Story on Agency, 50; 2 Kent's Com. 614. Authority from Dodge to Iglehart to sell the land, included the necessary and usual means to make a binding contract in the name of the principal. If the authority to sell may be created by parol, from this authority may be implied the power to use the ordinary and usual means of effecting a valid sale; and to make such sale it was necessary to make a writing evidencing the same. If a party is present at the execution of a contract or deed, to bind him as a party to it, when his signature is affixed by another, it is necessary that the person so signing for him should have direct authority to do the particular thing, and then the signing is deemed his personal act. Story on Agency, 51. In such case the party acts without the intervention of an agent and uses the third person only as an instrument to perform the mere act of signing. This is not such a case. The agent was authorized to negotiate and conclude the sale, and for that purpose, authority was implied to do for his principal what would have been incumbent on the principal to do to accomplish the same thing in person. Hawkins v. Chance, 19 Pick. 502; 2 Parsons on Con. 291; Story on Agency, chap. 6; Hunt v. Gregg, 8 Blackf. 105; Lawrence v. Taylor,

5 Hill, 107, 15 Ill. 411; Vanada v. Hopkins, 1 J. J. Marsh. 283; Kirby v. Grigsby, 9 Leigh, 387.

The mode here adopted was to sign the name of Dodge "by" Iglehart, "his agent," and it is the usual and proper mode in carrying out an authority to contract conferred on an agent. But if the signing the name of the principal was not authorized by the authority to sell, yet the signature of the agent is a sufficient signing under the statute. The language of the statute is, "signed by the party to be charged therewith, or some other persons thereto by him lawfully authorized." If Iglehart had authority to sign Dodge's name, then the contract is to be treated as signed by Dodge; and if Iglehart had authority to sell, in any view, his signature to the contract, is a signing by "some other person thereto by him lawfully authorized," within the statute. Truman v. Loder, 11 Ad. and El. 589; 2 Parsons on Con. 291. It is true that authority to convey must be in writing and by deed; for land can only be conveyed by deed, and the power must be of as high dignity as the act to be performed under it. It was not necessary to the obligation of the contract that it should have been signed by the vendee. His acceptance and possession of the contract and payment of money under it, are unequivocal evidences of his concurrence, and constitute him a party as fully and irrevocably as his signing the contract could. 2 Parsons on Con. 290; McCrea v. Purmort, 16 Wend. 160; Shirly v. Shirly, 7 Blackf. 452.

We cannot question the sufficiency of the tender in equity, to entitle the complainant to specific performance. Webster et al. v. French et al., 11 Ill. 278. Nor do we find any substantial departure in the contract from the authority proved. While we hold that the authority to the agent who, for his principal contracts for the sale of land, need not be in writing, yet we should feel bound to refuse a specific performance of a contract made with an agent upon parol authority, without full and satisfactory proof of the authority, or where it should seem at all doubtful whether the authority was not assumed and the transaction fraudulent.

*Decree [dismissing the bill] reversed.*[70]

[70] In Illinois, and in a number of states, statutes have been passed requiring the agent's authority to be in writing. Morton v. Murray, 176 Ill. 54 (1858), mentioned in note 72, *post*, was decided under such a statute. Where an unauthorized agent makes a written contract of sale, an oral promise of the owner to perform will not prevent him from pleading the statute. Kesner v. Miesch, 204 Ill. 320 (1903).

On necessity that agent have written authority to make memorandum required by the statute of frauds, see 7 Ann. Cas. 1101, note.

"An auctioneer is [usually] the agent of both parties to the sale and a memorandum thereof, signed by him at the proper time, if otherwise complete, is sufficient to charge both the vendor and the purchaser under the statute of frauds. McBrayer v. Cohen, 92 Ky. 479, 18 S. W. 123; Gill v. Hewett, 7 Bush, 10; Thomas v. Keer, 3 Bush, 619, 96 Am. Dec. 262.

EUGENE L. LEZINSKY CO., INC., *v.* CHARLES HOFFMAN ET AL.

(Supreme Court, Appellate Term, First Department, 1920. 111 Misc. 415, 181 N. Y. Supp. 732.)

Action by the Eugene L. Lezinsky Company, Incorporated, against Charles Hoffman and Jacob Hoffman. From a judgment entered in

"While it is sometimes stated that the auctioneer's authority ceases as soon as the sale has taken place, it is now generally held that his agency for the vendor is not necessarily coextensive with his agency for the purchaser. His agency for the purchaser ends with the sale; and, unless the memorandum be made and signed contemporaneously with the sale, or immediately thereafter, it is not binding on the purchaser. On the other hand, his agency for the vendor may or may not end with the sale. If he be a mere crier, who simply calls for bids and strikes the bargain, his authority ends with the sale; but, if he be given authority to advertise the property and to make all the necessary arrangements for carrying the sale into effect, his authority to bind the vendor does not end with the sale, but extends beyond it, and, until it is revoked, he may properly bind the vendor by a memorandum signed within a reasonable time." Clay, C., in Martin v. Mathis, 184 Ky. 20, 211 S. W. 198 (1919), citing White v. Dahlquist Manufacturing Co., 179 Mass. 427 (1901). On the sufficiency of the auctioneer's memorandum to satisfy the statute, see Ann. Cas. 1912 D, 1069, note.

But the other party to the contract cannot serve as agent to execute the memorandum for both, even if he is an auctioneer. In Bent v. Cobb, 9 Gray (Mass.) 397 (1857), Bigelow, J., said:

"In all cases of sales by auction, the auctioneer, acting only as such, is the competent agent of both parties, and his memorandum of a contract or agreement is binding on both. He is the agent of the vendor by virtue of his employment to make the sale, and he is made the agent of the vendee by the act of the latter in giving him his bid and receiving from him without objection the announcement that the property sold is knocked off to him as purchaser. But this rule is not applicable to cases where the auctioneer is also himself the vendor. The great mischief intended to be prevented by the statute would still exist if one party to a contract could make a memorandum of it which would absolutely bind the other. If such were its true construction it would be a feeble security against fraud, or, rather, it would open a door for its easy commission. A vendor could fasten his own terms on his vendee. If it was a written contract binding on the purchaser he could not show by parol evidence that the terms of the bargain were incorrectly or imperfectly stated. He could not vary or alter it by the testimony of those present at the sale. The publicity of a sale by auction would be no safeguard against a false statement of the terms of sale, made in the written memorandum signed by a party acting in the double capacity of auctioneer and vendor. The chief reason in support of the rule, that an auctioneer, acting solely as such, may be the agent of both parties to bind them by his memorandum, is that he is supposed to be a disinterested person, having no motive to misstate the bargain, and entitled equally to the confidence of both parties. But this reason fails when he is the party to the contract and the party in interest also. The purpose of the statute was, that a contract should not be binding unless it was in writing and signed by the party himself to be charged thereby, or by some third person, in his behalf, not a party to the contract, who might impartially note its contents.

"Nor can it make any difference as to the power of the vendor to make a

favor of the plaintiff, after a trial before the court and jury, defendants appeal. Judgment reversed, and complaint dismissed.

FINCH, J. This is an action for damages for breach of an alleged contract for the sale of certain goods by defendants to plaintiff. The defendant denied generally, and as a defense set up the statute of frauds. It appears that the plaintiff's president went to the defendants' place of business and looked over their line of samples;

memorandum binding on the vendee, that the sale is made by the former in a representative or fiduciary character as an executor, administrator, guardian or trustee. He is still the party to the contract, the price is to be paid to him, he is to deal with the purchase money; his interest and bias would naturally be in favor of those whom he represented, and, what is more material, in case of dispute or doubt as to the terms of the contract, his duties and interests would be adverse to those of the vendee. He would stand in a relation which would necessarily disqualify him from acting as agent of both parties. We do not mean to say that a contract would not be binding, made by an auctioneer, where, from the form in which it was written, an action might be brought to enforce the contract in his name. In such case, if he was only the nominal party to the contract and the record, not being himself the vendor, and having no interest in the sale except as auctioneer, his memorandum might be sufficient to bind both parties to the contract. But we confine our opinion to the case at bar, where the auctioneer was the vendor and a party having an interest, greater or less, in the contract, as well as a party to it in terms. Wright v. Dannah, 2 Campb. 203; Farebrother v. Simmons, 5 B. & Ald. 333; Rayner v. Linthorne, 2 Car. & P. 124; Bird v. Boulter, 4 B. & Ald. 443, and 1 Nev. & Man. 313; Smith v. Arnold, 5 Mason 417."

The auctioneer's authority is revocable moreover. "Between the fall of the hammer and the writing of his name in the memorandum, the bidder has a *locus poenitentiae*, and may withdraw his bid." Valliant, J., in Dunham v. Hartman, 153 Mo. 625, 630 (1899).

It would seem that a memorandum, if otherwise sufficient, will serve when signed by an agent even if it is not intended as a memorandum, if it would have served had the principal signed it under such circumstances.

"It seems to me that the unintentional by-product of satisfying the statute of frauds may be provided as completely by a note or memorandum signed by an agent of the party as by a note or memorandum signed by the party himself, provided, of course, that the agent had authority to sign the particular note or memorandum." Sargant, J., in Daniels v. Trefusis, [1914] 1 Ch. 788, 799.

In Grindell v. Bass, [1920] 2 Ch. 487, such "unintentional by-product" was held to have resulted from an answer in chancery signed by a solicitor which was deemed a sufficient memorandum for a party who did not coerce the answer. Although the solicitor was given no specific authority to sign a memorandum, but only to sign a defence which alleged the existence and terms of the contract, the solicitor was deemed "thereunto lawfully authorized" to sign within the meaning of the statute. But as to the solicitor's authority, see Thirkell v. Cambi, [1919] 2 K. B. 590.

Such "unintentional by-product" may be the result of a letter repudiating liability. Bailey v. Sweeting, 9 C. B. (N. S.) 843 (1861). In Thirkell v. Cambi, [1919] 2 K. B. 590, Scrutton, L. J., said that while such a letter may serve as a memorandum it must be both "a signed admission that there was a contract and a signed admission of what that contract was," to be sufficient.

that he procured from one of the defendants' employes a pad, on which was printed the defendants' names and a former address; that on this pad the plaintiff's representative wrote in duplicate various items of goods at stated prices, signed and handed the sheets containing the writing to defendants' employe, who retained the original and returned the copy to plaintiff's representative; the defendant making no writing thereon.

It is urged by the respondent, however, that the defendant must be deemed to have appropriated as its signature its printed name upon the sheet, and hence the alleged contract is not within the statute of frauds. With this contention I am unable to agree. Both in this country and England no case has gone further than to hold that a printed name, when at the top of an order blank or bill, may be appropriated or assigned to a particular transaction as a signature only where the remainder of the blank has been filled in by the party to be charged therewith or his duly authorized agent. Cohen v. Wolgel, 107 Misc. Rep. 505, 176 N. Y. Supp. 764; Hucklesby v. Hook, 82 Law Times Report, 117 [71] (the latter pointing out the distinction between the earlier English cases and the case at bar). Such decisions seem to mark the dividing line between those cases where the statute has been complied with and where it has not. In the one case you have taken the agreement out of the reach altogether of possible frauds and perjury, inasmuch as it is entirely out of the reach of verbal testimony only; whereas, in the case at bar, the vitals of the transaction are established or denied entirely by oral testimony. Wilson v. Lewiston Mills Co., 150 N. Y. 314, at pages 325, 326, 44 N. E. 959, 55 Am. St. Rep. 680.

The doctrine of appropriation of defendant's printed name as his signature to the contract must rest upon the principle that a man may say in any form, "This is my signature," but at the time he does so there must be a writing in existence, which must be the writing of the person to be charged therewith; for, if the writing is not then in existence, there is nothing to which the defendant's printed signature may be appropriated or assigned. This writing must be made by either the defendant or his duly authorized agent. The other party cannot be his agent for this purpose any more than he could for the

[71] In Hucklesby v. Hook the memorandum was written on a letterhead of a hotel with name of the hotel followed by the words "sole proprietor, Wm. Thos. Hook." The memorandum was in the form of a letter addressed "T. Hook, Esq.," written by Hucklesby in Hook's presence. In view of the cases holding that the other party to the contract cannot act as agent to sign for the defendant and that Hook wrote no part of the contract, it was held, that it was not signed by him. Brickley, J., said, however: "If it had been proved that the defendant dictated the document, actually dictated the words, and then did anything equivalent to handing it to the plaintiff, and said, 'Sign that as representing the contract between us,' I do not say that might not have been sufficient for the purposes of the statute."

purpose of appropriating the printed signatures. Wilson v. Lewiston Mills Co., *supra*.

The defendants' testimony in the case at bar furnishes an excellent example of the reason for the statute. Such testimony is that the plaintiff was trying to persuade the defendants to accept the order at the prices desired by the plaintiff, and the defendants refused, because a strike was in progress and labor costs could not be reckoned. Plaintiff finally wrote down what it wanted on what defendants allege to be a memorandum pad used for scrap, and not used for the purpose of taking orders, and left it with the defendants as a mere offer on the part of plaintiff, which the defendants never accepted. Plaintiff now seeks, solely by its own writing and oral testimony on its part, to bind the defendant, and the latter has to meet this issue likewise by oral testimony. As a result, the statute is entirely done away with, provided a plaintiff convinces a jury of the truth of his assertion.

It follows that the judgment should be reversed, with costs, and the complaint dismissed, with costs.[72]

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## LEE *v.* VAUGHAN SEED STORE.

(Supreme Court of Arkansas, 1911. 101 Ark. 68, 141 S. W. 496, 37 L. R. A. (N. S.) 352.)

Action by Arthur G. Lee against the Vaughan Seed Store. Judgment for defendant, and plaintiff appeals. Affirmed.

The appellant sued appellee on an alleged contract for the sale of onion sets, as follows: "Contract for onion sets between Vaughan's Seed Store of the city of Chicago, state of Illinois, party of the first part, and Arthur G. Lee, of the city of Ft. Smith, state of Arkansas, party of the second part. Said party of the first part sells said party of the second part the following amount of onion sets for delivery Jan. '08." Then follows description of the onion sets, and the terms of sale and shipment are set forth. The alleged contract was signed by appellant, and the name of appellee was printed in capital letters in the body of the contract, but was not written or printed at the bottom of the contract where the signature of appellant appears. Nor was the

[72] See Cohen v. Wolgel, 176 N. Y. Supp. 764 (1919).

Under a state statute requiring the authority of an agent to sign the memorandum to be in writing, it has been held that a signature by another at the party's request and with his mark or name is a signature by himself and not by agent. Morton v. Murray, 176 Ill. 54 (1898). Carter, C. J., said for the majority of the court: "One may write and execute an instrument by the hand of another when done in his presence and by his direction, and the fact may be proved by parol evidence and an action may be brought upon the instrument without violating the statute of frauds." On signing by proxy, see 22 L. R. A. 297, note.

name of appellee written anywhere in the instrument by the agent of appellee.

Appellant insisted that he had a contract with appellee for the delivery of the onion sets and appellee on the other hand claimed that it had not booked appellant's order and therefore had not approved or accepted same and had not entered into a contract for the sale and delivery of the onion sets. The court directed a verdict instead in favor of appellee, and appellant appealed.

WOOD, J.† Section 3656 of Kirby's Digest provides: "No contract the sale of goods, wares and merchandise for the price of $30.00 or upward, shall be binding on the parties, unless, first, there be some note or memorandum signed by the party to be charged." Under the above section, in order to bind appellee to the alleged contract it must appear that same was signed by appellee. "The party to be charged" is the one against whom the contract is sought to be enforced. 20 Cyc. 272, and note. See, also, Vance v. Newman, 72 Ark. 359, 80 S. W. 574, 105 Am. St. Rep. 42; Century Dig. p. 2286, § 244, where cases are collected; Browne on the Statute of Frauds, § 365.[73]

Does the printed name of appellee in the body, and on the back, of the instrument constitute a signature within the meaning of the above statute? Browne on the Statute of Frauds says: "In regard to the place of signature, there is no restriction. It may be at the top, or in the body of the memorandum as well as at the foot. * * * But the name, besides being in his handwriting, must always be inserted in such a manner as to authenticate the instrument as the act of the party executing it, or in other words, to show the intention of the party to admit his liabilty. The mere insertion of his name in the body of an instrument, where it is applicable to a particular purpose will not constitute a signature in the meaning of the statute, and although it be so inserted as to control and direct the entire instrument,

† The statement of facts is abbreviated and parts of the opinion are omitted.

[73] In some states the vendor is the party to be charged in a contract to sell land and the vendee may be sued in such states even if he has not signed if the vendor has. Evans v. Stratton, 142 Ky. 615 (1911); Brodhead v. Reinbold, 200 Pa. St. 618 (1901). But in the great majority of jurisdictions the party to be charged means the one against whom the contract is sought to be enforced in the action, i. e., usually the defendant, as noted in the principal case.

In Idaho, in Houser v. Hobart, 22 Ida. 735 (1912), and in Kerr v. Finch, 25 Ida. 34 (1913), the court held that the memorandum is invalid when signed by less than all the parties. In Kerr v. Finch the memorandum was signed by the vendor only and it was held invalid even at the suit of the vendee. The court admitted, that its view was that of a small minority, but said that "Precedent is strongly persuasive with this court, but not controlling, and, if devoid of reason and justice, will not be followed."

On the sufficiency of a signature of the memorandum by one party only, see 3 Ann. Cas. 1036, note; 13 Ann. Cas. 1121, note; Ann. Cas. 1912 C, 416, note.

still the better opinion seems to be that its insertion must also be intended as a final signature, and that if it appear that the instrument was to be further executed, it will not be taken to have already been sufficiently signed." Browne on the Statute of Frauds, § 357.

The agent of appellee was furnished with a form of contract containing blanks to be filled and with the name of appellee printed in the body and on the back thereof. The agent when he took the order for goods filled in the blanks, but he did not sign the name of appellee to the instrument and did not write it in the alleged contract. The letters of appellee to appellant written after the instrument was signed by appellant (but introduced by appellant himself) indicate that appellee's agent who took the order had no authority to sign appellee's name to the alleged contract. His authority according to these letters, was only to solicit orders and submit them for consideration and confirmation of appellee at its home office. But even if it could be assumed that the sales agent had authority to sign appellee's name, it does not appear that he did so.

"A signature consists both of the act of writing the party's name and of the intention of thereby finally authenticating the instrument." Greenleaf on Evidence, § 674, quoted in Vines et al. v. Clingfost, Ex., 21 Ark. 312, and in Seventh Street Colored Church v. Campbell, 48 La. Ann. 1546, 21 South. 184; Davis v. Sanders, 40 S. C. 510, 19 S. E. 138; Watson v. Pipes, 32 Miss. 466; 25 Am. & Eng. Ency. of Law, 1065.

A name merely printed in an instrument where according to its purport the name should be mentioned in the recitals is not a signature within the meaning of the statute of frauds. See Evans v. Ashley, 8 Mo. 181. There must be a writing, stamping or printing of the name by the party to be charged, in person or through a duly authorized agent with the intention of authenticating and finally adopting the writing as his own. There is no proof to that effect in this record. We conclude therefore that the name of appellee printed in the instrument under consideration did not constitute a signing thereof within the meaning of the statute of frauds. * * *

The judgment is correct, and is affirmed.[74]

[74] But in Jones v. Victoria Graving Dock Co., L. R., 2 Q. B. D. 314, at 323-324 (1877), Lush, J., said:

"The signature required by the 4th section is not of the substance of the contract; it is matter of procedure only (Leroux v. Brown 12 C. B. 801), and is required as evidence of the contract. To prevent frauds and perjuries, the act will not allow any other kind of proof than the writing itself (if it be in writing) or a written admission that the contract was made, and that it was signed in either case by the party to be charged. But so that this kind of evidence is given, it matters not that the memorandum was not made at the time, or for what purpose the signature was put, if only it was put to attest the document as that which contains the terms of the contract."

And in John Griffith Cycle Corp., Ltd. v. Humber & Co., Ltd., [1899] 2 Q. B. 414, 417-418, A. L. Smith, L. J., said:

"It is undoubted law that the party to the contract himself may, by signing

## ARNETT ET AL. *v.* WESTCOTT ET AL.

(Supreme Court of Kansas, 1920. 107 Kans. 693, 193 Pac. 377.)

Suit by Floyd Arnett and others against Sarah J. Westcott and others for specific performance. Decree for plaintiffs, and defendants appeal. Affirmed.

PORTER, J.[75] The appeal is from a judgment directing the specific performance of a contract wherein John A. Boylan agreed to convey to J. W. Wilson a farm of 160 acres in Cowley county.

In her lifetime the legal title was in Martha A. Scott. She died intestate August 7, 1910, and one-half of the property descended to her eight children and one-half to their father, Robert B. Scott. Robert B. Scott owned another farm of 160 acres, and upon his death in 1911 the full title to both farms vested in the eight children. The heirs were of full age, and all except Nancy C. Boylan were nonresidents, some living in Oklahoma and others in Missouri. John A. Boylan, husband of Nancy C. Boylan, had been acting as the agent of all the heirs, looking after both farms, collecting the rents, and paying the taxes. Some years before he had on behalf of the heirs sold the farm they had inherited from their father, and for several years had had an arrangement with them to sell the farm in controversy at a fixed price. He was also the administrator of the estate of Robert B. Scott. In July, 1917, he entered into a written contract to sell the farm to one of the plaintiffs, J. W. Wilson, for $11,500, the price the heirs had agreed upon, and the contract was deposited in a bank, together with Wilson's check for $1,000; the balance to be paid when the title papers were perfected. Boylan prepared a deed for the heirs to sign, reciting the consideration and designating the grantors as the only heirs at law of Martha A. Scott, deceased, and Robert B. Scott, deceased. The deed was sent around among the heirs, and all except Alec Scott signed and acknowledged it for the purpose of carrying out the contract. Alec Scott and his wife refused to sign, not because of any dissatisfaction with the terms of the sale, but because Alec claimed that in the sale of the father's farm the other heirs had defrauded him out of $500 of his share. J. W. Wilson, in the meantime had arranged to sell the property to the other plaintiffs, Arnett and Foster, for the same price at which he was to purchase it. The heirs who had signed

a document subsequent to that containing the terms of the contract in the way required by the 4th section of the Statute of Frauds. It is also undoubted law that a signature to a document which contains the terms of a contract is available for the purpose of satisfying s. 4 of the statute, though put *alio intuitu* and not in order to attest or verify the contract. Jones v. Victoria Dock Co., L. R., 2 Q. B. D. 314." Though the House of Lords reversed the case, it was on other grounds.

See, also, note 70 *ante*, this chapter.

[75] Part of the opinion is omitted.

the deed, together with Wilson and Arnett, consulted an attorney, who advised them that there were three things they might do: First, the plaintiffs could take the deed executed by seven of the eight heirs; second, a suit in partition could be brought (which Wilson and Arnett claim they understood would force the sale of the one eighth interest belonging to Alec Scott); and, third, the plaintiffs could abandon the contract. Boylan wanted to see the contract carried out, and induced some of the heirs to bring suit for partition, and suit was filed.

The sale in partition occurred in April, 1918. Boylan did not guarantee that Wilson would get the farm at the agreed price, but Boylan wrote him shortly before the sale that the only thing left for them to do was "to go up and bid it in if we can, and hope no one will run it up higher than the price we had set." Wilson and Arnett attended the sale and bid the amount they had agreed to pay Boylan. W. S. Scott and Ross Scott bid $12,000, and the property was struck off to them, and afterwards the sale was duly confirmed. On October 24, 1918, the check Wilson had left in the bank with the contract was taken down by him. The contract itself was left in the bank. Afterwards, on July 27, 1919, another check for $1,000 was placed in the bank payable to John A. Boylan. This was after the plaintiffs determined to begin suit for specific performance.

Two propositions are insisted upon: First, that there was no written contract between plaintiffs and the defendant heirs, and especially none between plaintiffs and W. S. Scott and Ross Scott, who now hold the title by virtue of their purchase at the partition sale. There was a written contract, however, between Boylan and Wilson, which is the contract the court ordered performance of. It is urged that Boylan only purported in the contract to act for the defendants, but that, in fact, he had no authority to act in their behalf, or at least that there was no way to prove that authority. That he did act in their behalf and under their authority are facts determined by the court, and there was abundant evidence to sustain the finding. It is of no consequence at all that in signing his name to the contract with Wilson, Boylan added the letters "Admr." It is conceded that, as administrator, he had no authority to make such a contract; in fact, he never claimed to possess such authority. He claimed to represent the defendant heirs under some arrangement with them, and Wilson so understood. If, in fact, he did have authority, though not in writing, to represent the defendant heirs, a court of equity would have the power, in a proper case, to compel the defendants to perform the contract, providing, of course, there was some memorandum in writing signed by the defendants which is sufficient to take the case out of the statute of frauds.

The chief contention of the defendants is that there was no such memorandum. They say that the warranty deed signed by them was never delivered, and therefore is not a sufficient memorandum. The appeal is prosecuted particularly in the interest of W. S. Scott and Ross Scott,

who claim title under the partition sale. They testified, in substance, that they understood John Boylan had contracted to sell the land to Wilson for the amount expressed in the deed, which was agreeable to them; that they signed the deed to carry out the agreement whatever it was; they remembered about the sale of the other place negotiated by Boylan in the same way. Boylan was named as a defendant because of his wife's interest. He testified that he was the agent of the owners to sell the place, that he sold it, and that all of them, including Alec, were satisfied with the price and terms.

There can be no question that the deed was executed for the purpose of carrying out the contract made by Boylan with Wilson. Although not finally delivered, it was evidence of a ratification and confirmation by those who signed it of the contract Boyland had made as their agent. Painter v. Fletcher, 81 Kan. 195, 105 Pac. 500. Two of the heirs who had thus ratified the contract to convey obtained the whole title by virtue of the partition sale, and it is clear that a court of equity has the power to compel them to perform their contract and to convey the title subsequently acquired. Nor is delivery of the deed essential in order to establish the oral contract. If the deed has been executed, it may, and often will, constitute a sufficient memorandum of the oral contract. The writing required by the statute is merely evidence of the contract, and is not the contract itself.

"The writing does not become the contract, but simply the evidence thereof; and whether it remains in the hands of the one party or the other, if it is properly identified as the full expression of the contract, upon which the minds of the two parties met, it fulfills the purpose of the statute and renders the contract agreed upon enforceable." Ames v. Ames, 46 Ind. App. 597, 604, 91 N. E. 509, 512.

In Schneider v. Anderson, 75 Kan. 11, 88 Pac. 525, 121 Am. St. Rep. 356, it was held that:

"A writing * * * and an undelivered deed, executed by the grantor at the same time and as part of the same transaction, which is deposited by the parties in escrow, constitute a sufficient memorandum of a contract for the sale of lands to satisfy the statute of frauds." Syl. par. 1.

In the opinion it was said:

"The courts are at variance upon the question whether a deed alone, when executed by the vendor and deposited in escrow, to be delivered by the depositary to the grantee upon his paying the purchase price or performing some other condition, is itself a sufficient memorandum to avoid the statute of frauds. The cases are cited in 29 Am. & Eng. Ency. of Law, 855. A majority say that the deed alone is not a sufficient memorandum. But the better reasoning seems to be the other way. The ground usually stated for holding that the deed is not a sufficient memorandum is that, until it is finally delivered or the condition is performed, it does not constitute a contract. The reason given seems to be beside

the question, which, in this character of cases, is not, Was there a written contract? but is, Is there a sufficient memorandum signed by the party which is evidence that a contract existed or which tends to prove that fact? The evil the statute seeks to guard against is the use of oral evidence to prove a contract. This is obviated by the production of the deed which is a memorandum of a contract. * * *

"By far the best reasoned case we have examined is Jenkins v. Harrison, 66 Ala. 345, followed in Johnston v. Jones, 85 Ala. 286, 4 South. 748. It is said in the former case: 'A deed, drawn and executed with the knowledge of both parties, with a view to the consummation of the contract of sale, which, in itself and of itself, embodies the substance, though not all the details or particulars, of the contract, naming the parties, expressing the consideration, and describing the lands, though not delivered, and its delivery postponed until the happening of a future event, is a note or memorandum of the contract sufficient to satisfy the words, the spirit, and purposes of the statute of frauds.' "

75 Kan. 16, 17, 88 Pac. 527 (121 Am. St. Rep. 356.)

See note to same case, 121 Am. St. Rep. 356, 362, and note 132 Am. St. Rep. 811, 813.

The defendants insist that the case of Schneider v. Anderson, *supra*, goes not further than to hold that a deed may be a sufficient memorandum, but they insist that the contract sought to be enforced must be the same as the one shown in the deed, and they say that the contract between Boyland and Wilson provided for the payment of $1,000 in cash and $10,500 on the 1st day of October, 1917, while the deed provided for payment of $11,500 in cash, and that there is a material variance between the contract and the deed. We think there was no variance. Both the contract and the deed contemplated a cash transaction. Obviously the parties understood that the entire consideration was to be paid upon delivery of the deed. Several things remained to be done, the execution of the deed by all the parties, the furnishing of an abstract and its approval. The $1,000 deposited with the contract and the $10,500 which was to be paid when the transaction was closed would constitute a cash payment of the entire consideration.

In Anderson v. Anderson, 75 Kan. 117, 88 Pac. 743, 9 L. R. A. (N. S.) 229, the written contract relied upon consisted of letters signed by the parties to be bound thereby which had been lost or destroyed, and secondary evidence of the contents was held sufficient to establish the written contract. In that case, however, the contract had been performed on the part of the plaintiff.

Since an undelivered deed may constitute a sufficient memorandum, it is of no importance which party has the instrument in its possession or where it comes from. If the memorandum or writing "signed by the party to be bound thereby" is not in the possession of either party, if it be found discarded and abandoned in some ash heap or floating about the streets, and is produced at the trial and shown to have been signed

by the parties sought to be bound, and otherwise answers the requirements of the statute, it is sufficient.

In Ames v. Ames, *supra*, it was said in the opinion:

"Thus, where a verbal agreement was made for the sale of land, a letter written by the vendor or purchaser to his own solicitor or agent stating the terms of the agreement, and not intended for the inspection of the other party, has been held to be a sufficient note or memorandum within the intent of the statute." 46 Ind. App. 605, 91 N. E. 512.

The opinion cites the case of Barry v. Coombe, 1 Pet. 640, 651 (7 L. Ed. 295), where it was said:

"An examination of the cases on this subject will show that courts of equity are not particular with regard to the direct and immediate purpose for which the written evidence of a contract was created."

In Charlton v. Columbia Real Estate Co., 67 N. J. Eq. 629, 60 Atl. 192, 69 L. R. A. 394, 110 Am. St. Rep. 495, 3 Ann. Cas. 402, the court said:

"Nor does it signify to whom the memorandum is addressed. It may be to the third person, and yet be a good writing to satisfy the statute of frauds. Form is not important. * * * The reason for this is clear. The memorandum is only necessary to evidence the contract, not to constitute it." * * *

*The judgment is affirmed.*[76]

[76] But see Freeland v. Charnley, 80 Ind. 132 (1881); Morrow v. Moore, 98 Me. 373 (1903).

On an undelivered deed or a memorandum, see 22 L. R. A. 273, note; 3 Ann. Cas. 404, note. On deed delivered in escrow as a memorandum, see 43 L. R. A. (N. S.) 390, note.

While a deed may serve as a memorandum within the statute, deeds probably do not have to conform to the statute. The question is primarily one of signature.

"It seems that the statute of frauds does not apply to deeds. Signature is unnecessary for the validity of a deed at common law, and it is not likely that the legislature meant to require signature where the higher solemnity of sealing (as it is in a legal point of view) is already present. But as in practice deeds are always signed as well as sealed, and distinctive seals are hardly ever used except by corporations, the absence of a signature would nowadays add considerably to the difficulty of supporting a deed impeached on any other ground." Pollock on Contracts, 8 ed., pp. 171-172.

"I must own that I think a deed is not within the statute of frauds, because, in my opinion, that statute was never meant to apply to the most solemn instrument which the law recognizes." Parke, B., in Cherry v. Heming, 4 Exch. 631, 636 (1849).

"So obsessed did the courts become with the notion that a seal imports a consideration, that in a long line of decisions they held that the presence of a seal on a contract or 'memorandum' dispensed with the recital of a consideration as required by the statute of frauds. Douglass v. Howland, 24 Wend. 35; Bush v. Stevens, 24 Wend. 256; Smith v. Northrup, 80 Hun. 65, 70, aff'd 145 N. Y. 627; 20 Cyc. 264." Seals at Common Law and By Statute, 3 Bench and Bar (N. S.) 25-26.

## SMITH & NYE *v.* MUNSEL ET AL.

(Supreme Court of Vermont, 1920. 110 Atl. 12.)

Bill for specific performance by Smith & Nye, as executors, against Wingate W. Munsel and others. Decree for the plaintiffs, and defendants appeal. Decree altered and affirmed, and cause remanded.

MILES, J.[77] The defendant and Hannah (Smith) Skeels on the 28th day of August, 1899, were joined in marriage. Both were advanced in years, and each had been previously married. Neither had children at the time of the marriage, nor have they had any since. April 27, 1914, Mrs. Munsel died, leaving an estate slightly in excess of $15,000. Previous to her death she made her will, devising and bequeathing her real and personal property to her relatives without leaving anything to the defendant. The defendant filed in the probate court his waiver of the provisions of his wife's will. This bill is brought to enjoin the defendant from claiming any of his deceased wife's estate, and for specific performance of a verbal antenuptial contract, reduced to writing subsequent to the marriage, and a written postnuptial contract, containing substantially the same terms as are contained in the alleged antenuptial contract. Both of these written contracts were executed by the defendant and his wife November 16, 1901. * * *

The second exception taken by the defendant is founded upon the claim that the alleged verbal contract is within the statute of frauds, and not binding in law or equity, and that the bar was not removed by reducing the contract to writing after the marriage. * * *

The master has found upon substantial evidence that Munsel and his wife entered into a verbal antenuptial contract, as alleged in the plaintiffs' bill; that after the marriage that contract was reduced to writing in the form of ante-nuptial and post-nuptial contracts. In considering this exception it should be kept in mind that the lack of a writing does not render a contract in consideration of marriage in any way illegal or void under the statute. The statute only affects the matter of evidence by which such a contract may be proved. Child v. Pearl, 43 Vt. 224, 230. If, then, the evidence required by the statute can be supplied, the statute cannot be availed of by the defendant. The plaintiffs claim that it has been supplied by reducing the verbal ante-nuptial contract to writing before suit was brought. This claim seems to be supported by Ide & Smith v. Stanton, 15 Vt. 685, 40 Am. Dec. 698. While the facts in that case are somewhat dissimilar to those in this case, the principle there involved is similar to the one here involved. It is there held that the statute has never required that the written evidence should be created at the time of making the contract, and that a written admission of a previous verbal contract will satisfy the statute. To the same effect is the rule laid down in Brown on Frauds (2d Ed.) 222-224, inclu-

[77] Parts of the opinion are omitted.

sive; Moore v. Harrison, 26 Ind. App. 408, 59 N. E. 1077; Claypool v. Jaqua, 135 Ind. 499, 35 N. E. 285; Buffington v. Buffington, 151 Ind. 200, 51 N. E. 328; Argenbright v. Campbell, 3 Hen. & M. (Va.) 144; Satterthwaite v. Emley, 4 N. J. Eq. 489, 43 Am. Dec., 618; Frazer v. Andrews, 134 Iowa, 621, 112 N. W. 92, 11 L. R. A. (N. S.) 593, 13 Ann. Cas. 556; Kohl v. Frederick, 115 Iowa, 517, 88 N. W. 1055; McNutt v. McNutt, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372; Rowell v. Barber, 142 Wis. 304, 125 N. W. 937; 27 L. R. A. (N. S.) 1140; Dundas v. Dutens, 1 Ves. Jr. 196, 2 Cox, 235; Mountacue v. Maxwell, 1 Strange, 235; 20 Cyc. 158 D.

As authorities holding otherwise, McAnnulty v. McAnnulty, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552, Powell v. Myers, 64 S. W. 428, 23 Ky. Law Rep. 795, and Frazer v. Andrews, 134 Iowa, 621, 112 N. W. 92, 11 L. R. A. (N. S.) 593, 13 Ann. Cas. 556, are cited. If we view these cases from the point taken by the several courts of review, and carefully consider the facts of each case and the precise issue raised and determined, much, if not all, of the apparent conflict disappears. Some of the cases have turned on the peculiar provisions of the statutes, like the cases from New York and Wisconsin, others have turned on the relations which creditors bore to the contract, and still others have turned on the character of the writing relied upon as avoiding the statute.

The main question discussed in the McAnnulty Case was whether a marriage contracted subsequent to the making of a will revoked the will. The question of whether a subsequent written contract, purporting to be an ante-nuptial contract, was sufficient as against the statute was discussed by the court more briefly and without reference to or citation of any of the long list of cases upon that subject, and this, perhaps, can be accounted for upon the assumption that the court was of the opinion that the execution of the alleged contract had not been made out. Indeed, it discusses the evidence upon that subject in a manner indicating that such was its views. As an authority upon that subject very little weight can be given to it.

In the Powell Case a settlement had been made in accordance with a verbal ante-nuptial contract, and after the death of the wife the husband sought to avoid the settlement. It was held that he could not do so, though the ante-nuptial contract was within the statute, for the contract had been fully performed and was no longer executory. What was said with reference to the verbal ante-nuptial contract being within the statute was merely incidental and unnecessary to the decision of the case.

Frazer v. Andrews turned on the character of the writing. The court in that case expressly approved the rule declared in Kohl v. Frederick, *supra*, but distinguish that case from the one then in hand, in that there is nothing in the writing itself that shows it was executed to give effect to the previous verbal ante-nuptial contract. The court considers the case as if no ante-nuptial contract had been made, and as if the written

contract was a post-nuptial contract. The court holds, however, by fair inference, that, if the written contract had contained a provision or statement that it was executed to give effect to the verbal ante-nuptial contract, or in consideration of such contract, it would have taken that contract out of the statute.

Satterthwaite v. Emley, *supra*, is sometimes cited as authority that a verbal ante-nuptial contract is not taken out of the statute by being reduced to writing after marriage. But the holding in that case goes no farther than as it affects creditors; but, as to a party to the contract or those claiming under such party, the court held that a subsequent writing, made after the marriage, evidencing the verbal ante-nuptial contract, would save that contract from the operation of the statute.

Rowell v. Barber, *supra*, a strong and well-considered case, in which many of the authorities are collected, clearly points out the effect that slight variations in the wording of the different statutes have upon the decisions of the court. In that case it was held that, because of the statute of Wisconsin which made a verbal ante-nuptial contract void, subsequently reducing it to writing after the marriage did not take it out of the statute; for, being void, there was nothing to revive or to be taken out of the statute; that in this respect it differed from the English and many of the state statutes which did not render the verbal contract void, but provided the kind of evidence by which it must be proved, that the object of those statutes was not to prohibit such contracts, but was to require such evidence as would prevent fraud and perjury after the death of one or the other of the parties. Such has been the construction given to our statute. Child v. Pearl, *supra*.

The so-called written ante-nuptial contract in this case removed the statute that otherwise would have barred a recovery on the verbal ante-nuptial contract, and this renders it unnecessary to consider what effect, if any, the so-called post-nuptial contract had upon the verbal ante-nuptial contract. * * *

We think the decree below is too broad. * * *

[*Decree altered and then affirmed.*]

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## LOUISVILLE ASPHALT VARNISH CO. *v.* LORICK ET AL.

(Supreme Court of South Carolina, 1888. 29 So. Car. 533, 8 S. E. 8, 2 L. R. A. 212.)

MCIVER, J.[78] This was an action to recover the sum of $83.05, the price of certain varnish and paint alleged to have been sold by plaintiff to defendants. The defense was a general denial. At the trial the

[78] Parts of the opinions are omitted.

plaintiff offered testimony tending to show that on the 16th October, 1885, one of its traveling salesmen, Hutchinson by name, took from Moore, a clerk of defendants, who, it was admitted, had authority to give the order, a verbal order for the articles specified in the account sued on, which Hutchinson immediately entered in his memorandum book as follows:

"No. 65 COLUMBIA, S. C., Oct. 16, 1885.

"Louisville Asphalt Varnish Co., Louisville, Ky. Ship Lorick & Lowrance, Columbia, S. C.:

1. Bbl. No. 1 Turpt. Asphalt Black Varnish, - - - 55c
1. " D. Roof Paint C. - - - - - - - - 50c
12. 5 gall. Pails D. Roof, do. - - - - - - - - 55c

"Cr. by 2c gal., on acct. freight.

"60 days. H. L. Hutchinson, Salesman."

On the same day, a copy of this order was sent by mail, by said salesman, to the plaintiff, who received it on the 29th October, 1885, and on the next day shipped the goods, by rail, to defendants. On the 17th October, 1885, the defendants wrote to plaintiff as follows: "Louisville Asphalt Varnish Co., Louisville—Gents: Don't ship paint ordered through your salesman. We have concluded not to handle it." This letter, however, was not received by plaintiff until after the goods had been shipped; and upon its receipt plaintiff wrote defendants, saying "that the shipment had gone before the request to cancel was received." When the goods arrived in Columbia, the defendants declined to receive them, but what became of them the testimony does not show. At the close of plaintiff's testimony, defendants moved for a nonsuit, which was granted, upon the ground that section 2020, Gen. St., (Statute of Frauds,) was fatal to a recovery. Plaintiff appeals, upon the several grounds set out in the record which make these two questions: First, whether there was such a note or memorandum in writing of the bargain as would satisfy the requirements of section 2020 of the General Statutes; second, if not, whether there was such an acceptance and actual receipt of the goods as would take the case out of the operation of that section.

It is quite certain that there was no formal agreement in writing, signed by the parties to be charged, for the sale of the goods in question, and we think it equally certain that there was no single instrument or memorandum in writing sufficient to satisfy the requirements of the statute; for the letter of the defendants, copied above, did not specify the necessary particulars as to quantity, nature, and price of the goods which were the subjects of the alleged contract of sale, and the copy of the order sent by the salesman to the plaintiff, which did contain all the necessary particulars, was not signed by the defendants. It is plain, therefore, that neither one of these papers, standing alone, would be sufficient. But as it is well settled that the whole agreement need not appear in a single writing, but may be made out from several instru-

ments or written memoranda referring one to the other, and which, when connected together, are found to contain all the necessary elements, the precise, practical question in this case is whether the letter of defendants can be connected with the written order sent by the salesman, so that the two together may constitute a sufficient note or memorandum in writing to satisfy the requirements of the statute.

In Saunderson v. Jackson, 2 Bos. & P. 238, the action was for not delivering certain articles alleged to have been sold by defendant to plaintiff, and the question was whether there was a sufficient note or memorandum in writing of the bargain, under the statute of frauds. It seems that when the plaintiff gave the verbal order for the goods, he was furnished by the defendant with a bill of parcels, not signed, but written on a piece of paper, with a printed heading containing the name and place of business of defendant. Shortly after this, defendant wrote a letter to plaintiff, saying: "We wish to know what time we shall send you a part of your order," etc. The court held that the requirements of the statute were complied with, saying: "This bill of parcels, though not the contract itself, may amount to a note or memorandum of the contract, within the meaning of the statute. * * * At all events, connecting this bill of parcels with the subsequent letter of the defendants, I think the case is clearly taken out of the statute of frauds; for, although it be admitted that the letter, which does not state the terms of the agreement, would not alone have been sufficient, yet, as the jury have connected it with something which does, and the letter is signed by the defendants, there is then a written note or memorandum of the order which was originally given by the plaintiff, signed by the defendants." This case has been expressly recognized and followed in this state, in Toomer v. Dawson, Cheves, 68. The same doctrine was applied in Western v. Russell, 3 Ves. & B. 188. See, also, to the same effect, Drury v. Young, 58 Md. 546, 42 Amer. Rep. 343, where, as in the case now under consideration, the letter of defendant was written for the purpose of withdrawing from the contract; but as it referred to the previous order, the two, taken together, were held to satisfy the terms of the statute. * * *

In Beckwith v. Talbot, 95 U. S. 289, it was held that, while the general rule is "that collateral papers adduced to supply the defect of signature of a written agreement, under the statute of frauds, should on their face sufficiently demonstrate their reference to such agreement, without the aid of parol proof," yet such rule is not absolute, as "there may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof." Accordingly, it was held in that case that "the defendant, unless he could show the existence of some other agreement, was estopped from denying that the agreement referred to by him in his letters was that which he induced the plaintiff to sign." Even in the case of Johnson v. Buck, 35 N. J. Law 338, which seems to be much

relied on by the counsel for respondents, it is conceded that parol evidence may be received "to identify papers which, by a reference in the signed memorandum, are made parts of it." While it is true that some of the cases which we have cited arose under the fourth section of the statute of frauds, and not under the seventeenth section, which controls the present case, yet it is admitted by Kent, C. J., in Bailey v. Ogdens, 3 Johns. 412, that the words of the two sections are in this respect similar, and require the same construction, and it was so held in Townsend v. Hargraves, 118 Mass. 325.

It seems to us, therefore, that the letter of defendants, taken, as it must be, in connection with the order sent to plaintiff by the salesman, to which it expressly referred, and which was in writing, and specified all the necessary particulars as to price, quantity, quality, and time of payment, constituted a sufficient note or memorandum in writing of the bargain to take the case out of the statute of frauds. In the absence of any evidence that any other order was given, the language of the letter—"Don't ship paint ordered through your salesman"—must necessarily be regarded as referring to the order of which a memorandum in writing was taken at the time by the salesman, and a copy thereof immediately forwarded to the plaintiff, who at once filled the order, and shipped the goods to the defendants. This is a stronger case than that of Beckwith v. Talbot, *supra*, for there the letter of the defendant simply referred to "the agreement," without indicating when or how it had been made, while here the letter refers to a particular article "ordered through your salesman," and we hear of no other order through the salesman or in any other way. The only necessity for any parol evidence at all, if, indeed, there was any, was to identify the order sent by the salesman, and for this purpose, as we have seen, such evidence would be competent. Suppose the plaintiff had, on the 16th October, 1885, written a letter to defendants, proposing to sell them the articles mentioned in the salesman's order, in the quantities there stated, and at the prices and on the time there mentioned, and that defendants had replied by letter, simply saying, "I accept your offer," without repeating the particulars as to quantity, price, etc., it could not be doubted that, although defendants' letter—the only paper which they signed—did not contain in itself the necessary particulars of the bargain, yet the two letters, taken together, would be held a sufficient compliance with the statute. It seems to us that the transaction here in question was in principle practically the same as that in the supposed case, and we think there was error in holding that the contract sued on was void under the statute of frauds.

We do not see how it is possible to regard the letter of the defendants as a denial of the order given to the salesman by their clerk, Moore, who, it was conceded, had authority to give the order. * * * The manifest purpose of that letter was to countermand the order, and this necessarily presupposed that the order had been given. The terms

used clearly show this: "Don't ship the paint ordered through your salesman. We have concluded not to handle it." This clearly means that the paint had been ordered, but that the defendants had subsequently changed their minds and "concluded not to handle it;" and we don't see how it can be construed to mean anything else. We have then an admission in writing that an order for the goods in question through the salesman had been given, and we have the order referred to, likewise in writing, and the two together fully satisfy the requirements of the statute. Under the view which we have taken of the first question raised by this appeal, the second question becomes immaterial, and need not, therefore, be considered. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.[79]

[79] See Smith v. Colby, 136 Mass. 562 (1884), where the words "upon the terms agreed upon when at your place" in a signed paper let in the memorandum of those terms not signed by the defendant. Moreover, in Freeland v. Ritz, 154 Mass. 257 (1891), where the defendants agreed in writing to accept a lease "to be made subject in all respects to the agreement and lease between" the plaintiffs and their lessor, which latter lease was not then in existence but came into existence, it was held that the statute of frauds was satisfied. Lathrop, J., for the court, said:

"It is a well-settled rule of law that, while the memorandum must express the essential elements of the contract with reasonable certainty, these may be gathered either from the terms of the memorandum itself or from some other paper or papers therein referred to. If one of a series of papers which appear to have relation to the same contract is signed by the party to be charged, this is enough, as all the papers are to be considered together as forming one contract or memorandum. There is no doubt, also, that parol evidence is admissible to identify any paper referred to. * * *

"The defendants, however, contend that these principles apply only to papers already in existence when the instrument signed by the party sought to be charged is executed. * * * The last point decided in [Brown v. Bellows, 4 Pick. (Mass.) 179] * * * is a direct authority for the proposition that it is no objection to a written contract that some of the terms are to be fixed by something to be done in the future, if that something is done before action is brought; and that if it is in writing the provisions of the statute of frauds are complied with. We are therefore of opinion that the statute of frauds is no defense to this action."

In Freeland v. Ritz the court cited Lerned v. Wannemacher, 9 Allen (Mass.) 412 (1864), where duplicate writings were delivered, each party signing one. The one signed by the defendants did not contain the names of the plaintiffs, as, apart from the plaintiffs' signatures, was true of the one signed by the plaintiffs. Later the agent of the defendants wrote some words on the memorandum delivered to the defendants and the plaintiffs signed the addition and redelivered the memorandum. Although neither memorandum referred to the other, the court said that "the intrinsic evidence which they afford that they refer to the same transaction is very strong and competent for the consideration of the jury" and that if the jury so found they could be read together to make the memorandum required by the statute.

On several writings as a memorandum within the statute of frauds, see 2 Ann. Cas. 293, note; 19 Ann. Cas. 1162, note; Ann. Cas. 1914 C, 1010, note. On telegrams as a memorandum, see 50 L. R. A. 240, note.

SIMPSON, C. J., (dissenting). * * * Was there evidence of a note or memorandum in writing, signed by the defendants or their agent thereunto lawfully authorized, sufficient to carry the case to the jury? There is no pretense that the order sent by plaintiff's salesman was signed by the defendants or their agent. On the contrary, the order was prepared and sent by the plaintiff's agent, and no doubt was sufficient to bind the plaintiff if it was the party sought to be charged, although the defendants might not be bound. It is not necessary that both parties should sign the contract. It is sufficient that the defendant, whether he be vendor or vendee, has signed the contract, and it is no objection that he has no remedy thereon against the plaintiff, inasmuch as the latter has not signed it. Chitty Cont. (11 edit.), 568. It may be urged, however, that it is not necessary that the whole of the terms of the contract should be confined in one memorandum, it being sufficient if they can be collected from several distinct writings having reference to the same subject-matter. This is true, and it has been held that if, after the transaction has taken place, it be recognized in a letter written by the party to be charged, which refers to the specific contract, and not merely to the subject-matter, this will satisfy the statute. Id. 546. Under this principle, plaintiff contends that defendants' letter, in which they wrote: "Don't ship paint ordered through your salesman. We have concluded not to handle it,"—was sufficient to carry the case to the jury, on the question whether a note or memorandum in writing of the contract sufficient to comply with the statute has been executed by the defendants. The rule upon this subject, as will be seen from its discussion by Mr. Chitty, (11th Ed.) 544 *et seq.*, and the cases there cited in notes, seems to be this: The letter relied on must in itself contain the terms of the contract, quantity, quality, and price of the goods, etc., or it must refer to some other paper containing them in such way as by its own terms to connect itself with said paper. Now the letter here might possibly be construed as an admission by the defendants that they had ordered certain paints from the plaintiff, and that since said order they had concluded not to take said goods. But there is nothing in this letter which points distinctly to the contract sued on. It could as well apply to any other contract as this, and therefore a most important link is wanting, which could be supplied only by verbal testimony. If the case had gone to the jury, there was no testimony by which the memorandum made by plaintiff's salesman could have been connected with defendants' letter. It was said in Waterman v. Meigs, 4 Cush. 497, "that a letter from the purchaser to the vendor, alluding to a parol agreement for the sale of goods, and inquiring whether they will be ready at the time agreed upon, but not mentioning the quantity, quality, or price of the goods, or the time of payment, is not a sufficient memorandum to take the agreement out of the statute of frauds." See, also, Manufacturing Co. v. Goddard, 14 How. 446; Bailey v. Ogden, 3 Johns. 399. We think there was an absence of all

testimony connecting defendants' letter distinctly and clearly with the memorandum made by plaintiff's agent, and sent by him as an order for the goods, so that the two could constitute one memorandum in writing, signed by the defendants; and, the letter itself failing to embody the contract as to the quantity, quality, and price of the goods, the nonsuit was inevitable. Thus far it has been admitted that the letter of defendants, impliedly, at least, acknowledged an order for paints, but there is great doubt whether such is a proper construction of said letter. It may well be construed as a denial of the order. This view strengthens the conclusion we have reached.

*Judgment reversed.*

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## ALBERT H. HAYES *v.* CHARLES E. JACKSON.

**(Supreme Judicial Court of Massachusetts, 1893. 159 Mass. 451, 34 N. E. 683.)**

HOLMES, J. This is an action upon a contract for the sale of land. The judge has found for the plaintiff, and the only question is whether the memorandum was sufficient to satisfy the Statute of Frauds. Pub. Sts. c. 78, sec. 1, cl. 4. The memorandum was as follows:

"Boston, April 6, 1889.

"Received of Albert H. Hayes one hundred dollars on account of sale of estate number 379 Columbus Avenue, for the sum of $14,140, subject to a mortgage of 8,000 dollars on 4½ per cent interest, and I agree to pay the 140 dollars as commission to James C. Tucker. Rents and insurance and interest to be adjusted to date. Title to be passed within ten days from date.

"C. E. Jackson."

On the face of it this discloses no defect. But as the defendant and the plaintiff agreed in their testimony that the assumption of the mortgage of $8,000 was part of the consideration, and went to make up the sum of $14,140 mentioned, we assume that the judge found accordingly, and that it is open to the defendant to argue that the memorandum does not agree with the fact, but sets forth an agreement which was never made to pay $14,140 for the equity of redemption. Whether this argument is sound or not we do not consider, because it seems to be disposed of by sec. 2 of our statute, that the consideration of such promise, contract, or agreement need not be set forth or expressed in the writing signed by the party to be charged therewith. This section was inserted in the Rev. Sts. c. 74, sec. 2, for the purpose of adopting and confirming the judgment of this court in Packard v. Richardson, 17 Mass. 122, declining to follow Wain v. Warlters, 5 East, 10.[80] That

[80] In Wain v. Warlters it was held that a memorandum which did not state the consideration of a guaranty, although that consideration was fully executed, was insufficient, and the guaranty, being of the debt of another, could not be

case concerned a promise to pay the debt of another, a subject on which there has been much controversy in this country (Browne on St. Frauds, secs. 390 *et seq.*), and went on the broad ground that it was not necessary to state the consideration. Marcy v. Marcy, 9 Allen, 8, 10; Wetherbee v. Potter, 99 Mass. 354, 362. The rule laid down in Wain v. Warlters was altered by statute in England, St. 19 & 20 Vict. c. 97, § 3,[81] "because it was found, in practice, that it led to many unjust and merely technical defences to actions upon guarantees." 2 Smith Lead. Cas. (8th ed.) 262, 263, note to Wain v. Warlters. The second section of our statute goes further, and applies to all the contracts mentioned in sec. 1, no doubt for similar reasons among others. The defendant is sufficiently protected if all that he is to do is required to be in writing.

Of course it may be said that, in a bilateral contract like the present, the contemporaneous payment of the price is a condition of the promise, and therefore that the promise cannot be set forth truly unless the consideration is stated. But the language of the section is general, and should be read as no doubt it was meant. The only effect is that a promise set forth as absolute may be subject to an implied condition of performance on the other side. When such an implied condition exists it will be construed into the writing, and knowledge of the law gives notice of its possible existence. In some cases it has been held unnecessary to state the consideration, even when there is no provision like our sec. 2, although the consideration was executory. Thornburg v. Masten, 88 N. C. 293; Miller v. Irvine, 1. Dev. & Bat. 103; Ellis v. Bray, 79 Mo. 227; Violett v. Patton, 5 Cranch, 142; Camp v. Moreman, 84 Ky. 635. In Howe v. Walker, 4 Gray, 318, Thomas, J., plainly indicated the opinion that sec. 2 of the statute applies in all cases, pointing out that this does not mean that when the parties are reversed the oral agreement will be sufficient to sustain an action.

The only case at all opposed to our conclusion, so far as we know, is Grace v. Denison, 114 Mass. 16. That was a bill for specific performance; not of the original agreement, but of the written document set forth, which document showed that a mortgage was to be given by the purchaser, but did not state what part of the purchase money was to remain secured in that way. Specific performance was refused, and in the judgment a brief reference was made to the statute of frauds, citing Browne on St. Frauds, secs. 376, 381; Fry on Spec. Perf. secs. 221, 222, and note 7. These sections state in general terms that the memorandum must contain the price, and do not apply in this state, so that the inference is that sec. 2 of our statute was overlooked by the court.

enforced because of the statute of frauds. Most American courts refused to follow the case, just as Massachusetts refused.

[81] This is known as the Mercantile Law Amendment Act. In this country local statutes should be consulted. They vary from statutes requiring consideration to be stated to those saying it need not be stated in the case of guaranties or need not be stated at all.

It was not mentioned in the briefs of counsel, or in the judgment. The decision cannot overrule the statute, and is no authority for a distinction under it. So far as it went on the doctrines of specific performance only, as would seem from the reference to Fry on Spec. Perf. sec. 222, note 7, stating Baker v. Glass, 6 Munf. 212, and to Boston & Maine Railroad v. Babcock, 3 Cush. 228, 232, and from the fact that Mr. Justice Wells, who delivered the opinion of the court in Grace v. Denison, also wrote the decision in Wetherbee v. Potter, 99 Mass. 254, 362, it has no bearing on the case at bar.

*Exceptions overruled.*

FIELD, C. J.[82] I do not assent to the opinion of the court. * * * The real difficulty in the case is, that the writing is ambiguous in regard to the price, and one question in the case might have been whether oral evidence was competent to remove the ambiguity, but no such question appears to have been raised. The evidence of the usage of real estate brokers with respect to the amount of their commissions, if competent, had some tendency to show that the writing should be construed as both the plaintiff and the defendant testified the contract really was. The opinion of the court proceeds solely on the ground that under our statute of frauds the contract of sale or a memorandum of the sale of land signed by the vendor, need not contain the price, or any of the other terms of the sale; that it is enough if the writing shows that the defendant has agreed to sell certain designated land to the plaintiff on some terms unexpressed, or if it contains an acknowledgment that such an agreement has been made. The reasons given for this opinion are, that by our statute, Pub. Sts. c. 78, sec. 2, "The consideration of such promise, contract, or agreement need not be set forth or expressed in the writing signed by the party to be charged therewith, but may be proved by any legal evidence." This provision was introduced in the Revised Statutes in consequence of the decision in Packard v. Richardson, 17 Mass. 122; Rev. Sts. c. 74, sec. 2. In the report of the commissioners appointed to make the revision, they say: "This section is new in terms, and is proposed for the purpose of adopting and confirming the judgment of the Supreme Judicial Court upon the construction of the statute now in force. 17 Mass. Rep. 122." The decision in Packard v. Richardson was upon a written promise on the back of a promissory note signed by the defendants, as follows: "We acknowledge ourselves holden as surety for the payment of the within note." In the opinion it is said: "The consideration existing was, that these defendants were members of the company which made the note; and that a suit, which had been commenced, was stopped by the plaintiff, at their request. But this consideration was proved by parol, and the writing acknowledges no consideration whatever." 17 Mass. 128. The court declined to follow the decision in Wain v. Warlters, 5 East, 10

[82] Parts of this dissenting opinion are omitted.

See Saunders v. Wakefield, 4 B. & Ald. 595. All these cases arose upon contracts of guaranty or contracts to pay the debt of another, and the consideration of the promise was executed. When these cases were decided it was not questioned that the memorandum of a contract of sale must contain the terms of the contract, and that one term of every contract of sale is the price.

Many of the United States have passed statutes on this subject similar to ours, viz.: Illinois, Indiana, Kentucky, Maine, Michigan, Nebraska, New Jersey, Virginia, and West Virginia. See Wood on St. Frauds, sec. 105, Appendix, 892-922. As it may be suggested that decisions in England and in states where no similar statutes exist are not applicable, I shall confine my citations chiefly, if not wholly, to our own decisions, and to the decisions of the courts of those states whose statute on this subject is similar to ours. It is substantially conceded that Grace v. Denison, 114 Mass. 16, is directly opposed to the opinion of the court in the present case, but it is said that the second section of our statute of frauds was overlooked by the court. It was a bill in equity against a vendor, for the specific performance of an agreement to convey land. The case arose on a demurrer for the cause "that such contract as the plaintiff alleges to be in writing and signed by the defendant is not sufficient to enable a court of equity to decree specific performance thereof." The only ground on which the demurrer was sustained was, that the memorandum of the agreement was not sufficient to satisfy the statute of frauds. The court say: "The memorandum of agreement indicates that a part of the purchase money was agreed to be secured by mortgage of the premises to be conveyed. But it does not disclose nor furnish any means for the court to ascertain what part or amount is to remain upon mortgage, and what paid in cash upon delivery of the deed. * * * The writing being incomplete in one of its essential terms, and the court having no means to which it can lawfully resort to supply the defect, specific performance must fail." * * *

While some of the cases cited above are suits against the vendee and some suits against the vendor, it seems to me that this court has always held, in both classes of cases, that, in a contract to convey land or other property executory on both sides, the contract or memorandum, although it need be signed only by the party to be charged, must contain all the essential terms of the contract or bargain, and that the price agreed to be paid is an essential term. To say that the court in the decision of Grace v. Denison overlooked a well-known provision of our statute of frauds concerning consideration is, I think, unwarranted. * * *

When the whole contract or promise of the defendant is to do a certain thing, and this is an absolute promise, resting upon a consideration which has been executed, there is some reason in saying that the memorandum signed by the defendant need not contain the consideration or inducement of the contract or promise. But in a contract exe-

cutory on both sides, where the promises are mutual, and each is the consideration of the other, the promises are conditional, and one party agrees to perform his part of the contract only on condition that the other will perform his part, and it cannot be known what the promise of the one is without knowing the express or implied promise of the other. A promise to convey land because the promisee has actually received $1,000 is not the same as a promise to convey land if the promisor will pay $1,000 on receiving the conveyance, and a promise to convey land for $1,000 to be paid on the delivery of the deed is not the same as a promise to convey land for $10,000 to be paid on the delivery of the deed. The conditions on which the vendor agrees to convey are often many and complicated, and involve the assumption of mortgages and the performance of other acts. If a mere acknowledgment in writing by the vendor that he has agreed to convey specific land to the vendee on terms which are not expressed is sufficient to satisfy the Statute of Frauds, then it is open to the vendee to prove by oral testimony the price to be paid, and all other terms of the contract to be performed by him, and the statute will no longer prevent frauds and perjuries. If it is a condition of the promise of the vendor that it is not to be performed unless at the time of the performance the vendee pays money and gives or assumes mortgages, the condition qualifies the promise and is a part of it, and the writing should contain all that is essential to show what the promise or contract on the part of the vendor in fact was. The decision of the court seems to me in great part to nullify the statute. I have not considered whether the judgment of the court may not be sustained on some other ground than that stated in the opinion.

Mr. Justice Knowlton concurs in this opinion.[88]

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## BIRD *v.* BLOSSE.

(Court of Chancery, 1683. 2 Ventris, 361.)

The case was thus: One wrote a letter, signifying his assent to the marriage of his daughter with J. S. and that he would give her 1500*l.*

[88] In agreement with the dissenting opinion, see Reid v. Diamond Plate Glass Co., 85 Fed. 193 (1898); Williams v. Robinson, 73 Me. 186 (1882).

In Drake v. Seaman, 97 N. Y. 230 (1884), where a statute requiring consideration to be stated had been repealed, Finch, J., for the court said:

"And if we conceded that the consideration might be wholly omitted from the memorandum, it would still be requisite that all the essential and material elements of defendants' own agreement [to pay plaintiff so much for his services as salesman] should be stated, and they are not stated where the very condition upon which they were to pay at all is omitted, and the subject matter of their agreement is absent."

On the necessity and sufficiency of a statement of consideration in a contract

And afterwards by another letter, upon a further treaty concerning the marriage, he went back from the proposals of his letter. And at some time after declared, that he would agree to what was proposed in his first letter.

This letter was held a sufficient promise in writing, within the Statute of 29 Car. 2, called the Statute against Frauds and Perjuries, and that the last declaration had set the terms in the first letter up again.[84]

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## WEISENBERGER ET AL. *v.* HUEBNER ET AL.

(Supreme Court of Pennsylvania, 1919. 264 Pa. 316, 107 Atl. 763.)

SIMPSON, J.[85] Plaintiffs filed a bill in equity, praying specific performance of an agreement for the sale of real estate, Gottlieb Huebner, one of the defendants, filed an answer, a decree *pro confesso* was entered against the other two defendants, evidence was taken, the court decreed a dismissal of the bill because the entire contract was not in writing as required by our statute of frauds of March 21, 1772 (1 Smith's Laws, p. 389), and plaintiffs appeal. * * *

On January 31, 1914, Samuel Weisenberger, one of plaintiffs, paid to Huebner the sum of $2,000, one-fourth of which was contributed by each of plaintiffs, and received a paper, of which the following is a copy:

"Harry A. Cyphers, Attorney at Law,
"Cor. Fourth Street and Brodhead Ave.,
"South Bethlehem, Pa., Jan. 31, 1914.

"Received from Sam. Weisenberger by hand of H. A. Cyphers, Esq., Two Thousand Dollars down money on acct. of purchase price for property at 3 & Spruce. Total price $18,500. Balance to be paid on or before April 1st, 1914, $18,500 less $2,000—$16,500.

"Gottlieb Huebner.

"I hereby approve of the within sale.
"Yours, H. A. Cyphers."

within the statute of frauds, see 60 Am. St. Rep. 432, note; 3 Ann. Cas. 656, note; Ann. Cas. 1912 A, 1242, note; Ann. Cas. 1918 A, 134, note.

[84] "That report [Ventris's] does not show the formation or date of the contract sued upon. It must be taken, however, that the defendant's letter 'signifying his assent to the marriage of his daughter' was not an acceptance of terms, but only an offer or an incident in a continuing negotiation: for no court could have held even in the worst period of the Restoration, that an assent which concluded a contract could be revoked afterwards at will. Assuming this, the point decided was that after a revocation of this letter, cancelled in turn by a declaration (it seems not in writing) of adherence to the original proposal, the first letter was a sufficient memorandum of the terms therein expressed to satisfy the statute of frauds. This case is of some interest because the statute was then (35 Car. II A. D. 1683) only six years old." F. P. [Sir Frederick Pollock], 30 Law Quar. Rev., 5.

[85] Parts of the opinion are omitted.

The part of the paper above the date is Cyphers' ordinary printed letter head, and even if a court would be justified in assuming therefrom the property referred to was in South Bethlehem, and that "3 & Spruce" meant Third and Spruce streets in that city, the statute of frauds would still apply, for the receipt does not specify the size of the property, or whether it is at the corner of "3 & Spruce," and, if it is, at which corner. * * *

A different question would arise if the property referred to had a well-known name, as, for instance, the "Fleming Farm on French Creek," Ross v. Baker, 72 Pa. 186; or the "Hotel Duquesne Property," Henry v. Black, 210 Pa. 245, 59 Atl. 1070, 105 Am. St. Rep. 802; but there is nothing in the receipt to bring it within that class of cases. On the contrary, it is within the class of Mellon v. Davison, 123 Pa. 298, 16 Atl. 431, where the description was "a lot of ground fronting about 190 feet on the P. R. R., in the 21st Ward, Pittsburgh, Pa.," and Safe Deposit & Trust Co. v. Diamond Coal and Coke Co., 234 Pa. 100, 83 Atl. 54 L. R. A. 1917 A, 596, where it is held an agreement reformed by parol, so as to comport with the one actually made, even if it then specifies every essential fact required by the statute of frauds, cannot be the basis of a bill for specific performance, because, as reformed, it is only a parol agreement.[86] * * *

The decree of the court below is affirmed, and the appeal dismissed, at the cost of appellant.

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## PATRICK DOHERTY *v.* SARAH A. HILL.

(Supreme Judicial Court of Massachusetts, 1887. 144 Mass. 465, 11 N. E. 581.)

Contract for breach of an agreement to convey to the plaintiff certain real estate in Stoneham. Answer, the statute of frauds.

J. H. Green, who claimed to act as agent for the defendant, and who executed the contract declared on, testified, for the plaintiff, that the estate referred to in said contract was placed in his hands by the defendant in May, 1884, at which time the defendant instructed him to sell it for the sum of $1,300; that on May 28, 1885, in reply to a telegram from him inquiring at what price she would sell, the defendant sent him the following telegram, signed by her: "Eleven hundred and fifty cash, if possible try for more;" that on May 30, 1885, the defendant wrote the witness a letter, which contained the following: "As I telegraphed you, I will sell the house in Lincolnville for $1,150; will pay last year's taxes and throw in insurance, which lasts until 1887. * * * I will make terms easy for the party purchasing it, say three or four hundred down and the other payments satisfactorily secured

[86] See last part of note 96, *post*, this chapter.

by mortgage;" and that, on June 1, 1885, and after receiving this letter, the witness received from the plaintiff $100 in cash, and executed and gave to the plaintiff the following paper, being the same declared on: "$100. Stoneham, June 1st, 1885. Rec'd of Patrick Doherty one hundred dollars to bind sale of estate on Congress Street owned by Sarah A. Hill. $350 cash. $850 in mortgage at 6 per cent. J. Horace Green, agent for Sarah A. Hill."

The witness further testified, that he had never paid back to the plaintiff the $100 received; and that he told the plaintiff he would pay interest on it, and that the plaintiff could have the money whenever he called for it. The plaintiff offered the contract of sale in evidence, to which the defendant objected; but the judge admitted it.

There was also evidence tending to show that the defendant, by her agent, one Kimball, sold said estate, on June 11, 1885, to one Almy, and delivered to Almy a deed thereof.

The defendant testified, and upon this point her testimony was not controverted, that in addition to the estate claimed to have been sold to the plaintiff, and which consisted of a lot of land with a dwelling-house on it, she owned, on June 1, 1885, several lots containing two or three acres in all, and all in one parcel, or other land on said Congress Street, upon the other side of the street and nearly opposite to the land in question; and that this parcel of land had no buildings upon it.

The plaintiff offered to show that the estate named in the agreement was the lot with the dwelling-house on it. The defendant requested the judge to rule that it could not be shown by extrinsic evidence to which of the defendant's estates on Congress Street the written memorandum referred; but the judge declined so to rule.

The plaintiff offered in evidence a draft of a deed from the defendant to him of the estate which the plaintiff claimed to have purchased, which draft was made by Green and sent by him to the defendant to be executed, and which the defendant refused to execute. To the admission of this draft in evidence the defendant objected; but the judge admitted it.

The defendant, for the purpose of showing the value of the estate as affecting the question of damages, offered to prove that said estate had been, since December, 1885, in the hands of a real estate agent in Stoneham, with authority to sell it for $1,200, but no purchaser had been found. The judge excluded the evidence offered.

The jury returned a verdict for the plaintiff in the sum of $200; and the defendant alleged exceptions.

HOLMES, J. The memorandum would have satisfied the statute of frauds, if the evidence had shown that there was only one "estate on Congress Street owned by Sarah A. Hill," in Stoneham, where the memorandum is dated. Hurley v. Brown, 98 Mass. 545; Scanlan v.

Geddes, 112 Mass. 15; Mead v. Parker, 115 Mass. 413. But the evidence shows that there were more than one. The plaintiff argues that this is an ambiguity introduced by parol, and that therefore it may be removed by parol. 98 Mass. 548. But the statement seems to us misleading. The words show on their face that they may be applicable to one estate only, or to more than one. If, on the existing facts, they apply only to one, then the document identifies the land; if not, it fails to do so. In every case, the words used must be translated into things and facts by parol evidence. But if, when so translated, they do not "identify the estate intended, as the only one which would satisfy the description," they do not satisfy the statute. See Slater v. Smith, 117 Mass. 96, 98; Potter v. Duffield, L. R. 18 Eq. 4, 7.

The letter from the defendant to her agent did identify the estate, we will assume, as the only one owned by her which had a house upon it. But, of course, this letter was not of itself a sufficient memorandum. It has been held that an offer in writing, afterwards accepted orally, satisfies the statute. Sanborn v. Flagler, 9 Allen, 474, Browne, St. of Frauds (4th Ed.) § 345 *a*.[87] But this letter was only an authority to offer. It does not appear to have been exhibited to the plaintiff, as in Hastings v. Weber, 142 Mass. 232, and plainly was not intended to be. We express no opinion whether it would have been sufficient, if it had been shown and its terms had been accepted.

Again, the letter cannot be used to help out the memorandum, on the ground that the latter impliedly incorporates it. The memorandum, it is true, purports to be signed by an agent, and therefore may be said to refer by implication to some previous authority. But this implied reference is at most rather an implied assertion that authority exists (which may be oral), than a reference to documents containing the authority. Jefts v. York, 10 Cush. 392, 395. Boston & Albany Railroad v. Richardson, 135 Mass. 473, 475. It would hardly be argued as a defence to an action of deceit, against a person who had assumed to act as agent without authority, that the memorandum signed by him impliedly referred to and incorporated the written communications from his alleged principal, and that therefore the plaintiff must be taken to have known them, and that they did not confer the authority assumed. In this case, the agent had authority by telegram before he

[87] "The authorities are almost unanimous in holding that an oral acceptance of a written option to sell land is valid. See 25 R. C. L. 674, and long list of cases there cited. The case of Wardell v. Williams, 62 Mich. 50, 28 N. W. 796, 4 Am. St. Rep. 814, is cited to us as holding a contrary doctrine. An examination of the case will show that the court in that case held the written memorandum incomplete, and that the precise question here presented was reserved." Vinje, J., in Russell v. Ives, (Wis.) 178 N. W. 300, 301 (1920).

On the necessity of a written acceptance of a written offer to constitute a sufficient memorandum under the statute, see Ann. Cas. 1913 A, 1041, note.

received the letter; the argument, therefore, would have to go the length of saying that all documents of authority were tacitly incorporated.

In Hurley v. Brown, *ubi supra,* it was held that a memorandum of an agreement to sell "a" house on a certain street should be presumed to mean a house belonging at the time to the contractor. It may be asked whether there is not at least as strong a presumption that a memorandum signed by an agent refers to property which he is authorized to sell. But unless the document of authority is specifically incorporated, then the memorandum is only of a sale of a house which the agent is authorized in some way to sell, and, so far as the memorandum goes, his authority may as well be oral as written. The difference may be one of degree, but the distinction is none the less plain between an identification by extrinsic proof of the usually manifest, external, and continuing fact that the party owned but one house on a certain street, and that by similar proof of possibly oral communications between principal and agent, which is precisely the kind of identification the statute seeks to avoid. See Whelan v. Sullivan, 102 Mass. 204, 206; Rossiter v. Miller, 3 App. Cas. 1124, 1141; Potter v. Duffield, *ubi supra;* Jarrett v. Hunter, 34 Ch. D. 182.

The same considerations would apply to an attempt to help out the memorandum by evidence that the estate intended was the only one which the plaintiff knew of as belonging to the defendant.

The remaining exceptions become immaterial. The draft of a deed of the premises was admissible, in connection with proof that it was offered to the defendant for execution, to show a breach, but not to aid the memorandum. The deed was not referred to by the previously executed memorandum, nor were its contents governed by the signature of the latter.

Evidence that a real estate agent had not sold the land for $1,200 was not evidence of its value.

*Exceptions sustained.*[88]

[88] But in Norton v. Smith (N. C.), 103 S. E. 14 (1920), in holding that a memorandum which recited that "Whereas, J. A. Smith has sold to W. H. Norton his entire tract or boundary of land consisting of 146 acres" was "the same as if J. A. Smith had described it as 'his 146-acre tract of land'" and was a sufficient description, it appearing that J. A. Smith owned only one tract and that it contained 146 acres, Walker, J., for the court, said:

"Carson v. Ray, 52 N. C. 609, 78 Am. Dec. 267 is exactly in point. There the description was 'my house and lot in the town of Jefferson,' and it was held that it would 'undoubtedly' be sufficient, if in a will, to pass the testator's house and lot, in the absence of any proof to show that he had more than one. If, then, such a description would be sufficiently certain in a will, we cannot perceive any reason why it should not be so in a deed, as, in both instruments, the only requisite, as to the certainty of the thing described, is that there shall be no patent ambiguity in the description by which it is designated. A house and lot, or one house and lot in a particular town, would not do, because too indefinite on the face of the instrument itself. See Plummer v. Owens, 45 N. C. 254; Murdock v. Anderson, 57 N. C. 77. But 'my house and lot' im-

## AUERBACH *v.* NELSON.

(High Court of Justice, Chancery Division. [1919] 2 Ch. 383.)

Witness Action.

On November 21, 1918, the plaintiff paid the defendant 10*l.* and received the following receipt:—

ports a particular house and lot, rendered certain by the description that it is one which belongs to me, and, upon the face of the instrument, is quite as definite as if it had been described as the house and lot in which I now live, which is undoubtedly good.

"Where the deed or will does not itself show that the grantor or devisor had more than one house and lot, it will not be presumed that he had more than one, so that there is no patent ambiguity, and if it be shown that he has more than one, it must be by extrinsic proof, and the case will then be one of a latent ambiguity, which may be explained by similar proof. * * *

"Every valid contract must contain a description of the subject-matter; but it is not necessary it should be so described as to admit of no doubt what it is, for the identity of the actual thing and the thing described may be shown by extrinsic evidence. Fry on Specific Performance, § 209; Pomeroy on Contracts, § 90, and note; Buckhorne L. & T. Co. v. Yarbrough, 102 S. E. 630, at this term."

In Mitchell v. Morgan (So. Dak.), 181 N. W. 958 (1921), "my farm at Estelline," the vendor owning only one, was held a sufficient description to satisfy the statute.

In Sholovitz v. Noorigian, (R. I.), 107 Atl. 94, 97-98 (1919), Sweetland, J., said:

"The description in the memorandum before us is, 'Harry Noorigian brick store and land at 46 Blackstone street.' It appears in evidence that the defendant Henry A. Noorigian was known as 'Harry Noorigian,' and there is no question raised but that by that name in the memorandum reference is made to the defendant. According to a commonly recognized presumption, since the memorandum was made in Woonsocket and both parties reside in Woonsocket and the defendant owns property on Blackstone street in Woonsocket, '46 Blackstone street' in the memorandum refers to No. 46 Blackstone street in the city of Woonsocket. As thus interpreted, the description is of the defendant's brick store and land at 46 Blackstone street in Woonsocket. This on its face is a definite description of a particular brick store and at least the land on which it stands.

"A description is required in a memorandum evidencing a sale of land in order that the property which is the subject of the contract may be identified. We cannot agree with the criticism of the said [trial] justice that, because there were two doors to the brick store of the defendant, one numbered 44 and the other 46, that said store is not identified when referred to as 'at 46 Blackstone street.' The fact that the other door is numbered 44 creates no uncertainty as to the identity of the store or building described in the memorandum.

"Neither in our opinion should the memorandum be held insufficient to charge the defendant because the width and depth of the lot, on which the store stands, is not set out therein. We have already said above that the description without question must be held to define at least the land on which the brick store stands and surely to that extent the defendant was bound to make conveyance. By reference to the evidence presented in the case at bar it appears that the defendant's brick store at 46 Blackstone street was situated at the easterly end of the defendant's property and that the land on which it stands and the small amount of land adjoining it was well defined and set

"6*d.* stamp. 21/11/1918

Received of Mr. Auerbach, 197, High Street, Shoreditch, 10*l.* on account of House being sold for 500*l.* from Mr. M. Nelson, Nelson Lodge, 143, Victoria Park Road.

Possession to be taken in six weeks after date.

1*d.* stamp. Morris Nelson,
21/11/1918."

The plaintiff alleged that on November 21st, 1918, before signing this receipt the defendant verbally agreed to sell him his house and residence, Nelson Lodge, for 500*l.* with possession in six weeks, that the 10*l.* was paid as a deposit on account of the purchase money. The defendant having failed to complete, owing to the difficulty of finding another residence, the plaintiff brought this action for specific performance relying on the receipt as a sufficient memorandum of the alleged verbal contract within the statute of frauds.

In addition to denying the verbal contract, which was however fully proved by the evidence, the defendant also contended that the memorandum was insufficient as neither the purchaser nor the property was sufficiently indicated or described. The latter point is alone reported.

ASTBURY, J. The only question is whether the memorandum is sufficient within the statute of frauds. The vendor contends that it is insufficient for two reasons—namely, first the purchaser is not sufficiently indicated; secondly the property is not sufficiently described.

On these points the general observations of Jessel, M. R. in Shardlow v. Cotterell, 20 Ch. Div. 90 must be borne in mind. He said (at p. 93): "No description can be framed that will prevent all disputes, and the framers of the statute of frauds knew very well that they could not prevent perjury altogether, but could only go some way towards it; and it was considered that to require a note in writing was a useful check. It could be nothing more: it could not entirely prevent perjury, for parties may suborn witnesses to swear to the existence, destruction, and contents of a memorandum which never in fact existed. Looking at the statute in that light, what is a sufficient description? I consider that any two specific terms are enough to point out sufficiently what is sold. For instance, 'the estate of A. B. in the County of C.,' or 'the estate of A. B. which was devised to him by

off from the remainder of the defendant's land by monuments, consisting of Blackstone street and Burts lane to the north and south respectively, the land of one Cunningham on the east, and the wooden building of the defendant on the west. * * *

"We are of the opinion that the description in question is in itself a sufficient description; that by the aid of parol evidence the finding would be warranted that the property described may be identified as all that portion of the defendant's property on Blackstone street which is east of the defendant's wooden building."

On the description of property by a street number, see L. R. A. 1918 C, 520, note. See also Baller v. Spivack (Mich.), 182 N. W. 70 (1921).

C. D.' would be sufficiently specific. If so, why should not 'the property which A. B. bought of C. D. on March 29, 1880,' be sufficient? Would anybody doubt that in a will 'the property which I bought from C. D. on March 29, 1880,' would be a sufficient description? If it is so in a will why not in a contract?"

In that case Jessel, M. R., and Baggallay, L. J., held that the following receipt alone, without referring to other documents, was a sufficient memorandum: "Pinxton, March 29, 1880. Received of Mr. A. Shardlow the sum of 21*l.* as deposit on property purchased at 420*l.* at Sun Inn, Pinxton, on the above date. Mr. George Cotterell, Pinxton, Owner." This was signed by the auctioneer. Jessel, M. R., said (20 Ch. D. 92): "It has not been contested that if the receipt had said 'on a house purchased' there would have been a sufficient description, but it has been argued that because the word 'property' is used, the description is insufficient, and Kay, J., has so decided." Further on (at p. 95) he agreed with Kay, J., that "You must have on the face of the contract a sufficient definite description of the thing sold to enable you to introduce parol evidence to show what the articles were to which that description refers." Baggallay, L. J., adopted (20 Ch. D. 96) the statement in Dart's Vendors and Purchasers, 5th Ed. p. 219 (7th Ed. p. 238), that "a general description of the estate is sufficient if parol evidence can be produced to show what property was intended."

It is plain in the present case that the point as to the non-identification of the purchaser is bad because the memorandum says: "Received of Mr. Auerbach. * * * 10*l.* on account of House being sold for 500*l.* from Mr. M. Nelson. * * *" and in the absence of evidence *aliunde* the clear inference is that Auerbach, who paid the 10*l.* is the purchaser. The similar receipt in Shardlow v. Cotterell, 20 Ch. Div. 90, was sufficient on this point.

On the whole I also think there is a sufficient description of identity. In Shardlow v. Cotterell the description was "Property purchased at 420*l.* at Sun Inn, Pinxton, on the above date. Mr. George Cotterell, Pinxton, Owner." That was held sufficient. Here it is "House being sold for 500*l.* from Mr. M. Nelson." to Auerbach on November 21st, 1918. This is quite as explicit as the memorandum in Shardlow v. Cotterell.

In Plant v. Bourne, [1897] 2 Ch. 281, the description was vaguer still, namely, "twenty four acres of land, freehold, * * * at Totmonslow, in the parish of Draycott, in the County of Stafford." Byrne, J., held that there was no sufficient identification of the subject matter. The Court of Appeal however held that the vendor Plant was presumably selling his own 24 acres, and the description being therefore equivalent to "Plant's 24 acres at Totmonslow," was sufficient to let in extrinsic evidence to show that he had only 24 acres at that place. Lindley, L. J. (at p. 288), after referring to Ogilvie v. Foljambe, 3

Mer. 53, and Shardlow v. Cotterell, adopted the principle expressed by Lush, L. J., in the latter case to wit: "The general rule is, *id certum est quod certum reddi potest*, and I am of the opinion that this maxim applies here. In Ogilvie v. Foljambe, parol evidence was wanted just as much as here to show what was the subject matter of the contract and [Kay, J.'s, judgment in the present case, 18 Ch. D. 289, 291-95], if carried to its legitimate results, would establish that no contract can be good within the statute unless it describes the property in such a way that it is wholly unnecessary to resort to parol evidence." Chitty, L. J., said, [1897] 2 Ch. 290: "It would be refinement, and not promoting justice, if we were to hold this description fails because 'my' is not to be found before the 'twenty four' or the definite article 'the'." In other words the court assumes that a man is selling his own property and that the man who pays the deposit is the purchaser.

The description of the property as a house, being sold by Nelson to Auerbach for 500*l.* on November 21st, 1918, is sufficient to let in parol evidence identifying the only house answering that description. The plaintiff is therefore entitled to specific performance.

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## NOBLE *v.* WARD AND OTHERS.

**(Court of Exchequer, 1866, L. R., 1 Exch. 117, and Court of Exchequer Chamber, 1867, L. R., 2 Exch. 135.)**

In the Court of Exchequer, Jan. 12, 1866.

BRAMWELL, B.[89] This case was tried before me at Manchester, and the plaintiff was nonsuited. The case comes before us on a rule to set aside that nonsuit. I think it was wrong, at least on the ground on which it proceeded. The action was for not accepting goods on a sale by the plaintiff to the defendants. The defendants pleaded, among other things, that the contract had been rescinded, and that the plaintiffs were not ready and willing to deliver. The facts were, that a contract for the sale and delivery of goods from the plaintiff to the defendants, at a future day, was entered into on the 12th of August, which may be called contract A; that another contract for sale and delivery by the plaintiff to the defendants also at a future day was entered into on the 18th of August, say contract B; that before any of the days of delivery had arrived the plaintiff and defendants agreed, verbally, to rescind, or do away with, contract A, and to extend for a fortnight the time for the performance of contract B; that is to say, the plaintiff had a fortnight longer to deliver, and the defendants a fortnight longer to take and pay for those goods. This, on principle and authority, was a third

[89] The statement of facts, the short opinion of Channell, B., in the Exchequer, and parts of the other opinions are omitted.

contract, call it C. It was a contract in which all that was to be done and permitted on one side was the consideration for all that was to be done and permitted on the other. See per Parke, B., in Marshall v. Lynn, 6 M. & W. 117. It remains to add that the declaration would fit either contract B or contract C, and that goods were tendered by the plaintiff to the defendants in time for either of those contracts. My notes, and my recollection of my ruling, are that contract B was rescinded, and contract C not enforceable, not being in writing. I think that was wrong. Either contract C was within the Statute of Frauds, or not. If not, there was no need for a writing; if yes, it was because it was a contract for the sale of goods, and so within the seventeenth section of the statute. That says that no contract for the sale of goods for the price of 10*l.* or upwards shall be allowed to be good, except there is an acceptance, payment, or writing. The expression "allowed to be good" is not a very happy one, but whatever its meaning may be, it includes this at least, that it shall not be held valid or enforced. But this is what the defendant was attempting to do. He was setting up this contract C as a valid contract. He was asking that it should be allowed to be good to rescind contract B.

It is attempted to say that what took place when contract C was made was twofold. First, that the old contracts were given up; secondly, a new one was made. But that is not so. What was done was all done at once—was all one transaction, one bargain; and had the plaintiff asked for a writing at the time, and the defendants refused it, it would all have been undone, and the parties remitted to their original contracts.

I think, therefore, that on principle it was wrong to hold that the old contract was gone. * * *

The defendants appealed to the Exchequer Chamber.

In the Exchequer Chamber, Feb. 8, 1867.

WILLES, J. * * * In setting aside the nonsuit directed by the learned judge who tried the cause, the Court of Exchequer * * * held that what took place on the 27th must be taken as an entirety, that the agreement then made could not be looked on as valid, and that no rescission could be effected by an invalid contract. And we are of opinion that the Court of Exchequer was right. Mr. Holker [of counsel for the defendant] has contended, that though the contract of the 27th of September cannot be looked on as a valid contract in the way intended by the parties, yet since, if valid, it would have had the effect of rescinding the contract of the 18th, and since the parties might have entered into a mere verbal contract to rescind *simpliciter*, we are to say that what would have resulted if the contract had been valid, will take place though the contract is void; or, in other words, that the transaction will have the effect which, had it been valid, the parties would have intended, though without expressing it, although it cannot operate as they intended and expressed. But it would be at least a

question for the jury, whether the parties did intend to rescind—whether the transaction was one which could not otherwise operate according to their intention; and a material fact on that point is, that, while they expressly rescinded the contract of the 12th of August, they simply made a contract as to the carrying into effect that of the 18th, though in a mode different from what was at first contemplated. It is quite in accordance with the cases of Doe d. Egremont v. Courtenay, 11 Q. B. 702, and Doe d. Biddulph v. Poole, 11 Q. B. 713, overruling the previous decision of Doe d. Egremont v. Forward, 3 Q. B. 627; see 11 Q. B. 723, to hold that, where parties enter into a contract which would have the effect of rescinding a previous one, but which cannot operate according to their intention, the new contract shall not operate to affect the previously existing rights. This is good sense and sound reasoning, on which a jury might at least hold that there was no such intention. * * *

*Judgment affirmed.*[90]

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## MORRIS *v.* BARON AND COMPANY.

(House of Lords. [1918] A. C. 1, 9 B. R. C. 399, Ann. Cas. 1918 C, 1197.)

LORD FINALY, L. C.[91] My Lords, this action was brought for the recovery of 888*l.* 4s. the price of goods which had been sold and delivered by the plaintiff to the defendants. The right of the plaintiff to recover this sum was not in dispute, but the defendants set up a counter-claim for damages for non-delivery of other goods by the plaintiff to the defendants. The case was tried by Bailhache, J., without a jury. He gave judgment for the plaintiff on the claim, and dismissed the counter-

[90] If, however, the new contract is not required to be in writing by the statute of frauds, as, for instance, where the original contract was one not to be performed within a year and when it had less than a year to run the new oral contract varying performance for the rest of the period was made, the new agreement governs. Williams v. Moss' Empires, Ltd., [1915] 3 K. B. 242. *Cf.* Blake v. J. Neils Lumber Co., 111 Minn. 513 (1910). As Shearman, J., said in Williams v. Moss' Empires, Ltd., *supra*, the cases of Goss v. Lord Nugent, 5 B. & Ad. 58 (1833) and Noble v. Ward, and cases following them "show that whenever the parties vary a material term of an existing contract [which would be invalid if it were not in writing] they are in effect entering into a new contract, the terms of which must be looked at in their entirety and if the new contract is one which is required to be in writing, then it must be wholly disregarded and the parties are relegated to their rights under the original contract. But if on the other hand there is nothing in the terms of the new contract which necessitates a written contract, then, although the original contract was one which was bound to be in writing, the new parol contract can be enforced because although it is not in writing it is nevertheless an effective contract."

[91] The statement of facts is omitted, as are also the opinions of Viscount Haldane, Lord Dunedin, Lord Atkinson and Lord Parmoor.

claim on the ground that the defendants had not made a valid exercise of their option under the contract to have the goods in question delivered to them. The Court of Appeal reversed the judgment of Bailhache, J., on the counter-claim, and entered a judgment upon it for the defendants, the damages to be assessed by a referee. From that decision this appeal is brought to your Lordship's House by the plaintiff in the action.

The appellant is a worsted manufacturer and the respondents are merchants. On September 24, 1914, they entered into a contract in writing for the sale by the appellant to the respondents of 500 pieces of cloth; 223 of these pieces were delivered. Disputes arose between the parties, the respondents complaining of delay in delivery under the contract, and the appellant complaining of the respondents' failure to pay for the goods which had been delivered, and litigation ensued.

The first action was brought on March 19, 1915. In it the plaintiff (the present appellant) claimed 888*l.* 4s., the price of the goods delivered, while the defendants (the present respondents) counter-claimed for damages in respect of the failure to deliver 277 pieces, the balance of the 500 pieces contracted to be sold. On April 20, 1915 (three days after the delivery of the counter-claim), the parties at an interview agreed to a settlement, and on April 22nd, the respondents sent a letter to the appellant setting out the terms of settlement. The appellant did not admit the correctness of the statement of the terms in this letter, but Bailhache, J., for the purposes of his judgment assumes its correctness, and I shall deal with the case on this basis, accepting the respondents' statement of the terms of settlement. The letter is as follows:

"24 and 26, Brook Street, Bradford, April 22nd, 1915.

"Messrs. The Troydale Mill Co., Leeds.

"Dear Sirs:—As personally arranged between Mr. Morris and Mr. Baron, we herewith confirm the terms agreed upon.

"Both to withdraw the legal proceedings and instruct the solicitors accordingly, and each to pay his own costs, you to allow 30*l.* (thirty pounds) to us to meet the expenses incurred through not fulfilling the orders.

"The account to be left over for three months so as to give us the opportunity of selling the goods, and the goods not delivered to be kept for us if we ask for them.

"We have the option of taking up the balance of pieces to complete the order, giving time to make.

"Yours faithfully,

"Baron & Co."

The three months' extension of credit which was given by the terms embodied in this letter for the goods delivered expired on July 22nd, 1915, and on the 27th, the appellant wrote asking for payment according to agreement. On the 28th the respondents wrote back saying that they would be pleased to pay the account if the appellant delivered the balance of the blue pieces to complete the order, as stated in the re-

spondents' letter of April 22. On August 17th the respondents wrote as follows to the appellant:

"Gentlemen, we are surprised you have not replied to our letter of the 28th July. As explained in that letter, we shall be glad to pay your account on delivery of the balance of the pieces to complete the order.

"As you have not answered we must now ask you to deliver the balance of the blue pieces on or before the 21st September, 1915. Kindly let us know by return of post if you will do this."

A proposal was made by the respondents in September for a variation in the class of goods to be delivered, but this came to nothing.

On September 27th the respondents wrote pressing for delivery, and on February 15, 1916, the second action (that on which this appeal is brought) was begun by the appellant.

Notwithstanding the agreement of April 22, 1915, the respondents had consistently refused payment for the goods already delivered, insisting on their claim to keep back the payment until delivery of the further goods.

The statement of claim in the second action was for the 888*l.* 4s. for the goods delivered.

The defense admitted the plaintiff's claim, subject to the counter-claim.

The counter-claim set out the contract of September 24, 1914, the proceedings in the first action and the settlement embodied in the letter of April 22, 1915, alleging that the defendants had exercised their option thereunder, but that delivery had not been made, and claimed damages for non-delivery under the arrangement of April 22, 1915, or, alternatively, under the original contract of September 24, 1914.

The counter-claim was based before Bailhache, J., solely on the agreement of April 22, and after hearing the evidence of the parties he delivered judgment, disallowing the counter-claim on the ground that the demand by the respondents for the delivery of the goods under the arrangement of April 22, 1915, was not a valid exercise of the option inasmuch as it was coupled with a refusal to abide by the terms of the arrangement as to payment for the goods already delivered.

It was contended before your Lordships on behalf of the respondents that the payment of that money was not a condition precedent to the exercise of the option. But the real question is not whether payment was a condition precedent, but whether the respondents could make a valid claim to have the goods delivered under the option while refusing to observe their part of the bargain. It is perfectly true that the appellant did not, as he might have done, claim that the contract of April 22, 1915, was at an end, treating the respondents' conduct as repudiation. But the question remains whether they could validly exercise their option while repudiating their own obligation under the agreement which conferred that option. Bailhache, J., held that they could not, and I agree. It was contended that the obligation to pay the 888*l.* 4s at the end of

the three months did not go to the root of the contract and that the only remedy was an action for the amount. The question is whether the obligation was regarded by the parties as an essential part of the new contract, and I think that its terms show that it was so regarded. It is, indeed, in itself a very important question for a manufacturer whether he is to go on making goods without being paid for those which have been delivered, and the stipulation that he should have the money at the end of the three months appears to me to be an essential part of the contract. A party to a contract which imposes certain obligations and confers certain rights upon him cannot claim to exercise these rights while repudiating his obligations in material particulars. The option to take the goods might indeed have been exercised before the three months had expired, but it would not have been a valid exercise of the option within the three months if at the same time the defendant repudiated his obligation to pay at the end of that term.

For these reasons, I agree with the decision of Bailhache, J., on the contract of April 22.

An objection was also raised before Bailhache, J., to the enforcement of the new contract on which the counter-claim is based on the ground that it is not enforceable by reason of the 4th section of the Sale of Goods Act. This point was not argued before him owing to the view which he took on the point I have just dealt with. It was raised and fully argued in the Court of Appeal and in your Lordships' House.

It was contended on behalf of the respondents that the new agreement was not an agreement for the sale of goods but for the settlement of an action. It was no doubt the settlement of an action but a part, and a very material part, of that settlement appears to me to have been an agreement for the sale of goods. It is an agreement that the respondents should have an option of taking the balance of goods undelivered, and it was implied that they were to pay for them on the terms of the original agreement. Surely this is an agreement for the sale of goods. This point, I agree with the Court of Appeal, would be enough to defeat the counter-claim.

But the Court of Appeal went on to hold that the arrangement of April 22, 1915, not being enforceable, must be wholly disregarded and the parties relegated to their rights under the original contract.

The Court of Appeal treated the case of Noble v. Ward, L. R. 1 Ex. 117; L. R. 2 Ex. 135, as having decided as a matter of law that in a case to which the 4th section of the Sale of Goods Act applies, the original contract cannot be rescinded by a contract not complying with the section. In that case there was a valid contract, on August 18 for the delivery of goods by the plaintiff to the defendant, and at an interview on September 27th it was agreed that the time for delivery should be extended. The defendant refused to take delivery and an action was brought for non-acceptance, the declaration covering either the contract of August 18 or that of September 27. The case was tried

before Bramwell, B., who directed a nonsuit on the ground that the contract of August 18 had been rescinded by the parol agreement of September 27, and that the parol agreement itself could not be sued on owing to the 17th section of the Statute of Frauds. The nonsuit was set aside by the Court of Exchequer, and Bramwell, B., was himself a member of the court and delivered the leading judgment. He pointed out that under s. 17 the contract of September 27 was not "allowed to be good," and that to treat it as having the effect of rescinding the old contract would be to hold that it was good for that purpose. A new trial was accordingly ordered. This decision was affirmed in the Exchequer Chamber, judgment being delivered by Willes, J. He said that no rescission could be effected by an invalid contract, and that it would be at least a question for the jury whether the parties did intend to rescind.

There are two observations to be made on this case.

In the first place, the agreement varying the first agreement was by s. 17 of the Statute of Frauds one which was not allowed to be good, while under s. 4 of the Sale of Goods Act, 1893, which applies in the present case, it is merely not enforceable by action. There is a marked difference between the wording in this respect of the 4th section of the statute of frauds and the 17th section, as was pointed out in Leroux v. Brown, 12 C. B. 801, and, notwithstanding the *obiter dicta* (for they are no more) of some eminent judges, I do not think that the language of the two sections had the same effect.[92] For the present purpose it is enough to say that both courts in Noble v. Ward, treated the contract as being invalid. The change made in the wording of the 4th section of the Sale of Goods Act as compared with s. 17 of the Statute of Frauds in my opinion altered the law. The agreement of April 22, 1915, in this case is not under that section invalid, as was the agreement in Noble v. Ward under s. 17 of the Statute of Frauds. It is only not enforceable by action.

In the second place, Noble v. Ward does not lay down as a matter of law that the parties cannot agree to rescind a written agreement which the law requires to be in writing by the substitution for it of another agreement not in writing, and therefore unenforceable. On the contrary Willes, J., in the Exchequer Chamber says that the question would be for the jury. If the law were as the Court of Appeal in the present case has laid it down, he would have said that the judge must rule that such a rescission could not take place.

The point which arises in such cases seems to me to have been well stated by Lord Denman in Stead v Dawber (1839), 10 Ad. & E. 57, 64, 65. In that case there was an agreement for the sale of goods to be delivered "on the 20th to the 22nd." The plaintiff at the defendant's

[92] But in his opinion Lord Dunedin said: "The statute of frauds does not make the parol contract void, but only prevents an action upon it." [1918] A. C. at p. 28.

request verbally agreed to enlarge the time to the 23rd or 24th. Lord Denman, after saying that many cases had been cited, expressed himself as follows: "But it seems to us that we are mainly called on to decide a question of fact; what, namely, was the intention of the parties in the arrangement come to for substituting the 24th for the 22nd as the day of delivery; did they intend to substitute a new contract for the old one, the same in all other respects except those of the day of delivery and date of the accepted bill, with the old one?"

The present case is not a case in which there has been a mere attempt to vary the written contract by parol, the situation of the parties being otherwise unchanged. The legal proceedings then pending between the parties were withdrawn, each bearing his own costs, a sum of 30*l.* was to be allowed to meet expenses from non-delivery, three months' credit was given to the respondents to give them the opportunity of selling the goods, and the respondents were released from the obligation to take the balance undelivered, getting an option instead. Under these circumstances it seems to me to be out of the question to hold that merely because the option is not enforceable on account of the 4th section of the Sale of Goods Act, the rights of the parties are to be regarded as still governed by the original contract under which the respondents were bound to take delivery of the balance. Both parties treated the original contract as at an end until attention was called in the Court of Appeal to the case of Noble v. Ward, *supra*, and the respondents throughout insisted on the option given by the new arrangement and treated the obligation to take delivery as at an end. To go back to the default in making delivery before the first action would be to ignore the settlement for 30*l.* of that claim, and to give damages for a subsequent default would be to treat the respondents as having been willing after the settlement to perform the original contract, which they certainly were not.

The evidence in the present case points to the conclusion that the parties intended not merely to vary the original contract but to set it aside and substitute another for it, giving a mere option to take delivery of the percale undelivered. This is the effect of the language of the memorandum of April 22, 1915, and it was on this assumption that all the subsequent dealings and correspondence of the parties proceeded. It is true that neither party adhered to its terms. The appellant tried to get payment of the 888*l.* 4s. before the three months' further credit had expired, and the respondents refused to pay when it had expired, claiming to retain the money until the goods were delivered. But neither party ever referred to the original contract as governing their rights; on the contrary, they treated it as at an end.

Is the law such as to prevent effect being given to the intention of the parties to treat the original contract as rescinded?

All that Noble v. Ward decided was that it was a mistake to say that as a matter of law the original contract was rescinded, the variation being by parol and there being no change of circumstances. It did not

decide that as a matter of law the first contract still existed. As was said in the judgment of the Exchequer Chamber, that would be a matter for the jury. There are some old cases in which it was held that there could not be an accord and a satisfaction by taking an unenforceable agreement in substitution for one which was enforceable (see Case v. Barber, T. Raym. 450 in the 33rd year of Charles II.; also Comyns Digest, "Accord" (B 4) 4, 6, and the case there cited of Wickham v. Taylor, T. Jones, 168, 33 Car. 2); but I do not think that these cases can be now regarded as good law. The non-enforceability of the new agreement would no doubt be a very material fact in arriving at a conclusion upon the question whether the new agreement without performance was taken in accord and satisfaction of the old, but it seems to me to be immaterial when once this has been established in point of fact.[98]

In the present case the parties, in my opinion, took the new agreement such as it was with the other terms of settlement in accord and satisfaction of the original agreement, and there is nothing in law to prevent them from doing so. The respondents, therefore, must stand or fall by the agreement of April 22. It was upon that agreement that the case was brought before Bailhache, J., and the learned judge held that the respondents could not recover upon it because they not only failed to pay the 888*l.* 4*s.* at the expiration of the extended credit given by that agreement, but throughout insisted that they would not pay until the further goods had been delivered under the option.

In my opinion the decision of Bailhache, J., should be restored and this appeal allowed with costs here and below.

*Order of the Court of Appeal reversed and judgment of Bailhache, J., restored.*

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## IMPERATOR REALTY CO., INC., *v.* TULL.

(Court of Appeals of New York, 1920. 228 N. Y. 447, 127 N. E. 263.)

CHASE, J. The parties to this action entered into a written contract under seal for the exchange of pieces of real property in the city of

[98] In his opinion Viscount Haldane said, that "While a parol variation of a contract required to be in writing cannot be given in evidence, the very authorities which lay down this principle also lay down not less clearly that parol evidence is admissible to prove a total abandonment or rescission. Now there is no reason why this should not be done through the instrumentality of a new agreement which does not comply with the statutory formalities just as readily as by any other mode of mutual assent by parol. What is, of course, essential is that there should have been made manifest the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which still leave it subsisting." [1918] A. C. at pp. 18-19.

New York. On the day fixed therein for carrying out the contract and making the conveyances, the defendant deliberately defaulted. The action was brought to recover damages alleged to have been sustained by the plaintiff.

At the trial the jury determined all of the issues in favor of the plaintiff and rendered a verdict for it. The defendant appealed from the judgment entered upon such verdict, and the Appellate Division reversed the judgment and dismissed the complaint. Imperator Realty Co., Inc., v. Tull, 179 App. Div. 761, 167 N. Y. Supp. 210. [Plaintiff appealed.]

One of the provisions of the contract is:

"All notes or notices of violations of law or municipal ordinances, orders, or requirements noted in or issued by any department of the city of New York against or affecting the premises at the date hereof, shall be complied with by the seller and the premises shall be conveyed free of the same."

There were several notices of violations of law or municipal ordinances, orders, or requirements noted in or issued by a department of the city of New York against or affecting the premises to be conveyed by the plaintiff at the date of the contract which, although aggregating an amount that is comparatively very small, were not satisfied or discharged on the day when the property was to be conveyed. The plaintiff sought to avoid the failure to procure the discharge of such violations by an alleged modification of the contract pursuant to a conversation between the president of the plaintiff and the defendant in which it is claimed that there were reciprocal promises. The president of the plaintiff testified that after the making of the contract, and on the same day thereof, it was agreed between the parties to the contract that either party in place of satisfying any of the so-called violations that might be filed against the pieces of real property therein mentioned might deposit with the New York Title Insurance Company a sufficient amount of cash to pay and discharge the same. There is evidence in the record to show that the plaintiff was able and willing on the day and at the time and place for closing the contract to carry out the same as therein provided except that he could not convey the property to be transferred by him free from such violations, and there is also evidence that he was able and willing to deposit a sufficient amount of cash to comply with and free the property from the violations as required by such oral agreement between the parties.

The conversation testified to by the plaintiff's president is denied by the defendant, but in our judgment the question whether the conversation occurred and the agreement was entered into by the parties as claimed by the plaintiff was a question of fact properly submitted to the jury. The objection that the oral agreement and waiver were not alleged in the complaint was not sufficiently taken by objection at

the trial. If it had been so taken at that time, the plaintiff would have had an opportunity to apply for an amendment of its complaint.

It is claimed by the defendant that the contract with the plaintiff was in writing under seal and could not be changed as claimed by an oral agreement so as to be binding upon either party to it. The contract was also within the provisions of section 259 of the Real Property Law (Consol. Laws, c. 50), and it was therefore necessary that it should be in writing as stated in the statute.

Where a contract is reduced to writing and appears to include the entire agreement of the parties and to be free from fraud, the rule is quite universal that oral evidence will not be received of conversations or transactions leading up to the making of a contract or in connection with the execution thereof for the purpose of varying, modifying, reducing or extending the terms thereof. Lese v. Lamprecht, 196 N. Y. 32, 89 N. E. 365; Eighmie v. Taylor, 98 N. Y. 288.

After the execution of a written contract including one within the statute the parties may, of course, reconsider the subject-matter thereof and decide to modify or rescind it. The oral agreement found in this case was made after the execution of the written contract. It is not the right to make a new and independent contract to modify a prior unperformed written contract that we are considering, but the effect, if any, of an oral contract upon a contract under seal or required by the statute to be in writing. We must assume in this case that the oral contract as claimed by the plaintiff, to accept a deposit in cash in place of the payment of outstanding violations, was actually made upon a sufficient consideration. The jury has so found. The oral contract did not purport to be inconsistent with any material part of the written contract, nor to substitute a new oral contract for any material part of the written contract. The plaintiff was simply told in effect to let the violations stand unsatisfied until the due day and then provide for the expense of satisfying the same by a deposit in cash. The extent of the violations was inconsiderable. Both parties were convenienced by waiving the necessity of having them actually canceled and satisfied before the due day.

In Thomson v. Poor, 147 N. Y. 402, 409, 42 N. E. 13, 15, which was an action to recover upon a balance claimed to be due pursuant to a written contract which was within the statute, this court say:

"We know of no principle of law which will permit a party to a contract, who is entitled to demand the performance by the other party of some act within a specified time and who has consented to the postponement of the performance to a time subsequent to that fixed by the contract and where the other party has acted upon such consent and in reliance thereon has permitted the contract time to pass without performance, to subsequently recall such consent and treat the nonperformance within the original time as a breach of the contract. The original contract is not changed by such waiver, but it stands as an answer to the

other party who seeks to recover damages for nonperformance induced by an unrecalled consent. The party may, in the absence of a valid and binding agreement to extend the time, revoke his consent so far as it has not been acted upon, but it would be most inequitable to hold that a default, justified by the consent, happening during its extension, should furnish a ground of action. It makes no difference, as we conceive, what the character of the original contract may be, whether one within or outside the statute of frauds. The rule is well understood that, if there is a forbearance at the request of a party, the latter is precluded from insisting upon nonperformance at the time originally fixed by the contract as a ground of action. * * * Until he gives notice of withdrawal he has no just right to consider the latter in default, although meanwhile the contract time has elapsed. We think the principle of equitable estoppel applies in such case."

The court further say that the principle of estoppel applies equally to sealed and unsealed contracts.

More recently this court in Arnot v. Union Salt Co., 186 N. Y. 501, 79 N. E. 719, held that, where the time of payment under a contract had been extended by parol and the party required to make the payment had acted upon such extension, the party waiving such time of payment cannot consider the debtor in default unless he withdraws the waiver before the time of payment has arrived.

The oral contract in the case before us modified the written contract simply as to the manner of charging the plaintiff with the amount required to satisfy the violations. Such oral contract if carried out in good faith made unnecessary the haste otherwise required to make the slight changes to comply with the notices which constituted the incumbrances or so-called violations.

The defendant by his mutual oral contract with the plaintiff is estopped from now claiming that the plaintiff who relied thereon was in default on the due day of the written contract because of its omission to then have the property free of the violations. He should not be allowed to take advantage of an omission induced by his unrevoked consent. Thomson v. Poor, *supra;* Arnot v. Union Salt Co., *supra;* Swain v. Seamens, 76 U. S. (9 Wall.) 254, 19 L. Ed. 554; Brede v. Rosedale Terrace Co., 216 N. Y. 246, 110 N. E. 430.

Parol evidence of the waiver constituting an estoppel as against the defendant under the circumstances was not error. Penn. Steel Co. v. Title Guarantee & Trust Co., 193 N. Y. 37, 85 N. E. 820. We do not think that the objections made by the defendant to the admission of evidence were upon a consideration of the whole record of sufficient consequence to have materially affected the jury or to require further consideration in this opinion.

The judgment of the Appellate Division should be reversed, and that of the Trial Term affirmed, with costs in the Appellate Division and in this court.

CARDOZO, J. (concurring in result). The statutes says that a contract for the sale of real property "is void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the * * * grantor, or by his lawfully authorized agent." Real Property Law (Consol. Laws, c. 50) § 259 (statute of frauds). In this instance, each party was a grantor, for the sale was an exchange. I think it is the law that, where contracts are subject to the statute, changes are governed by the same requirements of form as original provisions. Hill v. Blake, 97 N. Y. 216; Clark v. Fey, 121 N. Y. 470, 476, 24 N. E. 703. Abrogated by word of mouth such a contract may be (Blanchard v. Trim, 38 N. Y. 225), but its obligation may not be varied by spoken words of promise while it continues undissolved (Swain v. Seamens, 9 Wall. 254, 271, 272, 19 L. Ed. 554; Emerson v. Slater, 22 How. [U. S.] 28, 42, 16 L. Ed. 360; Goss v. Lord Nugent, 5 B. & Ald. 58; Harvey v. Graham, 5 Ad. & El. 61; Hickman v. Haynes, L. R. 10 C. P. 598; Abell v. Munson, 18 Mich. 307, 100 Am. Dec. 165; Malkan v. Hemmung, 82 Conn, 293, 73 Atl. 752; Long v. Hartwell, 34 N. J. Law, 116; Rucker v. Harrington, 52 Mo. App. 481; Bradley v. Harter, 156 Ind. 499, 60 N. E. 139; Jarman v. Westbrook, 134 Ga. 19, 67 S. E. 403; 1 Williston on Contracts, § 593). A recent decision of the House of Lords reviews the English precedents, and declares the rule anew. Morris v. Baron & Co., 1918, A. C. 1, 19, 20, 31. Oral promises are ineffective to make the contract, or any part of it, in the beginning. Wright v. Weeks, 25 N. Y. 153; Marks v. Cowdin, 226 N. Y. 138, 123 N. E. 139. Oral promises must also be ineffective to vary it thereafter. Hill v. Blake, *supra*. Grant and consideration alike must find expression in a writing. Real Prop. Law, § 259; Consol. Laws, c. 50.

Some courts have drawn a distinction between the formation of the contract and the regulation of performance. Cummings v. Arnold, 3 Metc. 486, 37 Am. Dec. 155; Stearns v. Hall, 9 Cush. 31; Whittier v. Dana, 10 Allen, 326; Hastings v. Lovejoy, 140 Mass. 261, 2 N. E. 776, 54 Am. Rep. 462; Wood on Statute of Frauds, p. 758. The distinction has been rejected in many jurisdictions. See cases cited *supra;* also, L. R. A. 1917B, 141 note. It has never been accepted by this court, and the question of its validity has been declared an open one. Thomson v. Poor, 147 N. Y. 402, 408, 42 N. E. 13, characterizing as *dicta* the statements in Blanchard v. Trim, *supra*. I think we should reject it now. The cases which maintain it hold that oral promises in such circumstances constitute an accord, and that an accord, though executory, constitutes a bar if there is a tender of performance. Cummings v. Arnold; Whittier v. Dana, *supra*. There seems little basis for such a distinction in this state where the rule is settled that an accord is not a bar unless received in satisfaction. Reilly v. Barrett, 220 N. Y. 170, 115 N. E. 453; Morehouse v. Second Nat. Bank of Oswego, 98 N. Y. 503, 509; cf. Ladd v. King, 1 R. I. 224, 51 Am. Dec. 624; Pollock on

Contracts (3d Am. Ed.) p. 822. But there is another objection, more fundamental and far-reaching. I do not know where the line of division is to be drawn between variations of the substance and variations of the method of fulfillment. I think it is inadequate to say that oral changes are effective if they are slight and ineffective if they are important. Such tests are too vague to supply a scientific basis of distinction. "Every part of the contract in regard to which the parties are stipulating must be taken to be material." Per Parke, B., Marshall v. Lynn, 6 M. & W. 116, 117; 1 Williston on Contracts, § 594. The field is one where the law should hold fast to fundamental conceptions of contract and of duty, and follow them with loyalty to logical conclusions.

The problem, thus approached, gains, I think, a new simplicity. A contract is the sum of its component terms. Any variation of the parts is a variation of the whole. The requirement that there shall be a writing extends to one term as to another. There can therefore be no contractual obligation when the requirement is not followed. This is not equivalent to saying that what is ineffective to create an obligation must be ineffective to discharge one. Duties imposed by law irrespective of contract may regulate the relations of parties after they have entered into a contract. There may be procurement or encouragement of a departure from literal performance which will forbid the assertion that the departure was a wrong. That principle will be found the solvent of many cases of apparent hardship. There may be an election which will preclude a forfeiture. There may be an acceptance of substituted performance, or an accord and satisfaction. McCreery v. Day, 119 N. Y. 1, 9, 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. Rep. 793; Swain v. Seamens, *supra;* Long v. Hartwell, *supra;* Ladd v. King, *supra.* What there may not be, when the subject-matter is the sale of land, is an executory agreement, partly written and partly oral, to which, by force of the agreement and nothing else, the law will attach the attribute of contractual obligation.

The contract, therefore, stood unchanged. The defendant might have retracted his oral promise an hour after making it, and the plaintiff would have been helpless. He might have retracted a week before the closing, and, if a reasonable time remained within which to remove the violations, the plaintiff would still have been helpless. Retraction even at the very hour of the closing might not have been too late if coupled with the offer of an extension which would neutralize the consequences of persuasion and reliance. Arnot v. Union Salt Co., 186 N. Y. 501, 79 N. E. 719; Brede v. Rosedale Terrace Co., 216 N. Y. 246, 110 N. E. 430. The difficulty with the defendant's position is that he did none of these things. He had notified the plaintiff in substance that there was no need of haste in removing the violations, and that title would be accepted on deposit of adequate security for their removal in the future. He never revoked that notice. He gave no warning of a change of mind. He did not even attend the closing. He abandoned the con-

tract, treated it as at an end, held himself absolved from all liability thereunder, because the plaintiff had acted in reliance on a consent which, even in the act of abandonment, he made no effort to recall.

I do not think we are driven by any requirement of the statute of frauds to sustain as lawful and effective this precipitate rescission, this attempt by an *ex post facto* revocation, after closing day had come and gone, to put the plaintiff in the wrong. "He who prevents a thing from being done may not avail himself of the nonperformance, which he has, himself, occasioned, for the law says to him, in effect: 'This is your own act, and, therefore, you are not damnified.'" Dolan v. Rodgers, 149 N. Y. 489, 491, 44 N. E. 167, quoting West v. Blakeway, 2 M. & Gr. 751. The principle is fundamental and unquestioned. U. S. v. Peck, 102 U. S. 64, 26 L. Ed. 46; Gallagher v. Nichols, 60 N. Y. 438; Risley v. Smith, 64 N. Y. 576, 582; Gen. El. Co. v. Nat. Contracting Co., 178 N. Y. 369, 375, 70 N. E. 928; Mackay v. Dick, 6 App. Cas. 251; New Zealand Shipping Co. v. Societe des Aletiers, etc., 1919 A. C. 1, 5. Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. Gallagher v. Nichols; Gen. El. Co. v. Nat. Constr. Co.; Thomson v. Poor, *supra*. We need not go into the question of the accuracy of the description. Ewart on Estoppel, pp. 15, 70; Ewart on Waiver Distributed, pp. 23, 143, 264. The truth is that we are facing a principle more nearly ultimate than either waiver or estoppel, one with roots in the yet larger principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819. The statute of frauds was not intended to offer an asylum of escape from that fundamental principle of justice. An opposite precedent is found in Thomson v. Poor, 147 N. Y. 402, 42 N. E. 13. In deciding that case, we put aside the question whether a contract within the statute of frauds could be changed by spoken words. We held that there was disability, or, as we styled it, estoppel, to take advantage of an omission induced by an unrevoked consent. Cf. Swain v. Seamens, *supra*, 9 Wall. at page 274, 19 L. Ed. 554; Arnot v. Union Salt Co., *supra;* Brede v. Rosedale Terrace Co., *supra;* 1 Williston on Contracts, § 595. A like principle is recognized even in the English courts, which have gone as far as those of any jurisdiction in the strict enforcement of the statute. They hold in effect that, until consent is acted on, either party may change his mind. After it has been acted on, it stands as an excuse for nonperformance. Hickman v. Haynes, L. R. 10 C. P. 598, 605; Ogle v. Lord Vane, 2 Q. B. 275; 3 I. B. 272; Cuff v. Penn, 1 Maule & S. 21; Morris v. Baron & Co., 1918 A. C. 1, at page 31. The defendant by his conduct has brought himself within the ambit of this principle. His words did not create a new bilateral contract. They lacked the written form prescribed by statute. They did not create a unilateral contract. Aside from the same defect in form, they did not purport to offer a promise

for an act. They did, however, constitute the continuing expression of a state of mind, a readiness, a desire, persisting until revoked. A seller who agrees to change the wall paper of a room ought not to lose his contract if he fails to make the change through reliance on the statement of the buyer that new paper is unnecessary and that the old is satisfactory. The buyer may change his mind again and revert to his agreement. He may not summarily rescind because of the breach which he encouraged. That is what the defendant tried to do. When he stayed away from the closing and acted upon an election to treat the contract as rescinded, he put himself in the wrong.

I concur in the conclusion that the judgment must be reversed.

Hiscock, C. J., concurs with Chase, J.

Cardozo, J., concurs in opinion in which Pound and Andrews, JJ., also concur.

Collin and Crane, JJ., dissent.

*Judgment reversed, etc.*[94]

[94] "The corn, by the original contract, was to be delivered at Cairo by the 15th of March, 1865; and, by correspondence and agreement with the plaintiffs, in view of the difficulties of which the defendants complained, the time of delivery was extended to the 1st of April, again to the 10th, and then to the last day of April. It would be strange law, indeed, if the defendants were allowed to say that, inasmuch as you gave us further time in which to perform our contracts, and we did not comply, you have no right to an action against us on our original contract; and this is the burden of many of the instructions, and a large part of the theory of their case. There is no merit in this plea of a new contract, or of variance in the one declared on." Breese, C. J., in Bacon v. Cobb, 45 Ill. 47, 56, 57 (1867). See Hickman v. Haynes, L. R. 10 C. P. 598 (1875); Neppach v. Oregon and Cal. R. Co., 46 Ore. 374 (1905).

In Hickman v. Haynes, the leading English case in accord with the principal case, the court emphasized the fact that the plaintiff was ready and willing to perform on time under the original contract and that there was not a substitution of one agreement for another but merely a voluntary forbearance to perform on plaintiff's part at the request of the defendant, or a waiver by the defendants of a delivery by the plaintiff at the time specified in the contract. Where the plaintiff could not or would not have performed under the original contract, the statute may be relied upon to obviate the oral extension or variation agreement. See Walter v. Victor G. Bloede Co., 94 Md. 80 (1901), where the plaintiff, being unable to perform on time, asked for the delay. So in Plevins v. Downing, L. R., 1 C. P. 220 (1876), the written contract was to sell and deliver 100 tons of pig iron, 25 tons at once and 75 tons in July next. By the end of July only 75 tons were delivered, but in October defendant orally requested delivery, plaintiffs claimed, and then refused to accept it. It was held, that as the plaintiffs were not ready and willing to perform in time under the written contract they could not recover on that, and they could not recover on the alleged oral request because "a substituted time of delivery" is "an altered contract or a new contract" and cannot be enforced if merely verbal and within the statute of frauds.

"There is no reason, in our opinion, why a party to a contract within the statute of frauds may not be estopped by his conduct from disputing a sub-

## SEYMOUR *v.* OELRICHS ET AL.

(Supreme Court of California, 1909. 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154.)

Action by John Seymour against Theresa A. Oelrichs and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

ANGELLOTTI, J.[95] An opinion was filed on this appeal on July 6, 1909, and judgment given thereon. * * *

We adhere to the views expressed in the former opinion as to the questions determined therein, and as to such questions adopt the same as the opinion of the court. For the reasons stated therein, the judgment and order denying a new trial must be reversed, but for the purposes of a new trial that must follow, we will determine the question of estoppel.

In our discussion we shall assume, of course, that Mr. Oelrichs was duly authorized in writing to enter into such a contract on behalf of the defendants as is alleged to have been made by him with plaintiff. If he was so authorized, it is apparent that defendants are bound by his acts, conduct and statements to the same extent that they would have been had they been personally present and personally had done just what he did. So assuming, the facts that plaintiff's evidence tended to show are substantially as follows: Plaintiff was captain of detectives in the police department of the city and county of San Francisco, at a salary of $250 per month. Under the law, he held practically a life position as captain of police, being removable therefrom only for good cause, after trial. All this was known to the defendants and to Charles L. Fair, to whose property they have succeeded. Under these circumstances they offered him a position, wherein he was to render personal services in connection with their property in San Francisco for a compensation in money. The terms of the contract were finally agreed upon before Mr. Fair left for Europe, Mr. Fair acting for himself and Mr. Oelrichs representing the defendants. Plaintiff told them that he then had a life position, with a right to a pension if he remained long enough in the police department, and that he could not afford to leave the place and go into anything else unless he was certain of steady employment,

sequent oral modification of it to the same extent as a party to any other contract. It is a principle of equity, superior to any technical or artificial legal rules, which takes effect whenever the assertion of such a rule would result in perpetrating or ratifying a fraud." Dorsey, C., in Hecht v. Marsh (Neb.), 181 N. W. 135, 138 (1920).

On parol modification of a written contract as affected by the statute of frauds, see L. R. A. 1917 B, 144, note; 8 B. R. C. 642, note; 56 Am. St. Rep. 671, note; 1 Ann. Cas. 728, note; 7 Ann. Cas. 1041, note. On the validity and enforceability of a parol contract partly within the statute of frauds, see 8 Ann. Cas. 963, note; 10 Ann. Cas. 509, note.

[95] Parts of the opinion are omitted.

and they then told him that they would give him a 10-year contract at $300 per month. This was assented to by plaintiff. The day before Mr. Fair left for Europe, to be absent a few weeks, being very busy in closing up certain business affairs that had to be attended to before he left, he told plaintiff: "Now, in regard to this contract, you leave that stand until I get back, and I will give you the contract." Plaintiff asked him why it could not be done "now," and Fair told him not to be afraid, it would be all right, everything would be all right. It was understood that he was to go to work at once. On leaving Mr. Fair, plaintiff met Mr. Oelrichs and told him about his conversation with Fair, and Oelrichs said: "As far as I am concerned I will give you my part of it now if you want it. I represent Mrs. Oelrichs and Mrs. Vanderbilt and there will be no trouble about it at all, but you might just as well leave it go until Fair returns," and plaintiff said, "All right." This was about June 1, 1902. Plaintiff relied absolutely upon the understanding that he was to have a written contract for 10 years at $300 a month, and would not otherwise have resigned his position in the police department or entered the employ of the defendants and Fair. The morning Fair went away, he asked plaintiff when he was going to resign, and plaintiff said, "Today," and Fair said, "All right, you go ahead, it will be all right, everything will be all right on my return." He did resign at once and his new employment commenced June 1, 1902. Fair was killed near Paris, France, August 14, 1902, without having returned to America. Plaintiff continued to perform all services agreed to be rendered and received $300 a month therefor to July 1, 1904, when defendants, having determined to sell all their San Francisco property, discharged all of their employees, including plaintiff, and have ever since refused to recognize him as an employee or pay him any portion of the salary agreed upon. Plaintiff had no intimation that either Mrs. Oelrichs or Mrs. Vanderbilt did not know all about the terms upon which he entered their employ until November, 1903, when an attempt, which was not persisted in, was made to reduce his salary; Mrs. Oelrichs on November 30, 1903, told him that Mr. Oelrichs had no right to make such an arrangement. There was nothing to indicate that Mrs. Vanderbilt personally had any knowledge that plaintiff was an employee at all until after Fair's death, or that she personally knew anything about the alleged contract. It is not claimed by plaintiff that either Mr. Oelrichs or Mr. Fair did not act in perfect good faith in this matter, it being conceded that each of them fully intended to execute the written contract.

The claim of plaintiff is not that mere part performance of a contract for personal services which by its terms is not to be performed within a year, "invalid" under our statute because not evidenced by writing, renders the same valid and enforceable. Such a claim would, of course, find no support in the authorities. Browne on Statute of Frauds, § 448. He necessarily is compelled to rely solely on the claim

that the defendants by their conduct and promises, on which he was entitled to and did rely, having induced him to give up his life position in the police department in order to enter their employ for a term of years at $300 a month, on the assurance from them that they would give him a written contract for such time and amount, and it being impossible for him to be placed in *statu quo,* are estopped from now setting up the statute of frauds as a defense to his action on the contract. Under this claim, the fact of part performance by plaintiff plays no part whatever. It was the change of position caused by his resignation from the police department upon which his claim wholly rests, and this resignation was, of course, no part of the performance of the contract of service, but was something that must be done by plaintiff before he could begin to perform, as was known to the defendants. Plaintiff's case, in this regard, would be just as strong if after his resignation he had been prevented by defendants from beginning to perform.

The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed. It is based upon the principle "thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme." 2 Pom. Eq. Jur. § 921. It was said in Glass v. Hulbert, 102 Mass. 24, 85, 3 Am. Rep. 418: "The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds." This statement has been accepted as setting forth a plain and satisfactory ground for equitable jurisdiction, together with a clear indication of the proper limitation of its exercise. See Browne on Statute of Frauds, § 457a. In the section last cited, Mr. Browne says: "A plaintiff * * * must be able to show clearly * * * not only the terms of the contract, but also such acts and conduct of the defendant as the court would hold to amount to a representation that he proposed to stand by his agreement and not avail himself of the statute to escape its performance; and also that the plaintiff, in reliance on this representation, has proceeded, either in per-

formance or pursuance of his contract, to so far alter his position as to incur an unjust and unconscientious injury and loss, in case the defendant is permitted after all to rely upon the statutory defense. After proof of this, the court may well be justified in using its undoubted power, in cases of equitable estoppel, to refuse to listen to a defendant seeking to deny the truth of his own representations previously made."

We can see no good reason for limiting the operation of this equitable doctrine to any particular class of contracts included within the statute of frauds, provided always the essential elements of an estoppel are present, or for saying otherwise than as is intimated by Mr. Pomeroy in the words already quoted, viz., that it applies "in every transaction where the statute is invoked." It is a general equitable principle, a part of the broader equitable doctrine stated in Dickerson v. Colgrove, 100 U. S. 580, 25 L. Ed. 618, and quoted therefrom in Carpy v. Dowdell, 115 Cal. 687, 47 Pac. 697, as follows: "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both."

The question, then, is whether the facts of this case bring it within the principle we have discussed. It is clear that there was such a change of position on the part of plaintiff in his irrevocable surrender of his office in the police department, induced in fact by his reliance on the promise of defendants and Fair that a written contract for 10 years at $300 a month would be given, that he will incur great injury and loss in case the defendants are permitted to rely upon the statute of frauds as a defense. That there would necessarily be such a change of position on his part in the event that he relied upon their promise and accepted their offer was known to them, and the promise was given with this knowledge and with the intent that it should be relied on by him and the change in his position thereby induced. The injury done plaintiff by a repudiation of the promise by defendants under these circumstances would certainly appear to be "unjust and unconscientious." Is it permissible to them, in view of the well-settled principle stated to so repudiate it by interposing the fact that the contract has not been reduced to writing, as promised, as a defense to his action?

Learned counsel for defendants say that no fraud on the part of defendants is shown, and that there can be no estoppel in the absence of fraud on the part of the person estopped. The presence of fraud is, of course, essential. It is established by a multitude of cases that to constitute fraud sufficient to serve as a foundation for estoppel by acts or conduct an actual intent to mislead is not essential. Mr. Pomeroy in his work on Specific Performance says that the fraud essential in such cases is not necessarily an antecedent fraud, consciously intended by a party in making the contract, but a fraud inhering in the consequence

of thus setting up the statute. Section 104. In Anderson v. Hubble, 93 Ind. 570, 576, 47 Am. Rep. 394, it was aptly said: "It is not necessary, in order to the existence of an equitable estoppel, that there should exist a design to deceive or defraud. The person against whom the estoppel is asserted must, by his silence or his representations, have created a belief of the existence of a state of facts which it would be unconscionable to deny; but it is not essential that he should have been guilty of positive fraud in his previous conduct. * * * All that is meant in the expression that an estoppel must possess an element of fraud is that the case must be one in which the circumstances and conduct would render it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon. * * * There need be no precedent corrupt motive or evil design." See, also, 2 Pom. Eq. Jur. § 805. It is unnecessary to cite other authorities upon this well-settled doctrine in regard to equitable estoppel. We do not understand it to be disputed by counsel for defendant. Their claim, as we understand it, is that there is nothing more in this case than a mere promise on the part of defendants to give the written contract, made honestly and in good faith, and that a refusal to comply with such a promise so made cannot serve as a basis for the application of the doctrine of equitable estoppel; the contention being that the mere failure to keep an oral promise to reduce an oral contract to writing cannot suffice to constitute the fraud essential to the application of such doctrine, and that there must be some other fraud shown, such as an actual fraud to prevent the contract being reduced to writing. This claim presents the most doubtful question in this case. The authorities all recognize the proposition that the acts, conduct, or statements relied on as constituting ground for the estoppel must generally be acts, conduct, or statements amounting to a representation of fact, as distinguished from mere expression of opinion or intention, or mere promise of something to be done in the future. It has, therefore, been said many times that the mere refusal to make a writing, as agreed, is not such fraud as will take a case out of the operation of the statute of frauds under the doctrine of equitable estoppel. This, undoubtedly, is ordinarily true, even where a party, relying simply on the honor, word or promise of the other, has changed his position to his injury because thereof. But is it applicable to such a state of facts as we have before us? Practically, defendants said to plaintiff: "We want you to enter our employ at once. We know that to do so you must give up your life position in the police department and that you are not willing to do this unless you are assured of employment for ten years at $300 a month. A written contract is, under our statute, essential to guarantee you such employment. We will execute this contract just as soon as Mr. Fair returns from Europe. Go ahead and resign your position now and commence work with us at once, and it will be all right. The written contract will be given as promised." Here, cer-

tainly, in the language of a note to section 877 of Pomeroy's Equity Jurisprudence (volume 2), was a representation of a future intention absolute in form, deliberately made for the purpose of influencing the conduct of the other party, and it is stated in such note that, notwithstanding the rule set forth in the text that a statement of intention merely cannot be a misrepresentation amounting to fraud, such a representation of intention as last set forth, if acted upon by the other party, is generally the source of a right, and may amount to a contract enforceable as such by a court of equity. Mr. Bigelow, in discussing the essentials of estoppel by conduct, and particularly the necessity of a representation or concealment of a fact, says that where the statement or conduct is not resolvable into a statement of fact, and does not amount to a contract, the party making it is not bound unless guilty of clear moral fraud, or unless he stood in a relation of confidence toward him to whom it was made. Bigelow on Estoppel (5th Ed.) p. 572. The same learned author further says that situations may arise in which a contract should be held an estoppel, as in certain cases where only an inadequate right of action would, if the estoppel were not allowed, exist in favor of the injured party, citing the case of Faxton v. Faxton, 28 Mich. 159, in which a mortgagee was held estopped from enforcing his mortgage, where he had induced the son of a mortgagor, contemplating removal, to remain on the mortgaged land and care for it and support the family of the mortgagor, to whom the mortgagee was related, on a promise, honestly made, that the mortgage would never be enforced if he did so. Page 577. In Harris v. Brooks, 21 Pick. (Mass.) 195, 32 Am. Dec. 254, it was held that a parol declaration by the holder of a note to a surety that he would look to the principal only was a good defense for the surety, on the ground that it lulled the party into security and prevented him from obtaining his indemnity, and that it would be a fraud on the part of the holder to subsequently call upon the surety contrary to such assurance. In White v. Walker, 31 Ill. 422, a somewhat similar case, it was said that while a promise to forgive a debt or forbear its collection, unsupported by any consideration, was ineffectual as a defense viewed merely as an agreement, yet if the surety has been induced by such assurance to neglect any of the means which might have been used for his indemnity, the "promise may have that effect as an estoppel, which it wants as a contract, and amount to a defense in any subsequent action brought by the creditor." These authorities are cited simply to show that the mere fact that there was no misrepresentation of fact, but only a promise of future action, is not always a bar to equitable relief. The cases to be found in support of the doctrine that the mere omission or refusal to make a writing, as promised, is not such fraud as will take a case out of the operation of the statute of frauds, are generally cases where the promise was not made under such circumstances as would warrant the conclusion that it constituted, in the eye of equity, a con-

tract, the repudiation of which would be a manifest fraud on the other party. For instance, in stating the rule, the Supreme Court of Indiana said, in Caylor v. Roe, 99 Ind. 1, that never has it been held that the simple failure or refusal to reduce a verbal contract to writing, unaccompanied by elements of estoppel or other circumstances invoking the equitable powers of the court, is such a fraud as will authorize the courts in excepting the contract from the operation of the statute of frauds. The case of Equitable Gas, etc., Co. v. Baltimore, etc., Co., 63 Md. 285, cited by defendants, was a case of an oral contract for the sale of personal property which, according to its terms, was not to be performed within one year. It was intended by the parties that it should be put into writing. The action was by the vendee to obtain an injunction preventing the disposition of the property to others and for specific performance. There were allegations showing the irreparable injury that would be suffered by the plaintiff in view of its action had in reliance on the contract. The court recognized it to be a settled rule "that the equity of part performance to entitle a plaintiff to specific execution of a contract within the statute does not relate to contracts for personal service not to be performed within a year." But they further said that here the parties intended a written contract, and that if such contract was fraudulently withheld, if executed, or, if not, signed, if the execution be fraudulently and without justifiable cause delayed, a court of equity may require its production or enforce proper execution. It is obvious that "the application of the rules as to equitable enforcement must, to a considerable extent, be governed by the circumstances of each case." Browne on Statute of Frauds (5th Ed.) p. 586.

While the question is by no means free from doubt, we believe that it should be held that there were sufficient facts in this case to support a conclusion that the promise here to give such a written agreement as was required by the statute was made under such circumstances that the irrevocable surrender by plaintiff of his position in the police department in full reliance thereon made it, in the eye of equity, a binding contract, the subsequent repudiation of which by defendants would constitute such a manifest fraud as would justify the application of the doctrine of equitable estoppel.[96]

For the purposes of a new trial it may further be properly said that we are entirely satisfied with the opinion filed in this case by the district court of appeal of the third district, written by Justice Hart of that court, so far as the question of measure of damages is concerned.

[96] On estoppel from pleading the statute of frauds in actions on contracts not to be performed within one year, see 134 Am. St. Rep. 172, note.

In Clement v. Rowe, 33 So. Dak. 499 (1914), the defendant agreed with the plaintiff that if the plaintiff would, as plaintiff accordingly did, convey certain land to a certain corporation in exchange for a stated amount of preferred

We adopt that portion of their opinion as the opinion of this court. * * *

*The judgment and order denying a new trial are reversed.*

stock in the corporation, and if the corporation failed to pay annually a 7 per cent dividend on the stock, which failure occurred, the plaintiff might transfer the stock to the defendant at the expiration of two years and the defendant would pay him the par value of the stock with 7 per cent interest. It was held that the contract was one not to be performed within a year, but it was also held that although the land was conveyed to the corporation and not to the defendant, the plaintiff should recover from the defendant the value of the land conveyed to the corporation. Gates, J., for the court, said (p. 507): "In the present case the defendant himself did not receive the land which was the partial consideration for the invalid promise. * * * But it went to the Medicine Company at the direction of the defendant. So far as the relations between plaintiff and defendant are concerned, the situation was the same as though the land really became the property of the defendant, but by his direction the title was taken in the name of a third person. In such a case the law will presume that the benefit of the transaction inured to the defendant." While the decision technically merely holds that in a code state a *quasi* contract recovery may be had against one who pleads the statute of frauds to the contract but is enriched as the presumed resulting trust *cestui* of the property obtained from plaintiff under the contract, it is believed that recovery should be allowed even if the presumption of a resulting trust for the defendant is rebutted. See George P. Costigan, Jr., Implied in Fact Contracts and Mutual Assent, 33 Harv. L. Rev. 376, 387 n, 392-393. The court in Clement v. Rowe went even farther, for the court added (p. 507):

"If, however, under the pleadings and evidence offered, it should be thought that the contract whereby the farm was traded for the shares of stock was really made between plaintiff and the Medicine Company and that defendant's oral promise to repurchase was the inducement which led the plaintiff to make the trade, the defendant should still be held responsible to plaintiff for the value of the property which plaintiff parted with because of that inducement. While defendant might assert the statute as a defense to the carrying out of the oral contract he could not assert such defense in an action on *quantum valebat* if he had received the farm. Nor should he be permitted, because he did not receive the farm, to assert the statute as against a claim for the recovery of the value of the property at the time of the trade. The plaintiff had irrevocably surrendered the farm relying upon defendant's promise. Defendant must therefore put him back as nearly as possible in *statu quo*. For a discussion of the doctrine of equitable estoppel as applied to this subject we refer to the case of Seymour v. Oelrichs, 156 Cal. 782, and the excellent note by Mr. Freeman in 134 Am. St. Rep. 171."

See also Fabian v. Wasatch Orchard Co., 41 Utah 404 (1912).

In Safe Deposit & Trust Co. v. Diamond Coal & Coke Co., 234 Pa. 100 (1912), the court held that a contract for the sale of land would be reformed on parol evidence but would not be enforced specifically because of the statute of frauds, the whole contract being in contemplation of law reduced to an oral agreement which the legislature has said shall not be enforced. But see Carson v. Davis, 171 Ill. 497 (1898); Olson v. Erickson, 42 Minn. 440 (1890).

On the effect of the statute of frauds upon the power of equity to reform a contract, see L. R. A. 1917 A, 571, note.

## CHAPTER X.

## THE DISCHARGE OF CONTRACTS.[1]

### KING *v.* GILLETT.

(Court of Exchequer, 1840. 7 M. & W. 55.)

To assumpsit for breach of promise of marriage, the defendant pleaded that before breach the plaintiff wholly absolved, exonerated, and discharged the defendant from his promise and the performance of of the same. Special demurrer and joinder in demurrer.

ALDERSON, B.[2] In this case we are of opinion that the plea is good, and that the demurrer must be overruled.

The question before the court was this, whether to an action founded on mutual promises to marry within a reasonable time the defendant could plead that, before any breach of contract on his part, the plaintiff wholly exonerated him from the performance of that contract. And it was contended that the proper plea was, that before breach, the plaintiff and defendant by mutual agreement had rescinded the contract previously made between them. No doubt such a plea would be good, but on looking into the precedents to which we have been referred, we find that the form of the present plea has been adopted and held good in several cases. There are precedents in several of the books of entries [Rast. Entr. 685; Brown's Entr. 67 (fol. edit.); Hern's Pleader, 31], and there are two decided authorities, Holland and Conier's Case, 2 Leon, 214, and Langden v. Stokes, Cro. Car. 383. And we think this latter case explains the matter, and reconciles the present plea with general principles. It seems to have been treated there as a mere question of the form of plea—and so we think it is, for although we are of opinion that this plea is good in point of form, yet we think the defendant will not be able to succeed upon it at Nisi Prius, in case issue be taken upon it, unless he proves a proposition to exonerate on the part of the plaintiff, acceded to by himself; and this in effect will be rescinding of the contract previously made.

We think, therefore, that judgment must be given for the defendant, but the plaintiff should have liberty to amend on payment of costs.

*Leave to amend accordingly.*[3]

1 See Arthur L. Corbin, Discharge of Contracts, 22 Yale L. J. 513.

2 The statement of facts is omitted.

3 "It is apparently thought by some writers that the decision [in King v. Gillett] in some way discredits the early authorities [cited in it], but this

## NATHANIEL S. COLLYER & CO. *v.* LEWMAN MOULTON AND ANOTHER.

(Supreme Court of Rhode Island, 1868. 9 R. I. 90, 98 Am. Dec. 370.)

POTTER, J.[4] The plaintiffs made a verbal contract with the defendants, then partners, to build a machine. The work was charged as fast as done, and the materials when furnished. After a small part of the work had been done, the firm was dissolved; and the defendant Moulton, the same day, gave notice of it to the plaintiffs; and told them he could be no longer responsible for the machine. The defendant Moulton claims that the plaintiffs released him and agreed to look to the other partner for payment; but this the plaintiffs deny. The plaintiffs went on and completed the machine, and then sued Bromley alone for his claim, but discontinued the suit, and now sue both the former partners, the writ having been served on Moulton only.

Where two parties contract, one to do a particular piece of work and the other to pay for it, the latter may, at any time, countermand the completion of it, and in such case the former cannot go on and complete the work and claim the whole price, but will be entitled only to pay for his part performance, and to be compensated for his loss on the remainder of the contract. Clark v. Marsiglia, 1 Denio, 317; Durkee v. Mott, 8 Barb. S. C. 423; Hosmer v. Wilson, 7 Michigan, 294.

In the present case the two defendants, although the partnership was dissolved, still remained joint contractors so far as the plaintiff was concerned; and we think that either of them had a right to countermand the order before completion, and then the joint contractors would have remained liable as before stated. But the defendant Moulton claims that he was verbally released by the plaintiffs, and that the plaintiffs agreed to look to the other defendant, Bromley, alone for their pay.

There is some apparent inconsistency in the language used in the

seems a mistake. The court simply said that mutual assent was necessary to make out the defense, but this is not saying that consideration was necessary. * * * The English law seems still to be that [in the case of a unilateral contract] exoneration before breach is good without consideration." 3 Williston on Contracts, § 1830, pp. 3151-3152. See Hathaway v. Lynn, 75 Wis. 186 (1889), supporting the English view. But see Metcalf v. Kent, *post*, p. 1402, *contra*.

"The doctrine of exoneration or discharge of a contract before breach without consideration never applied to sealed instruments." 3 Williston on Contracts, § 1836, p. 3159. Under the Uniform Negotiable Instruments Law it applies to negotiable instruments providing the exoneration is in writing. As to these instruments it applies after breach, *i. e.*, maturity, as well as before.

On consideration for new agreements abrogating, altering, supplementing or supplanting prior contracts, see L. R. A. 1915 B, 1, note.

[4] The statement of facts is omitted.

reports and text writers, as to the manner in which a simple contract may be annulled. We think the rule is, that so long and so far as the contract remains executory and before breach, it may be annulled by agreement of all parties; but that when it has been broken and a right of action has accrued, the debt or damages can only be released for a consideration; and even so far as it remains executory it may be said that the agreement to annul on one side may be taken as the consideration for the agreement to annul on the other side. Dane 5, 112; Johnson v. Reed, 9 Mass. 84; Cummings v. Arnold, 3 Met. 486-489; Richardson v. Hooper, 13 Pick. 446; Blood v. Enos, 12 Vermont, 625.

So far, therefore, as the contract in the present case remained unfinished on February 10th, 1865, when the notice was given and the alleged waiver was made, we may consider, either that the contract was annulled or waived by consent, in which case (the machine, so far as completed, being tendered or delivered) the plaintiff could claim only for work and materials to that date without further damages,—or that the work was countermanded by the defendant Moulton, without the assent of the plaintiffs, in which case the defendant would be liable for the part performed and for loss on the part unperformed.

We consider the present case to fall under the first head, the notice to, and declarations and conduct of the plaintiffs amounting to a waiver of the fulfilment of the contract as first made—that is, to a release of the defendant Moulton for the part still unperformed.

But the claim for payment for the part performed, stands, as we have seen, on a different ground. Was there any agreement to release Moulton from liability for this—that is, the part performed; and if so, was there any agreement to take the other partner's individual promise in lieu of the promise of the firm, or anything which would amount to a consideration for the release of the firm?

If, by mutual arrangement between the plaintiff Collyer and the two defendants, Moulton had been released from his liability for the work already done, and a new promise made by Bromley, the other defendant, to pay for it, this would have been a valid release for a valuable consideration, one debt would have been substituted for the other. Thompson v. Percival, 5 B. & A. 925.[5]

But we cannot find sufficient evidence of any promise on the part of the other partner, Bromley, to assume the liability; and if there was none, then the release of liability for the work already done was

[5] See Lyth v. Ault, 7 Exch. 669 (1852); Ludington v. Bell, 77 N. Y. 138 (1879); Frye & Bruhn v. Phillips, 46 Wash. 190 (1907). But where the joint debtors are not partners and so the detriment of giving up the shield of payment in bankruptcy of partnership debts out of individual assets only after partnership assets are exhausted does not exist, and where, as normally is the case today, the joint debtors are severally as well as jointly liable, consideration may be lacking. See 1 Williston on Contracts, § 123.

without consideration, as it is not claimed that there was any other consideration.

We cannot find, however, any count in the declaration upon which, upon this view of the case, we can allow for anything except labor done before February 10th, the day of the giving of the notice.

*Judgment for plaintiffs for amount so found due.*

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## REDDING *v.* VOGT ET AL.

(Supreme Court of North Carolina, 1906. 140 N. C. 562, 53 S. E. 337, 6 Ann. Cas. 312.)

Special proceeding by Lillian Redding against Lucy R. Vogt and others for dower. From a judgment in favor of plaintiff, defendants appeal. Reversed.

WALKER, J.† The plaintiff seeks to have dower allotted in the lands described in her petition, and her right to the relief depends upon the construction and legal effect of the contracts and deeds mentioned in the statement of the case. * * * "To give a right of dower, the estate of the husband must confer a right to the immediate freehold. This is an essential requisite at the common law. Dower is not allowed in estates in reversion or remainder expectant upon an estate of freehold; and hence, if the estate of the husband be subject to an outstanding freehold estate, which remains undetermined during the coverture, no right of dower attaches." Houston v. Smith, 88 N. C. 312; 1 Scribner on Dower, 217.

Under this settled rule of the law the defendants contended that the plaintiff is not entitled to dower in the lands in question, because there is an outstanding freehold estate in Mrs. Redding by virtue of the deed of J. P. Redding and wife to Lizzie C. Redding, dated June 5, 1899, the contract between Lizzie C. Redding and S. A. Redding, dated June 5, 1899, and the deed of E. A. Brown and wife (formerly Lizzie C. Redding) to S. A. Redding, dater Nov. 18, 1901. The plaintiff, on the other hand insists that she is entitled to dower for either of two reasons: First, because by the agreement between Lizzie C. Redding and S. A. Redding dated October 3, 1898, the latter acquired an equitable estate in fee in so much of the land as is described in that agreement and that as, under our statute, a widow is now dowable in an equitable estate, contrary to the rule of the common law (Fortune v. Watkins, 94 N. C. 314), she is entitled to have her dower set apart in those lands; and, second, because the reservation of the life estate in the agreement of June 5, 1899, and the deed of Nov. 18, 1901, is to persons who were strangers to the contract and deed, and therefore void. In this conflict of views,

† The statement of facts and parts of the opinion are omitted.

as to the law of the case, our opinion is with the defendants. If the contract of October 3, 1898, had not been followed by that of June 5, 1899, and by the deed of the same date made in execution of it, there would be force in the plaintiff's contention, but it is apparent to us that the latter contract and deed were made as substitutes for the contract of October 3, 1898, and that, by the transactions between them, the parties clearly intended to rescind that contract and to give full force and effect to the latter contract and the deed made under it. That parties may rescind a contract, either expressly or by substituting another in its place which is so inconsistent with it that the two cannot well coexist and operate at one and the same time, cannot be doubted. Rights acquired under a contract may be abandoned or relinquished, either by agreement or by conduct clearly indicating such a purpose. Falls v. Carpenter, 21 N. C. 237, 28 Am. Dec. 592; Faw v. Whittington, 72 N. C. 321; Miller v. Pierce, 104 N. C. 389, 10 S. E. 554; Holden v. Purefoy, 108 N. C. 163, 12 S. E. 848; Taylor v. Taylor, 112 N. C. 27, 16 S. E. 924; Gorrell v. Alspaugh, 120 N. C. 368, 27 S. E. 85; May v. Getty (at the last term) 53 S. E. 75; Lipschutz v. Weatherly (at this term) 53 S. E. 132. A contract may be discharged by the substitution of a new contract, and this results (1) where a new contract is expressly substituted for the old one; (2) where a new contract is inconsistent with the old one; (3) where new terms are agreed upon, in which case a new contract is formed, consisting of the new terms and of the terms of the old contract which are consistent with them; and (4) where a new party is substituted for one of the original parties by agreement of all three. Clark on Contracts, p. 610, § 260. The authorities are numerous to the same effect. It was held in Cocheco Bank v. Perry, 52 Me. 293, that where parties make two contracts upon the same subject-matter, which cannot be reconciled without rejecting some of the material stipulations in one or the other or both, the court will not enter upon this work of expurgation, but will endeavor to give effect to the one contract or the other, as the intention of the parties shall seem to require. Substantially the same ruling was made in Stow v. Russell, 36 Ill. 18, and Chrisman v. Hodges, 75 Mo. 413. The principle is thus stated in Harrison v. Polar Star Lodge, 116 Ill. 287, 5 N. E. 546: "When the parties to a contract come to a fresh agreement of such a kind that the two cannot stand together, the effect of the second agreement is to rescind the first. This is one form of *novatio* in the Roman law. When an agreement is thus rescinded by novation, the contract in existence prior to the novation loses its individuality, and becomes merged in the new contract. Any circumstances or course of conduct from whence can be clearly deduced an agreement to put an end to the original contract will amount to a rescission of it." Fry on Specific Performance (3d Am. Ed.) 998, 1009 *et seq.* In Patmore v. Colburn, 1 C. M. & R. (Exch.) 65, Lord Lyndhurst said that, when the provisions of two contracts are incon-

sistent and the second cannot be operative if the first is still in existence, the first is no longer a subsisting agreement. Hart v. Lauman, 29 Barb. (N. Y.) 410; Paul v. Meservey, 58 Me. 419. Many other decisions of the same import might be cited. If upon the facts of our case, therefore, we can gather that the parties intended the two contracts not to coexist, and the second was designed to take the place of the first, the former must be taken to embody the entire and final agreement of the parties. Mather v. Butler County, 28 Iowa, 253. * * *

It was impossible for the first and second transactions to stand together. By the first contract S. A. Redding acquired absolutely the entire interest and estate in one-half of the land, according to the very terms of the instrument, and by the second he was given only a remainder in one-half of that and other land; that is, a one-half interest therein subject to the life estate. His acceptance of the last contract is conclusively established by his taking the deed from his sister and thereupon entering into possession of the land and conveying a part of it to another. The first and second contracts could not, therefore, stand together, because the two estates conveyed are radically different; one being the entire fee, and the other only a remainder. If he claimed under the first contract, he must necessarily have rejected the second, and, if he claimed under the second contract and the deed made in fulfillment of it, he must just as surely have rejected the first contract. He acquired additional land under the second contract and the deed which he could not in good conscience keep and at the same time repudiate the provisions of the deed by virtue of which he asserted his right to it. If he had claimed under the first contract, the life estate excepted in the second contract and the deed to him would necessarily fail. When he claimed under the second contract and the deed, he thereby as fully recognized the existence of the life estate as if he had expressly done so by an instrument in due form of law, and those claiming under him will not be allowed to assert a right or title totally inconsistent with his deliberate choice so clearly manifested and in contravention of the just rights of others who must be held to have acquired interests, by virtue of his election which induced them to part with their land upon the faith of the rectitude of his conduct. The last contract and the deed made to S. A. Redding must be regarded as a substitute for the first contract and as a rescission of it; the two transactions being wholly irreconcilable. * * *

It follows that the plaintiff cannot have dower for want of the seisin of her husband; for the right of dower, as we have said, can attach only when the husband has the immediate estate of freehold, as well as the inheritance, and here the tenant for life was living at the death of the husband and at no time during the coverture could the latter have had the requisite seisin. Weir v. Humphries, 39 N. C. 264. * * *

Upon the consideration of the whole case, we conclude that S. A. Redding had no equitable estate in the land under the first contract,

at the time of his death, and no seisin sufficient to support the plaintiff's claim of dower. * * *

*New trial.*[6]

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## ADAMS *v.* BATTLE ET AL.

(Supreme Court of North Carolina, 1899. 125 N. C. 152, 34 S. E. 245.)

Action by Len H. Adams against R. H. Battle and J. N. Holding, executors of W. H. Pace, deceased. There was a judgment for plaintiff, and defendants appeal. Affirmed.

FAIRCLOTH, C. J.[7] On January 22, 1890, the plaintiff, by deed, conveyed a large amount of real and personal property to W. H. Pace, in trust to pay plaintiff's debts in the manner described, with power to collect, sell the property at private or public sale, and to do the usual duties of a trustee in such cases. Pace died in April, 1893, and this action was brought October 16, 1896; and it is agreed that the trust was closed in the lifetime of the trustee, except as to the matter controverted in this action. The deed provided that the trustee might retain 4 per cent. commissions on receipts and disbursements; that is, 8 per cent. on the total amount, which was $2,461.01. The defendants are the personal representatives of the trustee. The plaintiff was allowed to prove by parol that, some days after the deed was executed, Pace agreed with plaintiff that, if there was no litigation in the courts respecting the trust, he would charge only 2½ per cent. on receipts and disbursements. He also proved that there was no suit brought, and there is no evidence of any unusual trouble in executing the trust.

[6] "A subsequent contract completely covering the same subject-matter, and made by the same parties, as an earlier agreement, but containing terms inconsistent with the former, so that the two cannot stand together, rescinds, supersedes and is substituted for the earlier contract, and becomes the only agreement of the parties on the subject." Sanborn, J., in Housekeeper Pub. Co. v. Swift, 97 Fed. 290, 294 (1899).

In Taylor v. Hilary, 1 Cr. M. & R. 741 (1835), before breach of a contract of guarantee of the payment of goods to be supplied to one Holt, the plaintiff and defendant agreed to change the time of payment for the goods, and, the defendant having set up the new agreement as a defense to an action on the original contract, the court said:

"Before the breach of the first agreement a new agreement is entered into, varying the contract in an essential part, the time of payment. The latter, then, is a substituted contract, and is an answer to an action upon the former. The plea is not a plea of accord and satisfaction, and does not therefore require an averment of performance."

On rescission of contract by substitution of new contract between same parties, see 6 Ann. Cas. 315, note.

[7] Part of the opinion and all of the dissenting opinion of Furches, J., are omitted.

The defendants excepted to the admission of this parol evidence, and to the charge of the court in respect thereto. The verdict was for the plaintiff.

The defendants' contention is that the evidence is incompetent to prove that the parties agreed subsequently that the commissions should be less than specified in the deed, unless done in as solemn a manner as the deed was made; that is, under seal, under the maxim, "*Eo ligamine quo ligatur.*" It seems that no verbal agreement contemporaneous with the execution of an instrument under seal will be heard to contradict or vary its terms. The effect of a subsequent agreement by the same parties has been much discussed by different courts, and in some of the states the matter is put to rest by legislation. But we are informed by counsel that the question has not yet been decided in our state, and we find no such decision.

It was an old, ironclad maxim of the common law that an obligor would only be released by an instrument of as high dignity as that by which he was bound; that is, being obligated by a seal, he could be released only by an instrument under seal. Technically this is the rule of modern times unless changed by statute, but practically it is seldom enforced.[8] To this rule the exceptions were and are so numerous that seldom can the rule be applied. In an action on the bond or other sealed instrument, the debtor pleads and proves the actual receipt of the money by the obligee. No court could hesitate to hold this to be a release and discharge of the bond. Suppose the debt secured by a mortgage; a release and discharge need not be under seal. Suppose the principal of a note under seal pays the debt, and the sureties are sued on the same; would any court require them to show that their principal had been discharged under seal? Suppose, again, that a landlord leases land for a term of years under seal, and during the

[8] "Where a contract under seal is altered by parol, it all becomes parol. Vicary v. Moore, 2 Watts 451. But a mere additional parol agreement, not changing or modifying the one under seal, will not have this effect. Ellmaker v. The Franklin Fire Ins. Co., 6 W. & Ser. 439. Nor will a stipulation by parol releasing or waiving performance of part of the covenant. McComb v. McKennan, 2 W. & Ser. 217. 'The test of collision,' said Chief Justice Gibson in Ellmaker v. The Insurance Co., 'was the capacity of the two contracts to be executed together. Where that can be done, the one is not substituted for the other, and where there is in fact substitution it operates as abandonment, the specialty being relinquished, except as matter of reference, for the terms of the parol contract which has supplanted it.'" Knox, J., in Lawall v. Rader, 24 Pa. St. 283, 285 (1855).

"Verbal or written, or in part verbal and in part written, a contract not attested by seal is only parol, but the written part, being the better evidence, excludes spoken words contradicting the written part or contrary to it." Jenks, J., in Schwartzman v. Pines Rubber Co., 179 N. Y. Supp. 284, 286 (1919).

On subsequent parol agreement to vary a writing, see 56 Am. St. Rep. 659, note.

term the premises are greatly damaged without any fault of the lessee, or that they have greatly depreciated in value, or have become partially unfit for the purpose intended, and the landlord, conscious of these and similar facts, agrees verbally with the lessee that for the balance of the term he will take less rent than is stipulated in the deed; would not the lessee be protected by such agreement? If proof of payment will discharge, why should not an agreement to discharge have the same effect between the same original parties?

It seems difficult to find a case where the parties, bound to each other by an instrument under seal, will not be discharged by parol proof of facts, if they are sufficient in themselves to constitute a discharge. In such matters the defenses are performance *in pais*, and are probably of more value to business men than the dignity of being sheltered by a seal. The chief reasons for the sacredness of the seal have ceased since statutes and courts of equity have been liberally removing the hard places of the common law. The dignity of the seal is due more to the original form of the instrument than to the real interest and intention of the parties.

Whether the trustee intended to retain 8 per cent. commissions we are not informed, as he had recently before his death closed the other trust matters; nor is this very material now. He was a practicing attorney, and understood technicalities of the law, and we must assume that when he made the parol agreement he did so in good faith. We are led to the conclusion that the evidence was admissible, and that the charge of the court was not erroneous. The result seems to be full justice, without the infringment of any sound principle of law. * * *

*Affirmed.*[9]

[9] In jurisdictions where, by statute, law and equity are administered in one action, the allowance of equitable defenses in actions at law has in general resulted in the disappearance of the old rule that a contract under seal cannot be varied or discharged by a parol agreement.

"The rule that a sealed contract cannot be varied by a subsequent parol agreement is of great antiquity, the maxim on which it rests, *unumquodque dissolvitur eodem modo quo ligatur*, being one of the most ancient in our law. * * * But in this country it has become a well settled exception to the rule that a sealed contract may be modified by a subsequent parol agreement, if the latter has been executed, or has been so acted on that the enforcing of the original contract would be inequitable." Young, J., in Stees v. Leonard, 20 Minn. 494, 508-509 (1874).

"It is a necessary consequence of our changed system of procedure that whatever formerly would have constituted a good ground in equity for restraining the enforcement of a covenant, or decreeing its discharge, will now constitute a good equitable defence to an action on the covenant itself. It was one of the subtle distinctions of the common law as to the discharge of covenants by matter *in pais*, that although a specialty before breach could not be discharged by a parol agreement, although founded on a good consideration, nor even by an accord and satisfaction, yet after breach the damages, if unliquidated, could be discharged by an executed parol agreement, because,

## THACKERAY *v.* KNIGHT ET AL.

**(Supreme Court of Utah, 1920. 192 Pac. 263.)**

Suit by George Thackeray against Elizabeth A. Knight and others. From a judgment and decree for defendants, plaintiff appeals. Affirmed.

CORFMAN, C. J.[10] Plaintiff brought suit against the defendants in the district court of Morgan county, Utah, for the specific performance of a written agreement entered into by defendants Elizabeth Ann Knight, Mary Jane Wickle, and Agnes Irene Adkins with the plaintiff for the conveyance of real estate and water stock which the said defendants had subsequently thereto contracted to convey to the defendant Gibson A. Condie. * * *

It appears beyond dispute that by the terms of the contract between the parties the plaintiff was entitled to a conveyance of the property by a warranty deed. That was to impliedly say a title free and clear of all incumbrance. It is an admitted fact that the property was incumbered by a pipe line owned or claimed by John E. Condie, a third party. The defendants failed to have the pipe line removed from the premises. Thereupon, although there is some conflict in the evidence on this point, the plaintiff asserted he would not take the property, and on at least two occasions, March 20th and April 7th, demanded the money back which he had paid under the contract. The court so finds, and we think the great weight of the testimony justifies this finding.

Acting on the plaintiff's representation that he would not take the property and the demand made for a return of the money, the defendants Knight, Wickle, and Adkins thereupon proceeded to negotiate with, and entered into a contract on April 10th for the sale of the property to Gibson A. Condie for $1,500. That this contract was entered into in good faith by the defendants Knight, Wickle, and Adkins, they believing and relying on the representations of the plaintiff that he would not take the property, and that he wanted his money returned, there can be no doubt from the facts and circumstances as detailed by the record.

as was said, in the latter case the cause of action is founded 'not merely on the deed, but on the deed and the subsequent wrong.' Broom's Legal Maxims, 848, and cases cited. * * * The technical distinction between a satisfaction before or after breach seems to have been disregarded in this state, and a new agreement by parol, followed by actual performance of the substituted agreement, whether made and executed before or after breach, is treated as a good accord and satisfaction of the covenant. Fleming v. Gilbert, 3 John. 530; Lattimore v. Harsen, 14 id. 330; Dearborn v. Cross, 7 Cow. 48; Allen v. Jaquish, Cowen, J., 21 Wend. 633. So, also, a new agreement, although without performance, if based on a good consideration, will be a satisfaction, if accepted as such. Kromer v. Heim, 75 N. Y. 574, and cases cited." Andrews, J., in McCreery v. Day, 119 N. Y. 1, 8-9 (1889).

[10] Part of the opinion is omitted.

Immediately after the contract had been entered into with Gibson A. Condie the said defendant advised the plaintiff that they had raised the necessary funds to return to him his money; that it had been deposited in a Salt Lake City bank, where he could call and get it upon surrender of his contract. Not until after the defendants had thus placed themselves in a position, by reason of their acting on plaintiff's representation that he would not take the property and a demand for the return of his money, did the plaintiff announce his purpose of requiring performance of the contract of sale with him.

As a legal proposition, there can be no doubt but that an executory contract with respect to real property may not be rescinded nor discharged, unless by act or operation of law, where neither party is in default, without some form of written agreement entered into between the contracting parties. Our statute (section 4874), *supra,* is to that effect, and the following cases, cited and relied on by plaintiff, so hold: Barrett v. Durbin, 106 Ark. 332, 153 S. W. 265; Woolen v. Sloan, 94 Wash, 551, 162 Pac. 985; Grunow v. Salter, 118 Mich. 148, 76 N. W. 325; Finner v. McVay, 37 Mont. 306, 96 Pac. 340, 19 L. R. A. (N. S.) 879, 15 Ann. Cas. 1175; Carr v. Williams, 17 Kan. 575; Bennett v. Harrison, 115 Minn. 342, 132 N. W. 309; Brown v. Brown, 194 Mich. 578, 161 N. W. 823; Cutwright v. Savings & Inv. Co., 33 Utah, 493, 94 Pac. 984, 14 Ann. Cas. 725. But where there is a breach or abandonment of a contract by either party, the rule as held by the great weight of authority is otherwise. There can be no question but that the defendants had defaulted under their contract in failing to remove the incumbrance of a pipe line upon the real property. The plaintiff had a right to demand its removal because the defendants had contracted to transfer to him the property unincumbered and without defect, when they agreed to convey by warranty deed. The defendants being in default in that regard, the plaintiff had a legal right to rescind the contract without the consent of the defendants in writing or otherwise. 24 Am. & Eng. Enc. (2d Ed.) 643; 39 Cyc. 1408, 1404; 2 Black on Rescission, § 560; 13 C. J. 601, § 624; Pool v. Motter, 185 Pac. 715; Obrecht v. Neilson Land & Water Co., 44 Utah, 270, 140 Pac. 117.

We cannot conceive of a more effective way for a party to rescind a contract than that used by plaintiff in the present instance—asserting that he did not intend to take the property and demanding a return of his money. Then, again, under the facts and circumstances, there are equitable principles involved that we think estop the plaintiff from insisting on a specific performance of the contract now under consideration.

As pointed out, the defendants, Knight, Wickle, and Adkins, in contracting with and by accepting the defendant Condie's money, placed themselves in a position whereby they are now unable to perform their contract with the plaintiff. This was done without knowledge on the part of the defendant Condie, and by reason of the plaintiff leading

them to believe that he would not take the property and by making a demand for a return of his money. As a matter of equity one party may not induce another by his representations and demands to act to his prejudice, and then complain of the other's conduct, when he has thus performed in good faith and with good intentions.

The law applicable to the facts and circumstances of this case was quoted with approval in the opinion of Mr. Justice Frick in Cutwright v. Savings & Inv. Co., *supra,* from 2 Warvelle on Vendors (2d Ed.), which reads:

"It has been held in some of the earlier cases that an agreement to rescind is as much an agreement concerning land as the original contract, and hence should be in writing; but all the later cases, both in England and the United States, are unanimous in affirming that a contract in writing, and by law required to be in writing, may in equity be rescinded by parol, and this even though the contract may have been under seal. Such rescission may be effected, not only by an express agreement, but by any course of conduct clearly indicating a mutual assent to the termination or abandonment of the contract. It may consist either of words or acts, and all the circumstances attending may be shown to prove intention; but if evidenced by acts alone they must be such as leave no doubt as to such intention."

For the reasons stated, we are of the opinion that the conduct of the plaintiff was such as a matter of law to amount to a rescission of the contract sued upon. The defendants Knight, Wickle, and Adkins in good faith acted upon and treated plaintiff's conduct as a rescission, and thereupon placed themselves in a position in which they were unable to perform. The defendant Condie entered into his contract with the defendants, and paid his money to them also without knowledge that the plaintiff would demand performance of his contract, all resulting from the acts of the plaintiff in declaring that he would not take the property, and by demanding a return of his money. Under these circumstances the trial court was, in our opinion, fully justified in withholding from the plaintiff a decree of specific performance.

It is therefore ordered that the judgment and decree of the district court be affirmed, with costs to the defendants.

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## BLAKE'S CASE.

**(Court of King's Bench, 1605. 6 Coke, 43 b.)**

Eden brought a writ of covenant against Blake, assignee of Price, and the breach was for not repairing of the house; the defendant pleaded an accord between him and the plaintiff, and execution thereof

in *satisfactione and exoneratione decasûs reparationûm predict'*,[11] upon which the plaintiff demurred. * * *

But it was resolved [12] by the whole court that the defendant's plea was good in the case at bar; for there is a difference, when a duty accrues by the deed in certainty, *tempore confectionis scripti*, as by covenant, bill, or bond, to pay a sum of money, there this certain duty takes its essence and operation originally and solely by the writing; and therefore it ought to be avoided by a matter of as high a nature, although the duty be merely in the personalty; but when no certain duty accrues by the deed, but a wrong or default subsequent, together with the deed, gives an action to recover damages which are only in the personalty for such wrong or default, accord with satisfaction is a good plea; as in the case at bar, the covenant doth not give the plaintiff at the time of the making of it any cause of action, but the wrong or default after in not repairing of the house, together with the deed, gives an action to recover damages for default of reparations. And forasmuch as the end of the action is but to have amends and damages in the personalty for this wrong, therefore amends and satisfaction given the plaintiff is a good plea. For the action is not merely grounded on the deed, but also on the deed and the wrong subsequent, which wrong is the cause of the action, and for which damages shall be recovered. * * *

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## ELIZABETH CASE *v.* JAMES BARBER.

(Court of King's Bench, 1681. Thomas Raymond, 450.)

The plaintiff declares in an *indebitatus assumpsit* for £20 for meat, drink, washing, and lodging for the defendant's wife, provided for her

[11] "Accord is an agreement between two at the least, to satisfie an offence that the one hath made to the other, when a man hath done a trespasse or such like unto another, for the which hee hath agreed with him to satisfie and content him with some recompence, which if it bee executed and performed, then because that this recompence is a full satisfaction for the offence, it shall be a good barre in the law, if the other after the accord performed, should sue againe any action for the same trespasse.

"Note, that the first is properly called an accord, the other a contract." Les Termes De La Ley (1629 Ed.).

Professor Ames has shown that accord in that sense, *i. e.*, accord and satisfaction of a tort, has existed "from time immemorial." Ames, Lectures on Legal History, pp. 110-111, citing a Year Book case as early as 1273-1274. As it existed long before bilateral contracts were recognized and enforced, accord was used in the sense of an offer, sealed or unsealed, to give or receive the designated satisfaction. Today the ordinary accord consists of mutual promises, and the unsealed and therefore revocable offer as to satisfaction, which is like the accord of days before bilateral contracts were recognized and enforced, is no longer deemed worthy of being called an accord. See 3 Williston on Contracts, § 1838. As to a sealed offer, however, see Young v. Jones, reported *post*, p. 1403 and note.

[12] Part of the report is omitted.

at the request of the defendant, and lays it two other ways. The defendant pleads that after making the said promise, etc., and before for exhibiting the said bill, viz., such a day, it was agreed between the plaintiff and the defendant, and one Jacob Barber his son, that the plaintiff should deliver to the defendant divers clothes of the defendant's wife then in her custody, and that the plaintiff should accept the said Jacob, the son, for her debtor for £9, to be paid as soon as the said Jacob should receive his pay due from his Majesty, as lieutenant of the ship called the "Happy Return," in full satisfaction and discharge of the premises in the declaration mentioned; and avers that the plaintiff the same time did deliver to the defendant the said clothes, and that she accepted the said Jacob, the son, her debtor for the said £9, and that the said son agreed to pay the same to the plaintiff accordingly; and that the said Jacob afterwards, and as soon as he received his pay as aforesaid, viz., 27 April, 32 Car. 2, was ready, and offered to pay the said £9, and the plaintiff refused to receive it; and that the said Jacob hath always since been, and still is ready to pay the same, if the said plaintiff will receive it. *Et hoc paratus, etc.* The plaintiff demurs.

And it is alleged by the defendant's counsel that the plea is good; for though in Peyto's case, and formerly, it hath been held that an accord cannot be pleaded unless it appears to be executed, 9 Co. 79 *b*, 3 Cro. 46, pl. 2, yet of late it hath been held that upon mutual promises an action lies, and consequently, there being equal remedy on both sides, an accord may be pleaded without execution as well as an arbitrament, and by the same reason that an arbitrament is a good plea without performance; to which the court agreed,[18] for the reason of the law being changed, the law is thereby changed; and anciently remedy was not given for mutual promises, which now is given; and for this reason, Mich. 18 Car. B. R. Palmer v. Lawson, *ante.* In *indebitatus assumpsit* against an executor upon a contract made by the testator, the defendant pleads judgment in debt upon simple contract against him for the debt of the testator, and after argument resolved a good plea; because, though in debt against an executor upon a simple contract the defendant may demur, yet when he admits the demand, and executors are now liable to pay such debts in action upon the case, the judgment so obtained was pleadable; so Vaughan, Rep. Dee v. Edgcomb.

But in this case at bar judgment was given for the plaintiff for two reasons:

1 Because it doth not appear that there is any consideration that

[18] But in Allen v. Harris (1701), reported *ante*, p. 428, though this case was cited to the court, it was held that an arbitrament differed from an accord, "For, *per curiam*, if arbitrament be pleaded with mutual promises to perform it, though the party has not performed his part who brings the action, yet he shall maintain his action; because arbitrament is like a judgment, and the party may have his remedy upon it. But upon accord no remedy lies."

the son should pay the £9, but only an agreement without any consideration.

2. Admit the agreement would bind, yet now by the statute of frauds and perjuries, 29 Car. 2, this agreement ought to be in writing, or else the plaintiff could have no remedy thereon; and though upon such an agreement the plaintiff need not set forth the agreement to be in writing, yet when the defendant pleads such an agreement in bar, he must plead it so as it may appear to the court that an action will lie upon it, for he shall not take away the plaintiff's present action, and not give him another upon the agreement pleaded.

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## C. R. METCALF *v.* W. M. KENT, APPELLANT.

**(Supreme Court of Iowa, 1898. 104 Iowa 487, 73 N. W. 1037.)**

Action upon a written contract to recover commissions for the sale of real estate. Defendant answered, admitting the execution of the contract, and alleging that it was without consideration, that plaintiff failed to perform his part, and that a full settlement had been made with plaintiff. At the conclusion of the evidence, the court, on a motion of the plaintiff, directed a verdict for plaintiff for the amount claimed, and rendered judgment thereon. Defendant appeals. Affirmed.

GIVEN, J.[14] * * * II. As to the alleged settlement, the defendant testifies as follows: "I met Mr. Metcalf the day I sold the farm after the contract was drawed up; met him in front of the First National Bank in Sac City; and I told him that I had sold my farm. 'Now,' I says, 'you had better come up, and give me up my contract.' He says: 'That don't amount to anything. I don't charge you any commission.' I says, 'All right, I will set up the cigars and call it square.' He says, 'That is all right, sir.' Mr. Tom Riddinough was present at this conversation. Since that time there has been no conversation between Mr. Metcalf and myself concerning this matter; nothing more than I spoke to him here some time ago, after he had sued me, and I asked him what he done it for, was all the conversation we had." Riddinough testifies: "Mr. Kent says to Mr. Metcalf, 'I sold my farm.' Mr. Metcalf says, 'Is that so?' and he says, 'Yes, and I thought I would get my contract.' Mr. Metcalf says: 'That contract is no account. I don't charge anything for it.' Mr. Kent pulled out a cigar, 'If that is all you charge, I will treat you, and call it square.' Mr. Metcalf says, 'That is all right.'" We have seen that under the contract and the fact of the sale to Gregory defendant was liable to plaintiff for the commission named on the $8,400. * * *

[14] Parts of the opinion are omitted.

In this case there was a mutuality, and hence a contract, irrevocable except by consent of the parties. The cases cited by plaintiff's counsel sustain the claim that the release of an existing indebtedness is a new contract, and, to be binding, must be based upon a consideration. It is not seriously contended that the cigar was given or received as a consideration for the claimed release. Surely, such a trifle as that could not have been so intended. In determining whether the court erred in ordering a verdict, we do not consider plaintiff's evidence denying that there was any settlement or release. Accepting the evidence for defendant as true, it fails to show any consideration for the alleged release. Therefore, though made as claimed, it is not binding, and is no bar to plaintiff's right to recover. There was no error in sustaining plaintiff's motion for a verdict, and the judgment is therefore affirmed.[15]

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## YOUNG *v.* JONES.

(Supreme Judicial Court of Maine, 1875. 64 Me. 563, 18 Am. Rep. 279.)

APPLETON, C. J.† This is an action of assumpsit upon an accepted draft. After the plaintiff had made out his case the defendant offered to prove an agreement under the hand and seal of the plaintiff, after the maturity of the draft, to accept a certain percentage less than the amount of the draft, in payment thereof; and to transfer to some third person his debt, on receipt of the same within a certain space of time; that the percentage agreed upon was tendered within the time limited, and that the plaintiff refused to accept the same, and brought this action. [This evidence the trial court held to be inadmissible.]

The material question in whether these facts, if proved, would constitute a defense to this suit.

It is manifest they would not show payment. The plaintiff was to transfer his debt to a person agreed upon. The debt to be assigned must exist. If the debt was to be regarded by the parties as paid or discharged, it would cease to be a debt, and consequently would cease to be transferable. But as it was to be transferred, it is manifest that

[15] In Thurber v. Sprague, 17 R. I. 634 (1892), a father made, as trustee for his minor son, a deposit in a savings bank. After coming of age in 1885, the son demanded the deposit of his father, who said: "I never want to hear of this matter again. I made the change of investment supposing that it was for the best, but it was not. * * * If you are not satisfied and want the $500, take it and go; but if you remain here I do not want to hear of it again." The son, after this, remained at home and was supported by his father until the father's death in 1888. In an action for the five hundred dollars, brought by the son against the father's executors, it was held that the facts showed a complete accord and satisfaction.

† The statement of facts is omitted.

neither its payment nor its discharge was in the contemplation of the parties. It was to be held by the assignee for ulterior purposes.

Neither do the facts offered to be proved show accord and satisfaction. The agreement relied upon was executory. In Hawley v. Foote, 19 Wend. 517, it was held not a good plea of accord and satisfaction that the plaintiff agreed to accept the note of a third person in discharge of the demand in suit, which on being tendered him, he refused to accept. "There has been no satisfaction," observes Bronson, J., "the accord has not been executed and the action is not barred." Russell v. Lytle, 6 Wend. 390; Com. Dig., B. 4. It has been said that a different rule was laid down in Coit v. Houston, 3 Johns. Cas. 247, but the remark is not well founded. The question there was one of evidence, not of pleading. Thompson, J., said, "There were circumstances from which the jury might infer an actual acceptance at the place where the coal lay and that they were there at the risk of the plaintiff." The plea of accord to be good, must show an accord not executory at some future time, but one executed. Cushing v. Wyman, 44 Me. 121. A mere readiness to perform the accord, or tender of performance, will not suffice, and a plea of accord tendered has been held bad on demurrer.[16] A plea of accord and satisfaction must allege not only a clear agreement or accord, but that it was executed by the acceptance of the matter agreed upon in satisfaction. Hearn v. Kiehl, 38 Pa. 147. The facts do not show a consummate payment. Mansure v. Keaton, 46 Me. 346.

The tender, if there was one, cannot avail the defendant as it has not been brought into court.

The remedy of the defendant is upon his contract, if the plaintiff has failed to perform it.[17]

*Exceptions overruled.*[18]

[16] "Mere readiness to perform the accord, or a tender of performance, or even a part performance and a readiness to perform the rest, is not sufficient. Prest v. Cole, 183 Mass. 283, 67 N. E. 246; Hosler v. Hursh et al., 151 Pa. 415, 25 Atl. 52; Russell v. Lytle, 6 Wend. (N. Y.) 388, 22 Am. Dec. 537; Burgess v. Denison Paper Mfg. Co., 79 Me. 266, 9 Atl. 726." Slack, J., in Sargent v. Donahue (Vt.), 110 Atl. 442, 445 (1920).

On failure to perform act required by new agreement as affecting character thereof as accord and satisfaction, see 10 A. L. R. 222, note. On accord and satisfaction, see 100 Am. St. Rep. 390, note. On the accord promise taken as satisfaction, see 6 Ann. Cas. 564, note.

[17] For a similar statement about suing on the contract, see Gleason v. Allen, 27 Vt. 364 (1855). See also Harbor v. Morgan, 4 Ind. 158 (1853).

[18] Professor Williston suggests that "The word 'accord,' to avoid confusion, should be used only to designate a bilateral contract, by which the defendant promises to give the proposed satisfaction, and the plaintiff promises to accept it." 3 Williston on Contracts, § 1838, p. 3160. While that remark was made in successfully combatting the use of the word "accord" to apply to a revocable offer of a creditor to accept, or of a debtor to give, something as

## DAY *v.* McLEA.

(Court of Appeal, 1889. 22 Q. B. D. 610.)

The action was brought to recover damages for breach of contract. The defence was that the plaintiffs had agreed to accept and had accepted £102 18*s.* 6*d.*, in full satisfaction of all demands in respect of the breach. It appeared that, after the breach, the plaintiffs made a claim on the defendants, who thereupon sent them a check for £102 18*s.* 6*d.*, being less than the amount claimed, stating that it was "in full of all demands," and enclosing a receipt in that form for signature by the plaintiffs. The plaintiffs wrote in reply that they took the check on account, and had placed it to the defendants' credit, at the same time enclosing a receipt on account, and asking for a check for the balance of the claim. In answer to this letter the defendants wrote stating that the payment was made in full of all demands, and asking for a receipt in full. It was contended on behalf of the defendants that the keeping of the check by the plaintiffs was in law an accord and satisfaction of the claim. Charles, J., held that there was no accord and satisfaction, and gave judgment for the plaintiffs.

The defendants appealed.

LORD ESHER, M. R. This was an action to recover damages for breach of contract. The plaintiffs were claiming a considerable sum as damages, and, before action brought, the defendants sent them a check for £102 18*s.* 6*d.*, being less than the amount claimed, with a form of receipt, to be signed by the plaintiffs, that this sum was accepted in full satisfaction of the claim. The plaintiffs kept the check but refused to accept it in satisfaction, and sent a receipt on account. It was contended that the keeping of the check so sent was, as a matter of law, an accord and satisfaction of the claim, and that the plaintiffs were bound either to take it in full satisfaction or to return it. The contention, therefore, was that the plaintiffs having kept the check must be taken in law to have accepted it in satisfaction. Upon the other side it was contended that the keeping of the check could only be evidence of accord and satisfaction, and that whether or not it was taken in satisfaction was a question of fact to be determined according to the circumstances of the case. That argument raises the question whether the fact of keeping a check sent in satisfaction of a claim for a larger amount is in law conclusive that there has been an accord and satisfaction. It is said that that inference of law must be

satisfaction, it seems to go too far in excluding unilateral sealed contracts by the creditor to accept something as satisfaction from the debtor where the debtor is not bound to give it, as seemingly was true in the principal case. Such sealed offers, though unilateral rather than bilateral contracts, seem fairly entitled to be called accords.

drawn even though the person receiving the check never intends to take it in satisfaction and says so at the time he receives it. All I can say is that if that is a conclusive inference it would be one contrary to the truth. I object to all such inferences of law. This very question, however, came before this court in [1879 in the unreported case of] Miller v. Davies. In that case the action was upon a solicitor's bill of costs for £50, and there was a plea of accord and satisfaction. Before action the defendant sent the plaintiff a check for £25, with a letter stating that, in order to put an end to the matter, he sent the check for £25, on the terms that the plaintiff would receive it in settlement. The plaintiff kept the check and cashed it, and wrote to the defendant that he declined to accept it in settlement and that he required a check for the balance. The defendant thereupon wrote in reply requesting the plaintiff to return the check if he would not accept it in satisfaction. The jury found that there was no accord and satisfaction. It was contended there as in the present case that the fact of the plaintiff keeping the check was conclusive in law that he had taken it in accord and satisfaction of the claim, inasmuch as it had been sent in satisfaction and the plaintiff was bound either to keep it upon the terms on which it had been sent or to return it. This court, however, held that the fact of keeping the check was not conclusive in law, that the question was one of fact, and that the jury having found that there was no accord and satisfaction the court would not interfere. That case is clearly in point. The question, therefore, whether there has been an accord and satisfaction is one of fact. It was for the judge to decide whether the plaintiffs agreed to take £102 18*s.* 6*d.*, in satisfaction of their claim. The learned judge has found that fact in favor of the plaintiffs, and consequently this appeal must be dismissed.

BOWEN, L. J. I am of the same opinion. It seems to me, as a matter of principle as well as authority, that the question whether there is an accord and satisfaction must be one of fact. If a person sends a sum of money on the terms that it is to be taken, if at all, in satisfaction of a larger claim; and if the money is kept, it is a question of fact as to the terms upon which it is so kept. Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent. If accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim, and to cause him to act upon that view. In either case it is a question of fact. Therefore, upon principle, as well as upon the authority of the case of Miller v. Davies, which has been brought to our notice, the judgment of Charles, J., must be affirmed.

FRY, L. J. I also agree that the case of Miller v. Davies is conclusive upon the point of law.

*Appeal dismissed.*[19]

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## WHITTAKER CHAIN TREAD CO. *v* STANDARD AUTO SUPPLY CO.

(Supreme Judicial Court of Massachusetts, 1913. 216 Mass. 204, 103 N. E. 695, 51 L. R. A. (N. S.) 315, Ann. Cas. 1915 A, 949.)

LORING, J. The plaintiff sold and delivered to the defendant goods to the amount of $80.03. The defendant undertook to return a part of the goods sold, of the value of $50.02. The plaintiff disputed its right to do so and refused to receive the goods from the teamster through whom the defendant undertook to make the return. While matters were in this condition the defendant sent the plaintiff a check for $30.01, which was admittedly due and which the defendant stated was in full settlement of the account. The plaintiff cashed the check and on the following day notified the defendant that it had done so, and demanded payment of $50.02, the balance claimed by it to be due after crediting the amount of the check as a payment on account. The judge found that the defendant had no right to return the goods which it attempted to return, and that the plaintiff was entitled to recover the $50.02 due from them unless it was barred by cashing the check.

Cases in which debtors have undertaken to force a settlement upon their creditors by sending a check in full discharge of a disputed

[19] "We were pressed with Day v. McLea, 22 Q. B. D. 610, where the debtor himself sent a cheque for an amount smaller than that of the debt to the creditor on the terms that it should be in satisfaction of the debt. In that case, there being no consideration for the discharge of the balance of the debt, it was held that the creditor could retain the money, and sue for the balance. The same reasoning does not apply where the money is sent by a stranger, in which case it can only be accepted on the terms upon which it is sent. In the former case the creditor can reply to the debtor, 'you owe me more than this, and, if you sue for a return of this, I shall set off my larger claim against it.' In the latter case, the creditor has no excuse or justification for retaining the stranger's money, unless he complies with the condition on which it was paid. I agree with Fletcher Moulton, L. J., that the plaintiffs cannot be heard to say that they have acted dishonestly when an honest construction can be put upon their conduct by treating their acceptance and retention of the money as being upon the terms on which it was offered." Farwell, L. J., in Hirachand Punamchand v. Temple, [1911] 2 K. B. 330, 342. In that case the father of the debtor sent a draft for less than the amount of the son's debt, offering it in full settlement. The creditor cashed the draft but merely credited it on account. He was denied recovery of the balance of the debt. See Sigler v. Sigler, reported *post*, p. 1412.

account have given rise to more than one question upon which there is a conflict in the authorities.

In Day v. McLea, 22 Q. B. D. 610, it was decided by the Court of Appeal in England that a creditor who cashes a check sent in full settlement is not barred from contending that he did not agree to take it on the terms on which it was sent if at the time he accepts it he says that he takes it on account. The ground of that decision was that to make out the defence of accord and satisfaction the debtor must prove an agreement by the creditor to take the sum paid in settlement of the account, and that if the creditor in taking the check notifies the debtor that he accepts it on account and that he refuses to accept it in full settlement, the debtor as matter of law has not proved an agreement on the part of the creditor to accept the check in satisfaction of the claim, but that that question must be decided by the jury. This doctrine is upheld in 17 Harvard Law Review, at p. 469, and in the case of Goldsmith v. Lichtenberg, 139 Mich. 163. See also in this connection Krauser v. McCurdy, 174 Penn. St. 174; Kistler v. Indianapolis & St. Louis Railroad, 88 Ind. 460.

But the true rule is to the contrary. The true rule is put with accuracy in Nassoiy v. Tomlinson, 148 N. Y. 326, 331, in these words: "The plaintiff could only accept the money as it was offered, which was in satisfaction of his demand. He could not accept the benefit and reject the condition, for if he accepted at all, it was *cum onere*. When he indorsed and collected the check, referred to in the letter asking him to sign the enclosed receipt in full, it was the same, in legal effect, as if he had signed and returned the receipt, because acceptance of the check was a conclusive election to be bound by the condition upon which the check was offered." And to that effect is the weight of authority. Nassoiy v. Tomlinson, 148 N. Y. 326; Washington N. Gas Co. v. Johnson, 123 Penn. St. 576; Partridge Lumber Co. v. Phelps-Burruss Lumber & Coal Co., 91 Neb. 396; Neely v. Thompson, 68 Kan. 193; Hull v. Johnson, 22 R. I. 66; Cunningham v. Standard Construction Co., 134 Ky. 198; Canton Union Coal Co. v. Parlin, 215 Ill. 244; Petit v. Woodlief, 115 N. C. 120; Pollman & Brothers Coal & Sprinkling Co. v. St. Louis, 145 Mo. 651; Potter v. Douglass, 44 Conn. 541; Cooper v. Yazoo & Mississippi Valley Railroad, 82 Miss. 634. Barham v. Kizzia, 100 Ark. 251; Thomas v. Columbia Phonograph Co., 144 Wis. 470; Sparks v. Spaulding Manuf. Co., 158 Iowa, 491. See also in this connection McDaniels v. Bank of Rutland, 29 Vt. 230; Hutton v. Stoddard, 83 Ind. 539; Creighton v. Gregory, 142 Cal. 34.

Indeed the decision in Day v. McLea, *ubi supra*, was explained by the Court of Appeal in the recent case of Hirachand Punamchand v. Temple, [1911] 2 K. B. 330, and made to rest not on the lack of agreement, but on the lack of consideration.

But in cases (like the case at bar) where there is a dispute as to

the amount due under a contract and payment of an amount which he (the debtor) admits to be due (that is to say, as to which there is no dispute) is made by the debtor in discharge of the whole contract, further and other questions arise.

The question whether the creditor who under these circumstances accepts such a payment, protesting that he takes it on account, is or is not barred, is a question upon which again the authorities are in conflict. It was held in the following cases that a creditor in such a case is barred: Nassoiy v. Tomlinson, 148 N. Y. 326; Ostrander v. Scott, 161 Ill. 339; Tanner v. Merrill, 108 Mich. 58;[20] Neely v. Thompson, 68 Kans. 193; Treat v. Price, 48 Neb. 875; Hull v. Johnson, 22 R. I. 66; Cunningham v. Standard Construction Co., 134 Ky. 198; Pollman & Brothers Coal & Sprinkling Co. v. St. Louis, 145 Mo. 651. See also in this connection Chicago, Milwaukee & St. Paul Railway v. Clark, 178 U. S. 353.[21] But in the following cases it was held that he was not barred: Demeules v. Jewel Tea Co., 103 Minn. 150;† Seattle, Renton & Southern Railway v. Seattle-Tacoma Power Co., 63 Wash. 639; Prudential Ins. Co. v. Cottingham, 103 Md. 319. See also in this connection Chrystal v. Gerlach, 25 So. Dak. 128; Robinson v. Leatherbee Tie & Lumber Co., 120 Ga. 901; Watson v. F. D. Calkins Co., 119 Iowa, 150; Weidner v. Standard Life & Accident Ins. Co., 130 Wis. 10; Louisville, N. A. & C. Railway v. Helm & Bruce, 109 Ky. 388.

The decision in most of these cases was made to turn upon the question whether payment of the amount admitted to be due without dispute did not constitute a valid consideration for the discharge of the balance of the debt about which there was a dispute. If that were the only question involved in the case at bar it would be necessary to consider whether Tuttle v. Tuttle, 12 Met. 551, is in conflict with the well settled law of the Commonwealth that a promise to pay one for doing that which he was under a prior legal duty to the promisee to do is not binding for want of a valid consideration. The cases are collected in Parrot v. Mexican Central Railway, 207 Mass. 184, 194.

Tuttle v. Tuttle, *ubi supra*, was a case in which the holder of a note made an express agreement to forego a claim which he had made to interest on the note in consideration of payment of the balance of the principal then unpaid. It was a question whether he was entitled to interest, but there was no question of his right to the prin-

[20] Tanner v. Merrill is reported *ante*, p. 416.

[21] That payment of an admittedly due part of a disputed claim in full settlement, will satisfy the claim if the dispute is in good faith, see also Janci v. Cerny, 287 Ill. 359 (1919). See, further, note 160, page 418, *ante*. But "the payment of an admitted liability is not a payment of or a consideration for an alleged accord and satisfaction of another and independent alleged liability." Chase, J., in Mance v. Hossington, 205 N. Y. 33, 36 (1912).

† Demeules v. Jewel Tea Co. is reported *ante*, p. 418.

cipal. It was held that this agreement was a bar to any claim for interest on the note. There was no discussion in the opinion as to the lack or validity of a consideration. But the point was involved in the decision.

In the case at bar there was no express agreement by the creditor to forego the balance of his claim on receiving payment of the amount admitted without dispute to be due. The only way in which such an agreement can be made out in the case at bar is on the ground that the plaintiff had to take the check sent him on the condition on which it was sent, and that by cashing the check he elected to accept the condition and so took the part admittedly due in full discharge of the whole debt.[22] But while the doctrine of election is sound where

[22] "The check was tendered on condition it, and the notes which accompanied it, should be accepted in satisfaction of the unliquidated disputed claim. The acceptance and retention of the check involved the acceptance of the condition upon which it was offered, and the law will not permit the appellees to escape that conclusion so long as they retain the check. Ostrander v. Scott, *supra*, [161 Ill. 339] exemplifies this doctrine. In that case appellants enclosed by mail to appellees a check, and in an accompanying letter advised them the check was tendered in settlement of the account in full and should be so accepted or returned. Appellees (in that case) replied that they retained the check as a payment in the amount thereof, and demanded remittance of the balance of such account. The doctrine of the case is that the legal effect of the act of retaining the check was an acceptance of the same on the conditions upon which it was tendered. In Fuller v. Kemp, 138 N. Y. 238, which involved the same principle, it was said: 'The tender and the condition could not be dissevered. The one could not be taken and the other rejected. The acceptance of the money involved the acceptance of the condition, and the law will not permit any other inference to be drawn from the transaction. Under such circumstances the assent of the creditor to the terms proposed by the debtor will be implied, and no words of protest can affect the legal quality of this act.' And in McDaniels v. Bank, 29 Vt. 230, the court said: 'When a party makes an offer of a certain sum to settle a claim, when the sum in controversy is open and unliquidated, and he attaches to his offer the condition that the same, if taken at all, must be received in full satisfaction of the claim in dispute, and the party receives the money, he takes it subject to the condition attached to it, and it will operate as an accord and satisfaction. * * * The mere act of receiving the money is an agreement to accept the same on the conditions upon which it was offered.' The doctrine of these cases is applicable here." Boggs, J., in Lapp v. Smith, 183 Ill. 179, 184-185 (1899).

On part payment as satisfaction of a disputed claim, see Ann. Cas. 1915 A, 951, note.

See Wilcox, Ives & Co. v. Rogers, 13 Ga. App. 410, 79 S. E. 219 (1913), where cotton was sent to the holder of a note on condition that if he sold the cotton under certain circumstances, the note must be deemed paid in full, and where a plea of accord and satisfaction to the action on the note, the sale having occurred and the proceeds being less than the amount of the note, was held good on the ground that the defendant "had a right to dictate the conditions upon which it [the cotton] should be received, and the plaintiffs were bound to comply with his terms upon their acceptance of the cotton." See also the machinery case of Walters v. Glendenning, 87 Wis. 250 (1894), to the same effect.

a check is sent in full discharge of a claim no part of which is admitted to be due, it does not obtain where a debtor undertakes to make payment of that which he admits to be due conditioned on its being accepted in discharge of what is in dispute. Such a condition, under those circumstances, is one which the debtor has no right to impose, and for that reason is void. In such a case the creditor is not put to an election to refuse the payment or to take it on the condition on which it is offered. He can take the payment admittedly due free of the void condition which the debtor has sought to impose. Take an example: Suppose the defendant had agreed to deliver to the plaintiff a stipulated quantity of iron for a stipulated price during each month of the year, and after six months the market price of iron was double that stipulated for in the contract. Suppose further that the defendant on the seventh month sent the stipulated amount of iron but on condition that the plaintiff should pay double the stipulated price, can there be any doubt of the plaintiff's right to retain the iron without paying the double price? That is to say, can there be any doubt that the condition which required the plaintiff to pay double the contract price for the instalment sent was void and that the plaintiff under those circumstances is not put to an election but can keep the iron under the contract? There can be no doubt on that question in our opinion; and in our opinion the principle of law governing that case governs the case at bar, where the debtor undertook without right to impose upon a payment of what was admittedly due a void condition that it be received in full discharge of what was in dispute.[83]

[83] In addition, for a condition that the payment is in full satisfaction to be effective, it must be understood by the creditor to be such a condition.

"The defendant claims that the understanding by the creditor of the offer made by the debtor is to be determined by the standard of what a reasonable man would have understood under like circumstances. To a great degree this claim is well founded, but there still remains the duty and obligation to prove, by direct or implied testimony, what the debtor's intention was, and that the creditor, or the ordinarily reasonable man, under the circumstances, should have understood that intention. But understanding the intention of the debtor and acceptance by the creditor so as to constitute accord and satisfaction are not necessarily one and the same thing, as we have seen in cases already cited. True, if the debtor adds to his intention a condition that, if the creditor accepts, he does so in full settlement of the claim, and, fully understanding both the intention and the condition, the creditor does accept, then accord and satisfaction are established as a bar to subsequent suit upon the claim. But the 'proof should be clear and convincing that the creditor did understand the condition on which the tender was made, or that the circumstances under which it was made were such that he was bound to understand it.' Horigan v. Chalmers Motor Co., *supra*, [111 Me. 111, 114]." Philbrook, J., in Bell v. Doyle (Me.), 111 Atl. 513, 514 (1920). See also, Alling v. John V. Lee & Sons (Ark.), 230 S. W. 1 (1921); Le Doux v. Seattle North Pac. Shipbuild'ng Co. (Wash), 195 Pac. 1006 (1921).

It follows that in accepting the check in the case at bar as a payment on account, the plaintiff was within its rights and that it has not agreed to accept it in full settlement of the balance of the account. By the terms of the report judgment is to be entered for the plaintiff in the sum of $50.52, with interest from the twentieth day of October, 1911; and it is so ordered.

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## SIGLER *v.* SIGLER.

**(Supreme Court of Kansas, 1916. 98 Kans. 524, 158 Pac. 864, L. R. A. 1917 A, 725.)**

Action by Ode Sigler against his brother Joseph Sigler on a promissory note. Before the action was brought defendant employed one R. C. Wilson to purchase the note and mortgage for defendant as cheaply as possible. Wilson, concealing from plaintiff that he was acting for the defendant, paid the plaintiff $400, for which plaintiff delivered the note and mortgage to Wilson together with a blank assignment of the mortgage in which later Wilson wrote the name of one Hutchison as assignee so that Hutchison might make a formal release of the mortgage. Plaintiff insisted that the whole transaction amounted in law to nothing more than the payment of $400 on the note, and sued for the balance. Judgment was entered for the defendant, and plaintiff appealed. Affirmed.

PORTER, J.[24] * * * The plaintiff relies upon the rule that an agreement to accept part in satisfaction of the whole of a liquidated demand is invalid because without consideration. Bridge Company v. Murphy, 13 Kan. 35; St. L., Ft. S. & W. R. Co. v. Davis, 35 Kan. 464, 11 Pac. 421. The reason for the rule is that there is no consideration for the release of the remainder of the debt, as the debtor gives no more than he is bound to give and the creditor accepts no more than he is entitled to receive. * * * In a number of states it has been entirely abrogated or modified by statute. Courts generally refuse to apply the rule where the technical reasons for doing so do not exist (Brooks and Another v. White, *supra;* Harper v. Graham, 20 Ohio, 105, 115), and have recognized numerous exceptions to it, for instance, the payment of a part before due, or at a place other than that where the obligor was legally bound to pay, or a payment in property, regardless of its value, or by the debtor in composition with his creditors generally by which they agree to accept less than is due them, is held to create a consideration which is sufficient. The rule quite generally followed is that any additional consideration, however small, will support the

[24] The statement of facts is summarized from the statement in the opinion and parts of the opinion are omitted.

new agreement, provided only it be such that in law it is sufficient to support an ordinary contract and consist of something which the debtor was not legally bound to do or give. Bryant v. Proctor, 53 Ky. (14 B. Mon.) 451. * * * One established exception to the rule is that payment by a third person of a sum less than the amount due, with the understanding that it shall be in full payment, is held to be an accord and satisfaction.

A very thorough discussion of the subject of accord and satisfaction will be found in an elaborate note in 100 Am. St. Rep. 390-456. The author of the note, referring to the technical distinction drawn by the earlier cases, says:

"The strictness of the rule undoubtedly worked many hardships in preventing a creditor, who needed the money, from making an accord and satisfaction with his debtor or in preventing a debtor who might be temporarily embarrassed from settling with his creditor for less than the fixed amount of his debt. Hence the courts, though bound by precedents, from time to time enlarged the exceptions to the rule, so that now the exceptions might almost be said to form the rule itself." Page 430 of 100 Am. St. Rep.

There was great lack of harmony in the earlier decisions on the question whether part payment made by a stranger to the transaction to which it relates could be pleaded as accord and satisfaction. The English and many of the early American cases held that a satisfaction given by a stranger is not good because he is in no respect a privy to the original contract. The leading English cases to that effect are Grymes v. Blofield, 1 Croke's (39 Eliz.) 541, and Edgcombe v. Rodd and Others, 1 Smith, 515, 5 East, 294. The doctrine of Grymes v. Blofield, was followed in the United States by Clow v. Borst, 6 Johns. (N. Y.) 37, and by a number of other courts.

In Leavitt and Lee, Executors of Hans Wilson, Dec'd, v. Morrow, 6 Ohio St. 71, 67 Am. Dec. 334, the doctrine that a satisfaction is no defense if it accrue from a stranger is discussed, and the older cases are criticized. In the opinion it was said:

"But mere precedent alone is not sufficient to settle and establish forever a legal principle. Infallibility is to be conceded to no human tribunal. A legal principle, to be well settled, must be founded on sound reason, and tend to the purposes of justice. * * * Precedents are to be regarded as the great storehouse of experience, not always to be followed, but to be looked to as beacon lights in the progress of judicial investigation, which, although at times they may be liable to conduct us to the paths of error, yet may be important aids in lighting our footsteps in the road to truth. * * * The rule laid down is purely technical; and the reason assigned, that the stranger is not privy to the condition of the obligation, loses all its reality when we consider that the satisfaction must have been accepted by the plaintiff, and assented to or ratified by the defendant. It would seem, therefore,

that a rule which in its tendency is calculated to foster bad faith and defeat the purposes of justice ought not to be adhered to simply on account of its antiquity." Pages 78, 80, of 6 Ohio St., 67 Am. Dec. 334.

The Ohio case was approved in Harvey v. Tama County, 53 Iowa, 228, 233, 5 N. W. 130, and cited in Wellington v. Kelly et al., 84 N. Y. 543, 547, as having materially criticized and limited Grymes v. Blofield, *supra*. In Snyder v. Pharo (C. C.) 25 Fed. 398, it was held that:

"Satisfaction of a debt by the hands of a stranger is good when made by the authority of or subsequently ratified by the defendant; and the fact of pleading it will be sufficient evidence of ratification." Headnote, par. 2.

In Jackson v. Pennsylvania, R. R. Co., 66 N. J. Law, 319, 49 Atl. 730, 55 L. R. A. 87, it was held that an accord between the plaintiff and a third person and satisfaction moving from such third person to the plaintiff, who accepts and retains it, are available as a defense if the defendant has either authorized or ratified the settlement. After a full consideration of the early authorities, English and American, on the question of accord and satisfaction entered into by a third person, it was said in the opinion:

"The tendency of the American decisions is strongly in favor of supporting a satisfaction moving from a third person, when such person either had authority to make it, or the act was followed by ratification. and the article received in satisfaction was retained. * * * The reason of the rule is simple. On the one hand, no party can be deprived of a right by mere payment by a volunteer. On the other hand, since a party is entitled to only one satisfaction, his acknowledgment that he has received it, and his retention of it, operate to extinguish his right." Pages 325, 326 of 66 N. J. Law, page 732 of 49 Atl. [55 L. R. A. 87].

In Crumlish's Adm'r v. Cent. Imp. Co., 38 W. Va. 390, 18 S. E. 456, 23 L. R. A. 120, 45 Am. St. Rep. 872, there is a review of the English cases and the early New York cases, as well as the later American cases, and attention is called to the fact that in Wellington v. Kelly et al., 84 N. Y. 543, the old cases were doubted. In the opinion it was said:

"It seems utterly unjust and repugnant to reason that a creditor accepting payment from a stranger of the third person's debt should be allowed to maintain an action against the debtor pleading and thereby ratifying such payment, on the technical theory that he is a stranger to the contract. The creditor has himself, for this purpose, allowed him to make himself a quasi party, and consents to treat him so, so far as payment is concerned. To regard the debt paid, so far as he is concerned, is but to hold him to the result of his own act. Shall he collect the debt again? In that case can the stranger recover back? What matters it to the creditor who pays? As the Supreme Courts of Wisconsin and Ohio in cases above cited said, this doctrine is against

common sense and justice." Page 396 of 38 W. Va., page 458 of 18 S. E. [45 Am. St. Rep. 872, 23 L. R. A. 120].

In Harrison v. Hicks, 1 Port. (Ala.) 423, 27 Am. Dec. 638, it was said:

"The payment of a debt, although it be made by one who is not a party to the contract, and although the assent of the debtor to such payment does not appear, is still the extinguishment of the demand." Syl. par. 2.

No cases have been cited in the brief which involved facts at all similar to the case at bar. Our own research has resulted in finding but two cases which are at all analogous. In Shaw v. Clark, 6 Vt. 507, 27 Am. Dec. 578, where a judgment debtor furnished the money to a third person to purchase a judgment from the creditor who accepted a less sum than the face of the judgment, it was said in the opinion:

"As the sum paid was really the money of the debtor and paid over by his agent it is the same as if paid by himself." Page 508 of 6 Vt. 27 Am. Dec. 578.

The court held it to be quite obvious that the act of a debtor in furnishing funds to a third person to buy up his debts at a discount is so far fraudulent as to render the sale voidable at the election of the creditor. This case was decided in 1856.

A case to the contrary is Gordon v. Moore, 44 Ark. 349, 51 Am. Rep. 606, where the facts were in some respects similar to those in the present case, and it was held that an agreement by a creditor to accept from a third person, in behalf of the debtor, a smaller sum in satisfaction of the whole is valid and binding and will discharge the debt. In the opinion it was said that the consideration is that the creditor gets, or is assured of getting, what perhaps the debtor might never pay, and that "it cannot alter the nature of the case that the debtor repaid the advance." Page 355 of 44 Ark., 51 Am. Rep. 606. In R. C. L. 182, it is said:

"The modern and better rule is that an accord and satisfaction, made with one who is a stranger to the transaction to which it relates, is good, and will bar an action on the claim involved, if the person against whom the claim was made has either authorized or ratified the settlement."

The author concedes that there are authorities which hold to the contrary supported by some of the earlier American cases and the English authorities, but adds that:

"It requires powers of discrimination looking far beyond the justice of the case to see the reason of this rule. The reason assigned by some of the early adjudications is that the person from whom the accord and satisfaction comes is not privy to the contract giving rise to the debt. This reason might give just cause to the creditor to refuse to receive the satisfaction from a stranger, or third person, not known in the transaction of the parties, even as agent of the debtor, but, when the creditor has actually received and accepted the contribution in sat-

isfaction of the debt, to allow him to maintain an action on the same debt afterward would seem to shock the ordinary sense of justice of every man." Page 182.

In 1 Cyc. 317, it is said:

"But in order that the act of the stranger operate as a satisfaction of the debt or demand it must have been authorized by the debtor or subsequently ratified by him."

Formerly an exception to the rule was always made in a case where a release under seal was given with part payment on the theory that a release under seal implies a consideration. But this exception to the rule finds no room for application in those jurisdictions where, as in this state, the distinction between sealed and unsealed instruments has been abolished. Gen. Stat. 1909, § 1643; 1 C. J. 543.

From the foregoing authorities it seems firmly established that a debtor may authorize and employ a third person as his agent to make a satisfaction of his debt; that where he does so, and the money is advanced by the third party and accepted by the creditor in satisfaction of the debt, it is a good accord and satisfaction. This is so even where the third party makes the payment without the debtor's knowledge, if the latter afterward ratify the action.[25]

Did the concealment by Wilson of the fact that he was acting for the defendant destroy the effect of the payment, or, in other words, must there be knowledge on the part of the creditor that the payment is made on behalf of the debtor before it will constitute an accord and satisfaction? It was held that an accord and satisfaction is:

"The result of an agreement between the parties, and, like all other agreements, must be consummated by a meeting of the minds of the parties, accompanied by a sufficient consideration. If the creditor is to be held to abate his claim against the debtor, it must be shown that he understood that he was doing so when he received the claimed consideration therefor." Harrison v. Henderson, 67 Kan. 194, 200, 72 Pac. 875, 62 L. R. A. 760, 100 Am. St. Rep. 386.

[25] "It may be laid down as incontestible, as a general thing, that where one man is indebted to another and a third person steps in and pays the debt, in the absence of all circumstances tending to show the contrary, the rational inference would be that the act done, being for the debtor's benefit, was done with his consent, or, if without his knowledge at the time, that it would, as a matter of course, be ratified by him afterward. If in such a case the creditor should subsequently bring suit against the debtor, and the debtor should appear in the action and plead the satisfaction in discharge of his liability, I cannot conceive upon what just and rational ground the creditor could be allowed to reply that his debt was not discharged because the satisfaction which he had accepted in discharge of it was without the consent of the defendant. The very fact of the satisfaction being set up in the action by the defendant in discharge of the debt would, of itself, seem sufficient to conclude the plaintiff from denying that it had received the defendant's consent or ratification." Bartley, C. J., in Leavitt v. Morrow, 6 Oh. St. 71, 76-77 (1856).

And in Matheney v. El Dorado, 82 Kan. 720, 109 Pac. 166, 28 L. R. A. (N. S.) 980, it was ruled that:

"To constitute an accord and satisfaction, the agreement that a smaller sum shall be accepted in discharge of a larger one originally claimed must have been entered into by the parties understandingly and with unity of purpose." Syl. par. 1.

But the extent of the doctrine there declared is merely that the smaller sum must not only have been offered, but it must have been accepted with the understanding that it was in full satisfaction of the larger amount claimed. The plaintiff certainly understood that he was accepting the $400 in full satisfaction of all his interest in the note and mortgage. It is difficult to see how his rights were affected in the slightest by his failure to know and understand that Wilson was acting as the agent of the debtor, because, as we have seen, the weight of authority is that a payment of a part by a stranger, who may have acted without the knowledge or consent of the debtor, will, if accepted by the creditor and afterwards ratified by the debtor, constitute a full accord and satisfaction.

Section 126 of the negotiable instruments law (Gen. Stat. 1909, § 5372) enumerates the various ways in which negotiable instruments may be discharged, among which is "(5) when the principal debtor becomes the holder of the instrument at or after maturity in his own right." The phrase "in his own right" has been construed to exclude a case where a maker acquires the instrument in a purely representative capacity. Bank v. Dryden, 91 Kan. 216, 137 Pac. 928. There it was held that the note is not discharged when the maker acquires it as agent for another. Nor is it discharged when the maker becomes the holder, for example, as executor or administrator. See Crawford's Ann. Neg. Inst. Law (Revised Uniform Ed.) p. 195, and cases cited. Did not the debtor in this case become the holder of the instrument after maturity in his own right? Whether we consider the transaction as one in which he furnished the money in the first instance to purchase the note through his agent, Wilson, or as one in which Wilson first purchased it with his own funds and subsequently, upon being reimbursed by defendant, transferred it to him, it would seem to be clear that the maker became the owner in his own right, unless there be some principle of law which forbids a debtor to purchase his own debt. The holder of the note was willing to part with all his interest in it upon payment of $400, and accepted in full consideration for his interest that sum from one whom he believed to be the purchaser and surrendered the note and security. How are his rights as a holder affected in any manner by the subsequent transfer of the note to the maker? Promissory notes, both before and after maturity, are negotiable and transferable, and the exigencies of business and trade demand the extension rather than the restriction of these qualities.

We fail to find any showing of fraud in the transaction by which

plaintiff was induced to transfer the note to Wilson, unless it must be said as a matter of law that the transaction was fraudulent because it amounted to a purchase by the defendant of his own debt, and because the plaintiff supposed he was dealing with Wilson. * * *

It certainly does no violence to the presumed intention of the parties to hold him [plaintiff] to the result of his own act in accepting the $400 with the understanding, at least, that he was parting with all his interest in the note, and that, so far as he was concerned, the sum he received was to be in full payment of his claim. So far as shown by the evidence or findings, the money actually received by the plaintiff was advanced by the third party. Plaintiff, therefore, received something he might not otherwise have received; and applying the rule that any benefit or advantage accruing to the creditor, however slight, is a sufficient consideration to support the agreement, we think it must be held that a consideration was shown in this case. The rule that a payment of a lesser sum, accepted with the understanding that it shall be in full discharge of the entire debt, will not bar an action to recover the balance unless made upon a new and distinct consideration rests rather upon technical considerations than upon common sense, and the strict adherence to it has often resulted in preventing justice and the enforcement of the real intent of the parties. As we have seen, the modern tendency of the courts is to enlarge the exceptions to the rule in order to avoid its harshness, and to enforce settlements, adjustments, and compromises. It is always necessary that the minds of the debtor and creditor meet upon the proposition that the receipt of the lesser sum shall extinguish all right on the part of the creditor to exact further payment. Harrison v. Henderson, 67 Kan. 194, 72 Pac. 875, 62 L. R. A. 760, 100 Am. St. Rep. 386; Matheney v. El Dorado, 82 Kan. 720, 109 Pac. 166, 28 L. R. A. (N. S.) 980. When it is shown that the minds of the parties, whether acting by and for themselves as principals, or through others as agents, have met and agreed upon this point, the courts should reach out and seize upon any possible or probable benefit to the one, or loss or inconvenience to the other, which may be said to constitute a consideration for the new agreement, and thus carry into effect the understanding of the parties. * * *

So far as the record shows, the $400 was advanced by a third party. It was entirely satisfactory to plaintiff until he learned subsequently that Wilson had been acting in behalf of his [plaintiff's] brother, when he attempted to repudiate the transaction, but retained the payment.

Property of all kinds, real and personal, is purchased every day by agents for undisclosed principals. Why may not an individual purchase and become the owner of the evidence of his indebtedness? It is a common practice for the state, for cities and other municipalities, as well as for private corporations, to purchase their own bonded indebtedness. We have been cited to no principle of law, and are not aware of any, which would prevent an individual from going into the market

and purchasing, at a discount or otherwise, securities upon which he is indebted and which he has put in circulation. If he may do this himself, he may accomplish the same thing by an agent who acts without disclosing the agency.

We think * * * that upon the facts plaintiff cannot maintain the action to recover on the note. * * *

*The judgment will be affirmed.*[96]

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## FORD *v.* BEECH.

(Court of Exchequer Chamber, 1848. 11 Q. B. 852.)

PARKE, B.† This is a writ of error brought to reverse a judgment of her Majesty's Court of Queen's Bench. The declaration is in assumpsit, and contained five counts. The first count is upon a promissory note, dated 28th May, 1839, made by the defendant, for the sum of £140 and interest, payable to the plaintiff twelve months after date; the second count is also on a promissory note, made by the defendant, for the sum of £200, payable with interest to the plaintiff, two years after date. It is unnecessary to advert to the other counts in the declaration, or to the pleadings connected with them. Judgment has been given upon them for the defendant; and no question arises in respect of that judgment.

The defendant pleaded to the first count that he did not make the note therein mentioned, and the like plea to the second count. Upon these pleas issues were joined, and verdicts have been found upon them for the plaintiff. The defendant also pleaded, to both the first and second counts, that, after the making of the notes in those counts respectively mentioned, and after the same notes respectively became due, it was agreed between the plaintiff, the defendant, and one Alfred Beech that the said Alfred Beech should and would, at the request of the plaintiff, pay to the plaintiff, in trust for Elizabeth Beech, the sum of £200, for her own sole use and benefit, or the sum of £25 per annum so long as the sum of £200 should remain unpaid, which sum of £25 should be paid quarterly as therein mentioned; and that the rights and causes of action of the plaintiff upon and in respect of the said two several notes should be suspended so long as the said A. B. should continue to pay the said sum of £6 5*s.* every quarter; the payments to commence as therein set forth. The plea proceeds to aver that the said A. B. duly paid the annual sum of £25 quarterly according to the

[96] See Hirachand Punamchand v. Temple, [1911] 2 K. B. 330, quoted from in note 19, *ante*, this chapter.

† The statement of the procedural history of the case and part of the opinion are omitted.

agreement. The plaintiff in his replication to this plea traversed the allegation of the payments alleged to have been made by Alfred Beech of the annual sum of £25; and a verdict was found for the defendant upon the issue joined upon that traverse. And judgment having been given by the Court of Queen's Bench for the defendant upon the verdict so found, the present writ of error has been brought to reverse that judgment, upon the ground that, *non abstante veredicto* upon the matters in that plea, judgment ought to have been given for the plaintiff upon both the first and second counts. The plaintiff has brought his writ of error, praying for a reversal of this judgment.

And, upon the argument before us, the learned counsel for the plaintiff has contended that the plea of the defendant to the first and second counts of the declaration is bad, and sets forth no matter which is in law a bar to his right of recovery upon those counts. Upon the part of the plaintiff, the validity of the agreement mentioned in the plea is not denied; but it has been insisted in the argument before us, that the agreement does not in point of law operate as a suspension of the plaintiff's right of action or power to sue for the recovery of the notes mentioned in the first and second counts in the declaration; and that the plea which sets up the agreement in bar of the present action is bad, and furnishes no answer to the action, although such an agreement may give the defendant a claim to damages by reason of the plaintiff suing in breach of it. The defendant, on the other hand, has contended before us that the legal operation of the agreement is to suspend the plaintiff's right of action so long as A. B. shall continue to make the quarterly payments; and such agreement has therefore been well pleaded in bar. The question for the decision of the court is, therefore, what is the legal effect of the agreement between the parties set forth in the plea,—that is, whether the agreement operates as a legal suspension of the plaintiff's right to sue upon the notes so long as A. B. shall continue to make the quarterly payments, or whether the effect of the agreement is limited to the rendering the plaintiff liable to an action for damages in the event of his suing contrary to its terms.

In adjudicating upon the construction and effect in law of this agreement, the common and universal principle ought to be applied; namely, that it ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. And applying this rule, the question is, what sense and meaning must be given to the word "suspended," used by the parties. It is quite clear that it was not the intention of the parties that the agreement should have the effect, from the moment of its being signed, of utterly and forever and in all events extinguishing the plaintiff's claim and demand upon the notes, and of ever maintaining an action for the recovery; or, in other

words, that it should operate as a release of the money due upon them. This is plain from the words which import that the plaintiff might sue upon the notes when A. B. should cease to make the quarterly payments mentioned in the agreement.

It is a very old and well-established principle of law that the right to bring a personal action, once existing and by act of the party suspended for ever so short a time, is extinguished and discharged, and can never revive. It is said in Platt v. The Sheriffs of London, Plowd. 35, 36: "And if a personal thing is once in suspense, or the person of a man once discharged for a personal thing, it is a discharge forever." And in Lord North v. Butts, 2 Dyer, 139 *b*, 140 *a*, (39), it is said: "A thing personal or suspended, or action personal suspended for an hour, is extinct and gone forever, when it is by the act and consent of the party himself who has the thing suspended." And in Woodward v. Lord Darcy, Plowd. 184, it is said: "For a personal action once suspended by the act or agreement of the party is always extinct; and then if a personal thing cannot be had but by action, if the action is extinguished, the thing itself is extinguished." The principle thus laid down is repeated throughout the text-books of authority, and recognized and applied through a long course of decision. And in Cheetham v. Ward, 1 Bos. & P. 630, 633, it is said by Lord Chief Justice Eyre that the principle is "now acknowledged that where a personal action is once suspended by the voluntary act of the party entitled to it, it is forever gone and discharged."

To construe the agreement, therefore, to operate as a legal suspension or bar of the plaintiff's right to sue until the quarterly payments should cease, would have the effect of precluding him from ever suing at all, and of giving to the agreement the effect of an immediate release of the demand upon the notes, and an extinction of the debt. It follows that giving such meaning and effect to the word "suspended," used in the agreement, would be contrary to the intention of the parties; and it is a well approved rule of law that, where parties have used language which admits of two constructions, the one contrary to the apparent general intent and the other consistent with it, the law assumes the latter to be the true construction. * * *

Applying the rules of construction before referred to to the present case, and in order best to effectuate the intention of the parties, it is necessary to construe the agreement to mean that the plaintiff agreed to forbear his suit until the quarterly payment should cease to be made; and that the effect of such agreement on his part was, not to suspend his right of action in the meantime, but to subject him to an action for damages in the event of his suing contrary to his agreement.

The general doctrine of suspension of personal actions appears to be applicable to cases where persons have, by their own acts, placed themselves in circumstances incompatible with the application of the ordinary legal remedies; the cases generally referred to in the books being

where the party to pay and to receive have become identical, or where the same person was necessary to be joined at once both as plaintiff and defendant, which by law cannot be; such as a creditor making his debtor his executor, or debtor making his creditor executor, or debtor and creditor marrying, or similar cases of incapacity to sue, as to which the authorities are numerous. Cee Co. Litt. 264 b, also Butler's note, ib. 209; Woodward v. Lord Darcy, Plowd. 184; Sir. J. Nedham's case, 8 Rep. 135 *a;* Dorchester v. Webb, Cro. Car. 372; Wankford v. Wankford, 1 Salk. 299; Freakley v. Fox, 9 B. & C. 130; 2 Williams on Executors, 1124 (4th Ed.).

The only case in which a covenant or promise not to sue is held to be pleadable as a bar, or to operate as a suspension, and by consequence a release or extinguishment of the right of action, is where the covenant or promise not to sue is general, not to sue at any time. In such cases, in order to avoid circuity of action, the covenants may be pleaded in bar as a release (note (1) to Fowell v. Forrest, 2 Wms. Saund. 47 *gg*), for the reason assigned that the damages to be recovered in an action brought for suing contrary to the covenant would be equal to the debt (Smith v. Mapleback, 1 T. R. 441, 446) or sum to be recovered in the action agreed to be forborne. Accordingly, in Deux v. Jefferies, Cro. Eliz. 352, in debt on obligation, the defendant pleads that the plaintiff covenanted that he would not sue before Michaelmas; it was resolved, upon demurrer, for the plaintiff, for that it was only a covenant not to sue, and should not enure as a release, nor could be pleaded in bar, but the party was put to his writ of covenant, if sued before the time. "But if it had been a covenant that he would not sue it at all, there peradventure it might enure as a release, and to be pleaded in bar, but not here; for it never was the intent of the parties to make it a release." And there are other authorities to the like effect. The agreement in the present case, though not under seal, being founded upon a good consideration, may be argued to be equivalent in effect to a covenant, but cannot have a greater effect; and, in the modern case of Thimbleby v. Barron, 3 M. & W. 210, it was held that a covenant not to sue for a limited time for a simple contract debt could not be pleaded in bar to an action for such debt. In that case the plaintiff had covenanted that he would not before the expiration of ten years demand or compel payment of certain sums of money, nor would take any means or proceedings for obtaining possession or receipt of the same. Lord Abinger, C. B., said: "The breach of the agreement to forbear suing renders the party liable in damages, but it is not pleadable in bar;" and Parke, B., said: "The books are full of authorities" against the defendant, and referred to Ayloffe v. Scrimpshire, Carth. 63 s. c. 1 Show. 46: judgment for plaintiff. In 1 Roll, Abr. 939, tit. Extinguishment (L), pl. 2, it is said that, if the obligee covenant not to sue the obligor before such a day, and if he do, that the obligor shall plead this as an acquittance, and that the obligation shall be void and of none

effect, this is a suspension of the debt, and by consequence a release. It must be observed that in that case it was expressly covenanted that, in the event of the covenantor suing upon the obligation contrary to his covenant, the obligation should be void, and that the obligor or covenantor should plead the covenant as an acquittance, which, by consequence, was a release; the covenant in that case therefore went much beyond a mere covenant not to sue.

By holding the plea in question a valid bar, injustice would be done to the plaintiff, who would lose his demand upon the notes, contrary to the intention of the parties; but, by construing the agreement not to operate as a suspension of the plaintiff's right of action upon the notes, but as giving a remedy to the defendant by a cross-action to recover damages to the extent of the injury sustained by the defendant by the plaintiff suing in breach of the agreement, no injustice is done to the defendant.

Nor is such a construction inconsistent with the class of authorities in which matters were allowed to be pleaded in bar in order to avoid circuity of action, because such decisions are limited to cases in which, from the nature of them, the damages to be recovered must be supposed to be equal in both actions: Smith v. Mapleback, 1 T. R. 441, 446; which does not apply to the present instance, as the damages to which the defendant could be entitled as against the plaintiff, by reason of his suing upon the notes before a discontinuance of the quarterly payment, can in no view be assumed to be equal to the plaintiff's demand.

Neither is the decision in this case inconsistent with the several cases in which it has been held that a party accepting a negotiable security payable in future for and on account of an antecedent demand cannot, until after such negotiable security has become due and been dishonored, sue for such antecedent demand; because, independently of the consideration of how far the acceptancy of such negotiable security may be deemed payment for the time, all such decisions seem to be grounded upon the peculiar nature of the negotiable instruments, and are deemed to be necessary exceptions to the general rules of law, in favor of the law-merchant. See note (*c*) to Holdipp v. Otway, 2 Wms. Saund. 103 *b* (6th Ed.).

The case of Stracey v. The Bank of England, 6 Bing. 754, was cited on the defendant's behalf, as an authority to the effect that a right to bring a personal action may be suspended by agreement, without operating as a release or extinguishment. But, upon examination, it will be found probably not to be an authority bearing upon the point. The action was brought to recover damages for an alleged breach of a public duty in not making a transfer, upon request, of certain stock to which the plaintiffs were entitled; and the defendants insisted that the plaintiffs had for good consideration agreed not to make such request until they had themselves done certain acts; and alleged that the plaintiffs, contrary to their agreement, made the request, for the noncompliance

with which they brought their action, before they had done those acts: the defendants therefore contended that such noncompliance was no breach of duty on their part. There was no right of action suspended by the agreement, as it is clear from the case that no request had ever been made to the bank to transfer the stock, and no means had ever been given to enable the bank to do so, no name of a transferee having been given at the time when the agreement was made, nor for a long time afterwards; consequently the only right of action the plaintiffs ever asserted was a right founded upon a request made long after the agreement. The decision, therefore, was, not that any existing right of action was suspended by the agreement, but that the plaintiff suspended his right to call upon the defendants to make a transfer until after he had done the acts mentioned in the agreement. And, although the expression of suspending an action was used, perhaps inaccurately, yet it is plain that they referred to the right to call for the transfer of stock, and to that only. At all events, as a decision upon the point for which the case was cited, it could not be supported, as it would be inconsistent with an undoubted principle of law and an undeviating course of authority.

In the result, we are of opinion that the plea in question is bad in substance, and that the judgment which has been pronounced upon it in favor of the defendant must be reversed, and a judgment entered for the plaintiff, *non obstante veredicto,* upon the confession and insufficient avoidance in the plea.

*Judgment accordingly.*

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## STEEDS AND ANOTHER *v.* STEEDS AND ANOTHER.

(High Court of Justice, Queen's Bench Division, 1889. 22 Q. B. D. 537.)

WILLS, J.[87] The plaintiffs in this case sue for a sum of money alleged to be due for principal and interest on a bond made in their favor by the two defendants.

One of the defendants pleads that he delivered to one of the plaintiffs certain stock and goods which were given by him and accepted by the said plaintiff in satisfaction and discharge of the money due upon the bond. The other defendant pleads that he executed the bond as surety and was discharged by the transaction set up by the first defendant.

The plaintiffs apply to have this defence struck out, as being no answer to their claim. The same question arises as to both defendants, and is shortly whether in respect of a bond given by C. to A. and B., accord and satisfaction made by C. to A. after the cause of action had arisen, and accepted by A., is an answer to the claim of A. and B.

On behalf of the plaintiffs two objections are raised. 1. That in respect of a specialty debt, accord and satisfaction of the cause of

[87] The statement of the pleadings is omitted.

action by the person or persons liable is no more an answer to the action in equity than it is at law. 2. That even if it would be so, were the bond made in favor of A. alone, accord and satisfaction with A. is no answer in equity to the action by A. and B.

It is clear that at law accord and satisfaction of a debt due upon a bond is no bar to the action. This is, however, purely the result of a technicality absolutely devoid of any particle of merits or justice, viz., that a contract under seal cannot be got rid of except by performance or by a contract also under seal; so that supposing it had really been the case that in satisfaction of an overdue bond for £1,000 the person liable had given property worth £2,000, which had been accepted in discharge of the obligation, still at law the obligee of the bond might recover his £1,000 without returning the property.

One would have thought that if the Courts of Equity ever interfered at all to prevent a man from enforcing an unconscientious and dishonest demand to which there was no answer at law, they would perpetually restrain an action brought under the circumstances described. Mr. Wood, however, who is an equity lawyer, contended before us that this was a case in which equity would follow the law, and would refuse to interfere, and he laid great stress upon a case of Webb v. Hewitt, 3 K. & J. 438, which he said established that proposition. We are glad to say that we are unable to agree with him, and that we think he has done injustice to a system of which one recommendation has been supposed to be that it was, sometimes at all events, competent to correct some of the worst and most odious technicalities of the common law. The case cited appears to us to lead to the opposite conclusion to that contended for, and we think it perfectly clear that the *ratio decidendi* of the learned Vice-Chancellor was, that when the plaintiff had accepted money's worth in place of money in discharge of the bond, the debt in equity was gone and there was an end of it.

Upon the first point, therefore, we are against Mr. Wood, [counsel for the plaintiffs,] and have no doubt that if payment to one of the plaintiffs would have been an answer, the delivery to him and acceptance by him of goods in satisfaction of the debt would be equally an answer.

But Mr. Wood is, we think, right in saying that, as the defence is an equitable one, it is equally necessary to establish that payment by C., the obligor, to A., the latter being joint obligee with B., would in equity be an answer to the claim by A. and B. on the bond. We cannot follow Mr. Bullen's argument [as counsel for the defendants] that as equity would treat the satisfaction as equivalent to payment, having got so far, he is at liberty to discard any further reference to equity, and say that as at common law payment to or release by A. would prevent A. and B. from suing, he is now in a position to treat A. as having been paid, and say that as this is a common law action there is the equivalent to a common law defence. If he is obliged to resort to equity for his defence, he must take the equitable principles applicable to the circum-

stances in their entirety; and we must therefore inquire what is the rule in equity with respect to payment to one of two co-obligees or co-creditors.

The reason why the defence is a good one at law is that the two creditors are treated as having a joint interest in the debt, with its incident of survivorship, and the satisfaction to one of the parties of a joint demand due to himself and others puts an end to the joint demand, and he cannot afterwards, by joining the other parties with him as plaintiffs, recover the debt; nor can a right of action be supposed to exist which, if it existed, might survive to the very person who had already received full value. Wallace v. Kelsall, 7 M. & W. 264.

In equity, however, it would appear as if the general rule with regard to money lent by two persons to a third was that they will *prima facie* be regarded as tenants in common, and not as joint tenants, both of the debt and of any security held for it. Petty v. Styward, Eq. Ca. Abr. 290; Rigden v. Vallier, 2 Ves. Sen. 258, cited in the notes to Lake v. Craddock, 1 White & Tudor, 5th ed. 208. "Though they take a joint security," says Lord Alvanley, M. R., "each means to lend his own money and to take back his own." Borley v. Bird, 3 Ves. 631. Where a mortgage debt has been paid to one of the mortgagees, accordingly, it was held that the land was not discharged, and that the concurrence of the other mortgagees was necessary to make a good title. Matson v. Dennis, 10 Jur. (N. S.) 461, 12 W. R. 926. This is on the ground that the debt is held by the two in common and not jointly, and the principle seems to us equally applicable whether the debt is secured by a mortgage or is merely the subject of a personal contract. The principal right of a mortgagee is to the money, the estate in the land is only an accessory to that right.

It is obvious, however, that this proposition cannot be put higher than a presumption capable of being rebutted. If the money, supposing it to have been lent, were trust money, the presumption of a tenancy in common on the part of the two trustees could not, as it seems to us, arise. Survivorship is essential for the purpose of trusts, and so there may be a variety of circumstances which may settle the question either one way or the other. In the present case we do not even know whether the bond was for money lent, or what was the groundwork of the obligation, and it is clear that if the presumption is that the interest in this obligation belonged in equal portions in severalty to the two plaintiffs, the plaintiff who was settled with by the accord and satisfaction has been paid his half, at all events, and it cannot be recovered again in this action.

We think, therefore, that we cannot strike out this defence as we are invited to do. It seems to us that it must be good for a part of the claim at all events. But we think the statement of defence defective, and that Mr. Bullen [as counsel for the defendants] ought to amend by a further statement of the material facts, and our order is that the

statement of defence be amended accordingly, and if that be not done within ten days, the plaintiff be at liberty to sign judgment for half the amount claimed. We trust that upon the amended pleading being delivered the plaintiffs will, if possible, meet it by any necessary addition to or correction of the facts alleged, and not repeat a motion of this kind, which asks the court to do what is to the last degree unsatisfactory, give judgment for a defect of pleading and in ignorance of all the facts which ought to be known before the rights of the parties are definitely adjudicated upon. Both parties are partly responsible for the present motion, and the costs of this appeal will be costs in the cause.

*Order accordingly.*[28]

[28] In Upjohn v. Ewing, 2 Oh. St. 13, 18-19 (1853), Thurman, J., said: "But we are not prepared to say that one or more of several joint creditors, between whom no partnership exists, can release the common debtor so as to conclude their co-creditors who do not assent to such release. It is true, they may defeat an action at law, but it does not follow that a recovery in equity cannot be had. At law, joint creditors must join in the action; and all must recover, or none can. Hence, if part of them are barred, all are. But the forms of equity procedure require no such joinder when justice would be defeated by it. It may be admitted, that, as a general rule, joint creditors cannot, by a division between themselves, acquire a separate right of action against the debtor, either at law or in equity; but where the debtor himself procures the release of a part of them, we do not see how he can object to the others proceeding against him in equity."

On the other hand, in Powell v. Brodhurst, [1901] 2 Ch. 160, 164, Farwell, J., said: "In my opinion, the old rule of common law that payment to one of two joint creditors is a good discharge of the joint debt still remains good. There was no possible conflict of any equitable rule with this, because no bill would lie in Chancery to recover a mere money demand. Equity, no doubt, had to deal with debts in the administration of the estates of deceased persons and in the liquidation of companies, but in determining whether claims for debts had been discharged or not equity followed the law, and indeed, in cases of difficulty before the Chancery Procedure Act, 1852 (15 and 16 Vict. C 86) ss. 61, 62, sent cases for the opinion of the common law courts. There is nothing inconsistent wtih this in Steeds v. Steeds, 22 Q. B. D. 537. The question there was whether it was so clear that the debt claimed was joint, that the defense should be struck out and it was held that there was a conflict between law and equity as to the presumption to be drawn from the existence of a security to two without words of severance, and that the rule of equity as to such presumption now prevails. But this was a conflict of presumption whether there was or was not a joint tenancy, and had no relation to the legal consequences flowing from the existence of an admitted joint tenancy. In the present case both sides agree that this is a joint debt, and * * * I take this to be correct.

"But the joint debt in this case was not paid to either of the joint creditors, but to the firm of which one of them was a member. Now, payment of a private debt, due to a member of a firm, to the firm of which the creditor is a member will not, in my opinion, support a plea of payment in the absence of evidence, express or implied, that the creditor has authorized the receipt of the money by the firm as his agents."

## WILLIAM M. GRIFFIN *v.* JOHN H. CUNNINGHAM.

(Supreme Judicial Court of Massachusetts, 1903. 183 Mass. 505, 67 N. E. 660.)

Contract to recover for lumber furnished by Griffin, the plaintiff, to one Griffiths, a contractor, for the purpose of making alterations on a house owned by Cunningham, the defendant. Griffin proposed to bring a suit against Griffiths, and the three parties entered into an agreement by which Cunningham promised to pay Griffin the amount of his bill against Griffiths, if Griffiths approved the bill, payment to be made direct to Griffin. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

BRALEY, J. If the promise made to the plaintiff by the defendant was nothing more than an oral agreement on his part to pay any balance due to Griffiths that remained after a settlement of liens for labor, the undertaking was collateral, as the original debt owed by Griffiths to the plaintiff was not extinguished. And as it is not claimed that the defendant derived any benefit from the arrangement, the statute of frauds on which the defendant relies would be a full defense. Curtis v. Brown, 5 Cush. 488; Manley v. Geagan, 105 Mass. 445; O'Connell v. Mount Holyoke College, 174 Mass. 511, 514, 55 N. E. 460. But there was something more. What the parties agreed to was in dispute. And as the case is before us on a refusal to rule that upon all the evidence the plaintiff could not recover, it becomes necessary to determine whether there was any evidence to sustain the verdict.

The plaintiff puts his case on a substitution of debtors, and his evidence in substance tended to prove that Griffiths, who was owing him a large amount for lumber that had been used in reconstructing a house belonging to the defendant, with whom Griffiths had a contract to furnish materials and do the work, agreed that the balance coming to him under the contract should be paid by the defendant to the plaintiff in settlement of his bill for the lumber, and that the defendant, at whose suggestion the arrangement was made, assented to the substitution, and promised to pay the plaintiff the balance remaining due under the contract after the settlement of any liens for labor. Relying on this agreement, and in consequence of it, the plaintiff released Griffiths, his original debtor, and looked to the defendant solely for the payment of his bill. The question is, what was the intention of the parties? and, in order to determine the character of the transaction, all the circumstances are to be considered.

The substitution sought to be accomplished was a change of debtors to the extent of the plaintiff's claim against Griffiths, and it was not necessary that the whole indebtedness of the defendant to Griffiths, if it exceeded the amount of the plaintiff's bill, should have been discharged. But the arrangement between the parties was enough under the evidence in this case to fully discharge the defendant from any liability under

the building contract, as there was no contention that the amount due the plaintiff from Griffiths was more than the sum finally paid to him by the defendant in the settlement made between them. There was also evidence from which the jury might find that the original debt of Griffiths to the plaintiff had been discharged, though this follows if mutual consent to the substitution is proved. Walker v. Sherman, 11 Metc. 170. If the claim of the plaintiff against him had been converted into a claim of the plaintiff against the defendant, it is not necessary to consider the transaction as a possible assignment of a part of the claim of Griffiths against Cunningham, and that in such a case the plaintiff could have relief only in equity. See James v. Newton, 142 Mass. 366, 374, 8 N. E. 122, 56 Am. Rep. 692; Holbrook v. Payne, 151 Mass. 383, 384, 24 N. E. 210, 21 Am. St. Rep. 456. Under the plaintiff's evidence, the defendant, by accepting the order of Griffiths, who signed it with the understanding that the bill of the plaintiff was to be paid by the defendant, contracted not only to pay the debt, but also, as a part of the transaction, undertook that the debt should be paid to the plaintiff, while the plaintiff at the same time agreed to accept the defendant as his debtor in place of Griffiths. It would not be enough that the defendant accepted the order; he must go further and promise to pay the plaintiff. The consideration for the promise is that the plaintiff, as a part of the completed arrangement, became bound to look solely to the defendant for the money owed him, instead of to Griffiths. If the original debtor did not remain liable, the defendant's promise was not to answer for the debt of another, and it was not within the statute. Furbish v. Goodnow, 98 Mass. 296; Richardson v. Robbins, 124 Mass. 105. For these reasons, the case does not fall within Curtis v. Brown, *ubi supra,* as argued by the defendant, but is to be governed by Caswell v. Fellows, 110 Mass. 52, 54; Eden v. Chaffee, 160 Mass. 225, 35 N. E. 675; Trudeau v. Poutre, 165 Mass. 81, 42 N. E. 508; and Plummer v. Greenwood, 169 Mass. 584, 48 N. E. 782; and is to be distinguished from the line of decisions in which this court has held that a stranger to a simple contract, and from whom no consideration moves, cannot sue on it, or enforce a promise made to another for his benefit. Exchange Bank v. Rice, 107 Mass. 37, 9 Am. Rep. 1; Borden v. Boardman, 157 Mass. 410, 32 N. E. 469, and cases cited; Aldrich v. Carpenter, 160 Mass. 166, 35 N. E. 456.

In the case at bar the plaintiff was the promisee, and the contract between him and the defendant gave all the contractual rights provided for his benefit, and had an ample consideration to support it by the release of the original debtor. If there had been no conflict of testimony, and the terms of the alleged substitution of debtors was not in dispute, whether enough had been made out to establish the claimed novation would have been a matter of law for the court. But there were two possible conclusions on the evidence: If the defendant was believed, the plaintiff could not prevail; while if the plaintiff's testimony was accepted

as true, a complete substitution had taken place, and the defendant was liable. Obviously it could not be ruled as matter of law that the plaintiff was not entitled to recover; and, as the case was submitted to the jury under instructions not excepted to, the presumption is that they were full and accurate, and the order must be

*Exceptions overruled.*

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## MOTT GLEASON *v.* DAVID FITZGERALD, SURVIVOR, ETC.

(Supreme Court of Michigan, 1895. 105 Mich. 516, 63 N. W. 512.)

GRANT, J. July 18, 1889, the defendants made a contract with the Chicago & West Michigan Railroad Company by which they agreed to lay and ballast the track between Baldwin and Traverse City. The work was to be done under the instruction and supervision of its chief engineer, whose decisions were to be final and conclusive on all matters of dispute. The defendants sublet this work to the firm of Lambert & Van Norman. The contract contained the following provision:

"That the said parties of the second part reserve the right to pay off the laborers who work for said first party under this contract, and the said party of the first part, for and in consideration of the sum of one dollar, hereby sells, releases, and assigns unto the party of the second part all moneys and sums of money due to laborers under this contract, and in execution of the same; but it is expressly agreed that the party of the second part assumes no liability to the laborers who do work in execution of this contract, over and above the amount assigned by the party of the first part to the party of the second part, and not over and above the amount due and payable to the party of the first part."

Lambert & Van Norman continued for some time to work under the contract. A dispute arose between them, and Lambert & Van Norman finally abandoned it. Lambert & Van Norman, through their timekeeper, gave time checks to their workmen, certifying the number of days' work performed, the rate per day, the deductions, and balance due, and made payable at Hannah, Lay, & Co.'s Bank, at Traverse City, Mich. Lambert & Van Norman had no money at the bank with which to pay these checks. Plaintiff insists that he purchased these time checks, and made an arrangement by which the defendants agreed to pay them; that he released Lambert & Van Norman from liability; and that a complete novation was effected. It is insisted on the part of the defendants that a novation was not proven, and that before a novation could take place a valid indebtedness must be shown to exist between Lambert & Van Norman and the defendants.

It is not necessary, under the facts of this case, to determine whether the defendants were in fact indebted to Lambert & Van Norman.

They had assigned to the defendants all moneys due from them to their laborers. If, therefore, the defendants had agreed to pay the plaintiff, and he had released Lambert & Van Norman, it is entirely clear that they could not defend upon the ground that they had in fact overpaid Lambert & Van Norman. The statute of frauds has no application to such case. The evidence on the part of the plaintiff tended to show that he made the agreement with defendants and Lambert & Van Norman, that defendants made the promise to pay with notice that Lambert & Van Norman were to be released, and that these time checks were in fact charged up against Lambert & Van Norman in an account rendered by the defendants. It is unnecessary to review the evidence at length. The question was fairly left to the jury, under proper and explicit instructions, and there was ample evidence to support their verdict. The case is controlled by Mulcrone v. Lumber Co., 55 Mich. 622.

*Judgment affirmed.*[29]

[29] See James Barr Ames, Novation, 6 Harv. L. Rev. 184, Lectures on Legal History, 298.

"Novation by a change in the form of the obligation, as by the substitution of a specialty for a simple contract, has existed in English law from time immemorial under the name of merger. But our novation by a change of parties, whether by the intervention of a new creditor (*novatio nominis*) or by the substitution of a new debtor (*novatio debiti*) is a modern institution. The earliest judicial recognition of the doctrine seems to be the oft-quoted opinion of Mr. Justice Buller in 1759:

" 'Suppose A owes B £100, and B owes C £100, and the three meet, and it is agreed between them that A shall pay C the £100: B's debt is extinguished, and C may recover the sum against A.' " Ames, Lectures on Legal History, 298.

While Mr. Justice Buller spoke of novation where there are two debts, there need be only one, as the principal case shows. The essential thing is to get by the agreement a new debtor or a new creditor in place of the old.

In Perry & Walden v. Gallagher (Ala. App.), 82 So. 562, 563 (1919), Samford, J., said:

"The complaint alleged a previous valid indebtedness due from the original debtor to plaintiff, an agreement of all the parties to the new contract or obligation, an agreement that it was an extinguishment of the old contract or obligation, and a new contract or obligation binding between the parties thereto. It was not necessary to allege a consideration passing to the defendants other than the release by plaintiff, at the instance of defendants, of the claim which he held against the original debtor. This was not a promise of the defendants to answer for the debt, default, or miscarriage of another, but was an original undertaking by them, where, on account of their promise, the plaintiff released the claim which he had theretofore held. The complaint was not subject to demurrer interposed. Perry & Walden v. Gallagher (Sup.) 75 South. 396; Hopkins v. Jordan (Sup.) 77 South. 710; McDonnell v. Ala. Gold Life, 85 Ala. 414, 5 South. 120; 20 R. C. L., pp. 367, 368, § 10; Underwood v. Lovelace, 61 Ala. 155; Howard v. Rhodes, 81 South. 362.

"As has already been seen, it was not necessary to a novation that the defendants should have been actually indebted to plaintiff's original debtor."

In Mills v. McMillan (Fla.), 82 So. 812, 1813 (1919), Ellis, J., said: "A neces-

## CORBETT *v.* COCHRAN.

(Court of Appeals of South Carolina, 1836. 3 Hill, 41.)

CURIA, *per* EARLE, J.[30] The case made on the trial below seems to be this: Mrs. Pellott being indebted to the plaintiff in the sum of $407.69, on a book account for merchandise, and the account being presented to her for payment, the defendant came to the plaintiff, produced the account, and assumed to pay it in consideration that she should be discharged from the debt. Her account was accordingly credited in full, and the amount was charged to the defendant by his own direction. In the argument here a question has been raised whether Mrs. Pellott was privy to the arrangement by which the defendant assumed the payment of her debt, and whether the credit discharging her was entered with the knowledge and by the direction of the defendant. Both these were questions for the jury. It was only on proof of both that the liability of the defendant arose. And I think that the jury were warranted in the conclusion, that the defendant, when he exhibited Mrs. Pellott's account, and assumed the payment of it, came from her and with her assent for that purpose. And also that the credit given to her on the books was by the direction of the defendant, and in pursuance of the agreement with him, for his undertaking was to pay her debt in consideration that she should be discharged. * * *

In relation to the class of contracts we are now considering, where the promise is to pay another's debt, in consideration of his being discharged, it seems to be well settled now, that there need be no consideration moving between the person promised for and the person who promises. * * *

But the exception mainly urged here is that the promise of the defendant was without consideration, as, in point of fact and law, the debt of Mrs. Pellott was not discharged. * * * But it is surely competent for the creditor to accept of whatsoever he will, in discharge or satisfaction of a debt. If he may accept the promissory note of the debtor, he may also accept that of a stranger. And if he may accept the note of a stranger, he may also accept his promise without writing. The validity of the substitute, the note or promise, depends on the express agreement to discharge the original debt. * * * There is no form of words or writing necessary to give effect to these mutual undertak-

sary element in novation is that the original debt is by the agreement extinguished, and the debtor is absolutely released. If novation is pleaded, this element must clearly and definitely appear by averment or necessary inference from the facts averred. If by the agreement the parties intended to keep alive the old debt and accept the new as a sort of security, novation is not accomplished." The burden is on the original debtor to show a novation releasing him. Thomas v. George (Neb.), 181 N. W. 646 (1921).

On assent of creditor as essential to novation by substitution of debtors, see Ann. Cas., 1914 A, 339, note.

[30] The statement of facts and parts of the opinion are omitted.

ings. * * * But in the case at bar there is something more than a mere verbal agreement, if more be necessary. The plaintiff it is true has not given a receipt, or other written discharge, to the former debtor. But he has entered satisfaction in writing in the books, which constituted the evidence of his demand; and has declared by such entry that he has no further claim upon Mrs. Pellott, in whose stead he has accepted the defendant as his debtor and although he cannot be said to have cancelled the books, the entry furnishes written evidence of his agreement to discharge Mrs. Pellott, in consideration of the defendant's promise. Such agreement, whether proved by writing or parol, was an effectual legal discharge; and, after this agreement, the plaintiff could not have recovered on the original demand from her. * * *

The motion [by defendant for a new trial after verdict for plaintiff] is refused.[31]

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## J. I. CASE THRESHING MACH. CO. *v.* ROAD IMPROVEMENT DIST. NO. 3 OF PULASKI COUNTY, ARK.

(United States District Court, E. D. Arkansas, W. D., 1914. 210 Fed. 366.)

At Law. Action by the J. I. Case Threshing Machine Company against Road Improvement District No. 3 of Pulaski County, Ark. On demurrer to the jurisdiction of the court. Demurrer overruled.

[31] That the original debtor must also be a party to the agreement, see Rose v. Million (Ark.), 228 S. W. 376 (1921).

Professor Ames was of opinion that a valid novation might be made between only the old creditor and the person intending to take his place. He said, that "To convert a claim of C against B into a claim of C against A, it is only necessary for C and A to enter into a bilateral contract in which C promises never to sue B and A promises to pay C the amount due from B. C's promise operating as an equitable release, now pleadable as a defense at law, the claim of C against B disappears, while A's promise creates in its place the new claim of C against A." Ames, Lectures on Legal History, pp. 300-301.

Professor Williston suggests that the agreement would not be an equitable defense to B in a jurisdiction not recognizing the right of a beneficiary of a contract to sue upon it, though he concedes, "That an agreement with C for sufficient consideration to discharge A should be at least an equitable defense to A, need not be denied." Apart from the fact that the theory of Professor Ames is founded on the right of a beneficiary to enforce a promise, Professor Williston's chief objection to it seems to be "that a novation was valid at law as a discharge" of the debtor's liability "long before equitable defences were allowed at law." 1 Williston on Contracts, § 114, p. 238, n.

The troublesome question, however, is not what constitutes a novation, but the question of fact in the given case whether the parties agreed upon one either absolutely or conditionally.

It would seem that a novation could take place with the old debtor at once discharged, in consideration of a conditional promise by the intending new debtor, although the event never occurs on which the new promisor would have to pay. Compare note 165, p. 423, *ante*.

The complaint, in so far as it is necessary to set it out for the purpose of understanding the jurisdictional questions involved, states that the plaintiff is a corporation existing under the laws of the state of Wisconsin, and the defendant is a corporation created by the state of Arkansas, having its domicile within the jurisdiction of this court; that the defendant and one Mary V. Wiegel, the latter doing business under the firm name of Pulaski Stone Company, entered into a contract whereby Mrs. Wiegel was to build a certain road for the defendant; that the payments were to be made by the defendant to her on estimates of the engineer in charge as the work progressed; that 10 per cent. was to be retained until the contract was completed and accepted by the defendant, whereupon that sum was to be paid; that she performed the work, which amounted to $32,561.40, of which 90 per cent. has been paid, and 10 per cent., amounting to $3,256.14, is still unpaid; that while the work was being performed by Mrs. Wiegel, she being indebted to the plaintiff in the sum of $3,800, as evidenced by her note, assigned to it all of the 10 per cent. retained estimates to the extent of $3,800 and the interest on the note; that upon presentation of this assignment to the defendant it consented in writing thereto and agreed to pay the same to the plaintiff. This agreement is as follows:

"We hereby consent to the within assignment to the J. I. Case Threshing Machine Company by the Pulaski Stone Company and Mary V. Wiegel, and agree to pay the said assignee such part of the 10 per cent. retained by us in accordance with our contract with said assignors as may be due upon final settlement with the said assignors after the completion of the work called for by said contract up to the amount due upon the $3,800.00 note, with interest at the time of payment.

"[Signed] O. P. Robinson, President."

The contract having been completed by Mrs. Wiegel, and accepted by the engineer, the plaintiff demanded payment of the 10 per cent. retained sum, which was refused.

The defendant demurs to the jurisdiction of the court on the ground that the complaint fails to allege that Mrs. Wiegel, plaintiff's assignor, was a citizen of a state other than that of the defendant, and that she could have maintained an action for this money in this court.

TRIEBER, J.[32] It is conceded by counsel for the plaintiff that, if this action is merely upon an assigned chose in action, the failure of plaintiff to allege in its complaint that its assignor, Mrs. Wiegel, could have maintained the suit in this court would have been fatal;* but it is claimed that the defendant made an express promise to pay this sum of money to the plaintiff, and that this action is upon that express promise, and for that reason the citizenship of Mrs. Wiegel is immaterial.

[32] Part of the opinion is omitted.

* See *ante*, p. 525, n.

If this is a new promise to pay to the plaintiff this specific money due from the defendant to Mrs. Wiegel, agreed to by all the parties, it extinguished the liability of the defendant to Mrs. Wiegel, and created an obligation on the part of the defendant to the plaintiff. This is clearly a novation of the original indebtedness, and in such a case the jurisdiction of this court is controlled by the citizenship of the plaintiff and the defendant, regardless of that of Mrs. Wiegel.

"Novation" has been properly defined as:

"The substitution by mutual agreement of one debtor or of one creditor for another, whereby the old debt is extinguished, or the substitution of a new debt or obligation for an existing one which is to be extinguished. The requisites of a novation are: (1) A valid prior obligation to be displaced; (2) the consent of all the parties to the substitution; (3) a sufficient consideration; (4) the extinguishment of the old obligation, and (5) the creation of a valid new one." [33] In re Ransford, 194 Fed. 658, 662, 115 C. C. A. 560, 564, and authorities there cited.

In the instant case all of these requisites exist. It is true that Mrs. Wiegel's indebtedness to the plaintiff has not been extinguished, and will not be until the defendant makes the payment, as the plaintiff has accepted the assignment from her as collateral security only. But the defendant, when it accepted the order of Mrs. Wiegel, was exonerated from liability to her to the extent of the $3,800 and interest thereon, and, as it appears from the complaint that its liability is less than the indebtedness due plaintiff from Mrs. Wiegel, her claim is entirely extinguished, and she cannot maintain an action for the recovery of the retained 10 per cent. The contract between the plaintiff and the defendant is a new contract between them; the consideration for the promise to pay plaintiff being the extinguishment of Mrs. Wiegel's claim to this retained 10 per cent. The agreement of the defendant to pay this money to the plaintiff was, in effect, an acceptance of an order on it, and from the moment of acceptance it became the primary debtor, and Mrs. Wiegel only contingently liable in case of nonpayment by the defendant. Derby v. Sanford, 9 Cush. (Mass.) 263.

In Superior City v. Ripley, 138 U. S. 93, 11 Sup. Ct. 288, 34 L. Ed. 914, the facts were very much like those in this case In that case the city had entered into a contract with S. K. Felton & Co. for the construction of a system of waterworks for the sum of $25,000; Felton & Co. built and completed the waterworks, which were accepted by the city and a part of the contract price paid. Felton & Co., being indebted to plaintiffs Ripley and Brunson in the sum of $5,750, gave them an order which read as follows:

[33] For a criticism of such statement of the requisites of a novation as being inaccurate, see 3 Williston on Contracts, §§ 1869-1872.

"Upon final completion and acceptance of waterworks by the city of Superior, Nebraska, pay to the order of Ripley and Brunson $5,750.00, and charge same to contract price and on contract for erection of said waterworks.

"S. K. Felton & Company.

"To the Mayor and City Council of the City of Superior, Nebraska."

This order was presented to the city council and accepted. The acceptance indorsed on the order was as follows:

"The city of Superior, Nebraska, hereby accepts the within written order, provided the waterworks are fully completed according to plans and specifications and are duly accepted by the city, and then, in that event, the city of Superior will withhold from the final payment of contract price that may be due S. K. Felton & Company the amount of this acceptance or such part thereof as may be due said S. K. Felton & Company thereon, and will pay over such amount in city warrants to Ripley and Brunson in lieu of S. K. Felton & Company, such amount to be credited on said contract price for said waterworks as if the same was paid to S. K. Felton & Company.

"Dated Superior, Nebraska, December 24, 1888.

"By order of the City Council:

"[Seal of the City.] C. E. Davis, City Clerk.

"C. E. Adams, Mayor."

The waterworks having been completed and accepted by the city, and the amount due S. K. Felton & Co. being in excess of the sum for which the order was drawn, Ripley and Brunson demanded payment, which was refused, and thereupon they instituted an action against the city in the federal court. The complaint failed to allege the citizenship of Felton & Co. On behalf of the city it was claimed that the court was without jurisdiction, as the complaint failed to show that Felton & Co., the drawers of the order, were citizens of a state other than that of the defendant; but this contention was overruled, the court saying:

"This acceptance was a contract directly between the city and the plaintiff below, upon which the city was immediately chargeable as promisor to the plaintiff. Nothing is better settled in the law of commercial paper than that the acceptance of a draft to order in favor of a certain payee constitutes a new contract between the acceptor and such payee, and that the latter may bring suit upon it without tracing title from the drawer. From the moment of acceptance the acceptor becomes the primary debtor, and the drawer is only contingently liable in case of nonpayment by the acceptor."

It will be noticed that the order was not an instrument negotiable under the law merchant, as the date when it was payable was not cer-

tain, nor was the acceptance an unconditional one. It was practically the same as the order in the case at bar. * * *

In Castle v. Persons, 117 Fed. 835, 838, 844, 54 C. C. A. 133, 136, 142, it was held by the Circuit Court of Appeals for this circuit that even a verbal request is sufficient, when accepted, to constitute a novation. The court said:

"We see no difference between a verbal order or request and a written order or request, there being no law requiring either to be in writing. Neither need the acceptance be in writing. If the defendant in error owed Thomas Persons, and Thomas Persons requested him to pay the debt to Maria Persons, and he, upon such request, promised to pay it to Maria Persons, thereby extinguishing his debt to Thomas Persons, Maria Persons could sue and recover upon the promise, and, if this could be done, then all control over the chose in action would be in Maria Persons. She had complete power to reduce it to possession."

In that case Judge Sanborn, in a concurring opinion, said:

"If a creditor orally directs his debtor to pay his debt to a third party, and the debtor verbally agrees with the third party to do so, the latter is substituted for the first party as his creditor, the first party is estopped from collecting the debt, the debtor is released from paying to him, and is legally bound to pay it to the third party. A complete novation and assignment have been effected."

As this is an action upon an express promise of the defendant to pay to the plaintiff the retained money due on the contract to Mrs. Wiegel, and the requisite diversity of citizenship of the plaintiff and defendant exists, the demurrer to the jurisdiction is overruled.

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## COSTNER *v.* FISHER.

(Supreme Court of North Carolina, 1889. 104 N. Car. 392, 10 S. E. 526.)

The plaintiff brought his action before a justice of the peace, for recovery of $135.35 due by account and note under seal. When the cause was called for trial the plaintiff entered a *nolle prosequi* as to the cause of action upon the note. The plaintiff testified in substance that the bond was given for the amount due upon the account, and that he accepted it on condition that the defendant would pay him $10 a month; that the bond was intended merely as a security; and that he did not receipt the account. The court held that "the cause of action upon the account was merged into the note, and that, the same not being due, the plaintiff could not recover." There was a verdict for the defendant, and the plaintiff appealed.

SHEPHERD, J. His honor was clearly right in holding that the account was merged in the bond. Gibson, C. J., in Jones v. Johnson, 3

Watts & S. (Pa.) 277, says: "Extinguishment by merger takes place between debts of different degrees, and lower being lost in the higher; and, being by act of the law, it is dependent on no particular intention. * * * No expression of intention would control the law which prohibits distinct securities of different degrees for the same debt; for no agreement would prevent an obligation from merging in a judgment on it, or passing *in rem judicatum.* Neither would an agreement, however explicit, prevent a promissory note from merging in a bond given for the same debt, by the same debtor; for to allow a debt to be at the same time of different degrees, and recoverable by a multiplicity of inconsistent remedies, would increase litigation, unsettle distinctions, and lead to embarrassment in the limitation of actions," etc. This high authority fully sustains the ruling of his honor.

Even if there were no merger, the taking of the bond payable at a certain time implies an agreement to suspend his remedy on the account for that period. 2 Daniel, Neg. Inst., § 1272; Putnam v. Lewis, 8 Johns. (N. Y.) 389; Frisbie v. Larned, 21 Wend. (N. Y.) 450, and other cases cited in Bank v. Bridgers, 98 N. Car. 67.

*Affirmed.*[34]

[34] But if the remedies are not inconsistent, the intention will prevail.

"There can be no doubt, as a general rule, that the taking of a bond and mortgage or other security of a higher nature extinguishes a debt arising from mere matter of account; yet this will depend on the intention of the parties. If the higher security was given as the future evidence of the debt, to which the party was to look for payment, then the less security would merge in the greater; but, if the higher security was to be merely additional or collateral to the less, showing that the intention of the parties was to keep the latter open, to be looked to for payment in any event—then the less is not extinguished by the greater security. This doctrine is familiar, and may be found in most of the elementary works and cases that treat upon this subject, particularly in Chit. Cont. 607, and authorities there cited. The defendant's counsel admitted the position, but insisted that it must appear upon the face of the instrument itself, that it was an additional or collateral security, and the works that treat on this subject and cases adduced, seem to give countenance to this idea; for in the former it is usually stated as an exception to the general doctrine of merger, that if it appear upon the face of the instrument that it is intended to be a further or collateral security, then the rule of merger does not apply, and the cases referred to by counsel, are of the description where the matter appeared upon the face of the instrument. But these authorities, although they show very clearly that when the matter does so appear the general rule of extinguishment does not apply, yet they do not therefore prove that when it does not so appear the rule does apply; and if such cases do exist the labors of counsel and the researches of the court have failed to produce them. Deciding the case then upon principle rather than precedent, the question of extinguishment or not is one of intention. What did the parties mean by the transaction? Did they intend that the old security should remain open and the new one be merely collateral or additional; or did they intend to extinguish the former? This intention is of course to be collected from the face of the instrument itself, where it so appears; and, if it does not so appear, then from the next best evidence: the only difference being,

## W. A. CAROTHERS *v.* JAMES STEWART & CO.

(Supreme Court of North Carolina, 1920. 179 N. C. 693, 102 S. E. 615.)

Action by W. A. Carothers against James Stewart & Co., Incorporated. Judgment for plaintiff, and defendant appeals. Affirmed.

PER CURIAM. The plaintiff was an employé of defendant as a carpenter foreman receiving 87½ cents an hour. The defendant became a contractor of the United States government to do construction work

that in the former case the security itself proves the exception to the rule, and also the intention of the parties, whilst in the latter, the party alleging the exception must prove it. And in this no evil can arise, there is no parol contradiction of a written instrument, but only an explanation as to the object for which it was given. A contrary doctrine would prohibit parol proof of the payment of a collateral security, by the payment of the original claim, unless it appeared upon the face of the collateral that it was such." Randolph, J., in Van Vliet v. Jones, 20 N. J. L. 340, 342-343 (1845).

In Settle v. Davidson, 7 Mo. 604 (1842), a bond given by one of several debtors for a simple contract debt was held to extinguish the debt leaving the bond debt as the only one and, therefore, the sole debt of the one who executed the bond.

"The substantial question in the case is, therefore, whether the agreement is merged in the subsequent mortgage, or whether the mortgage was taken merely as collateral security for the performance of the agreement. There is no doubt that the acceptance of a security of a higher nature in lieu of or in satisfaction of one of an inferior nature operates as an extinguishment or merger of the latter; but where such security is accepted merely as an additional or collateral security for a pre-existing debt, it is equally clear that the doctrine of extinguishment or merger does not apply. Brengle v. Bushay, 40 Md. 141, and the cases there cited. The question whether the mortgage in this case was taken merely as collateral security is therefore one of fact, and the burden of proof is upon the appellee to show that such was the case. Taking the whole evidence, we think the appellee has made out his case with reasonable certainty." Stone, J., in Rees v. Logsdon, 68 Md. 93, 96-97 (1887).

"The execution of a deed in pursuance of a contract of sale of real estate where the conveyance of the property is the entire subject-matter of the contract extinguishes the contract, but not so where the contract provides for the performance of other acts than the conveyance. In such case the contract remains in force as to such other acts until full performance." Dunn, J., in Brewer v. Mueller, 254 Ill. 315, 321-322 (1912).

"Even though the original engagement [to marry] was absolute, and not coupled with an express or implied understanding as to the marriage settlement, the parties by the subsequent written contract are taken as a matter of law to have entered into new promises, including the engagement of marriage, and the original agreement must be treated as rescinded, or absorbed and embodied in the new. Lattimore v. Harsen, 14 Johns. 330." Brown, J., in Appleby v. Appleby, 100 Minn. 408, 428 (1907), citing, also, McNutt v. McNutt, 116 Ind. 545 (1888), a similar marriage settlement case.

"The execution of a note in renewal of a previous one is not a payment of such prior note, nor the creation of a new indebtedness, unless there is an express agreement to that effect by the parties." Ellis, J., in Cheves v. First Nat. Bk. of Gainesville (Fla.), 83 So. 870 (1920).

in France. The government was to furnish all tools, equipment, etc. The necessary labor and superintendent was to be secured by the defendant. The defendant through its superintendent, E. N. Pratt, induced plaintiff to go to France. He signed the contract to work for the government at 70 cents per hour. This contract is also signed by defendant as agent of and on behalf of the government. Plaintiff alleges that, while in the employment of defendant, and before signing the contract to work for the government at 70 cents, he had an agreement with Pratt for defendant that, if he would go to France and sign the contract with the government, he should receive at least 87½ cents an hour. Plaintiff sues to recover the difference between 70 cents per hour and 87½ cents per hour, admitted to be $553.46. At conclusion of evidence the defendant moved to nonsuit the plaintiff.

We think there is abundant evidence to establish the agreement to pay 87½ cents an hour. The plaintiff testifies to it, and also that in his formal application for employment he inserted in it a condition that he was to receive 87½ cents an hour and gave it to Pratt for defendant.

There is evidence that defendant knew of Pratt's contract and never repudiated it. This is shown by Pratt's letter to defendant of June 22, 1918, in which Pratt informs them of his agreement with plaintiff. This letter is a strong testimonial to the efficiency of the plaintiff. We think there is abundant evidence of the agreement to pay the 87½ cents to plaintiff if he would sign up with the government at instance of defendant and go to France, and that defendant knew of the agreement and ratified it.

It is contended that the agreement to pay 87½ cents is a violation of the rule which prohibits the contradiction of a written contract by parol evidence. We do not think the rule applies here.

The contract in writing was made with the government, and in it plaintiff agreed to accept 70 cents per hour from the government. The contract for the 87½ cents per hour was in parol and a separate and distinct contract entered into by plaintiff with defendant before the contract with the government was signed.

The consideration for the parol, the first contract, was that, if plaintiff would enlist with defendant for the government as a workman, the defendant would see to it he received at least 87½ cents per hour. This was a separate and distinct contract and preceded the one in writing with the government. It constituted a condition precedent to the plaintiff's entering into and executing the written contract with the government, and is separate and distinct from it. Under the authorities there is no contradiction, and parol evidence was competent to prove such condition precedent. Elliott on Contracts, §§ 1629-50; Typewriter Co. v. Hardware Co. 143 N. C. 97, 55 S. E. 417; Taylor, Evidence, § 1038; Basnight v. Jobbing Co., 148 N. C. 357, 62 S. E. 420.

Nor do we think the parol contract to pay 87½ cents is merged into

the written contract to pay only 70 cents, for the very good reason that the latter was made with the government. The parol contract was made with the defendant and guaranteed to plaintiff wages while in France of not less than 87½ cents per hour.

We think the rulings of the court upon the questions of evidence were correct, and that the charge presented the matter to the jury fairly and fully.

We find no error.

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## BACON *v.* REICH.

(Supreme Court of Michigan, 1899. 121 Mich. 480, 80 N. W. 278, 49 L. R. A. 311.)

Assumpsit by Elbridge F. Bacon against William Reich for goods sold and delivered. From a judgment for defendant, plaintiff brings error. Affirmed.

HOOKER, J.[35] The defendant recovered a judgment against the Architectural Iron & Wire Works for a breach of a contract. He was afterwards sued by the assignee of the iron works for the price of the articles furnished to him under the contract, the assignment being made before his action for damages was instituted. In this action he sought to set off or recoup his damages, which was permitted by the trial court. The plaintiff has appealed the case, contending that the claim for damages is merged in the defendant's judgment, and therefore will not again support an action or defence, and that the judgment cannot be set off against the plaintiff, for the reason that there is a want of privity. It is also claimed that the plea was insufficient to warrant the admission of this proof.

It must be admitted that the plaintiff is not privy to the judgment, because he acquired his rights, whatever they are, before defendant began his action. Bartero v. Bank, 10 Mo. App. 76; Powers v. Heath's Adm'r, 20 Mo. 319; Mathes v. Cover, 43 Iowa, 512; Todd v. Flournoy's Heirs, 56 Ala. 99 (28 Am. Rep. 758); Marshall v. Croom, 60 Ala. 121; Cook v. Parham, 63 Ala. 456; Coles v. Allen, 64 Ala. 98; Winslow v. Grindal, 2 Greenl. 64; Weed Sewing-Machine Co. v. Baker, 1 McCrary, 579; Bigelow, Estop. 135, 136. He is privy, however, to the injury upon which defendant's judgment rests. It is also true that the claim of the defendant was merged in the judgment against the iron works, and the judgment would be a bar to another action, or an attempt to recoup the damages, against the Architectural Iron & Wire Works. But the judgment could be set off in an action brought by the iron works, or an action might be brought upon it. We deem it unnecessary

[35] Parts of the opinions are omitted.

to cite authorities in support of these principles, which are elementary. It is nevertheless true that the plaintiff took this claim subject to the equitable right of the defendant to have his damages applied upon it, and all that can prevent is the technical rule that they are merged in a judgment against plaintiff's assignor. Theoretically, this may be said to be no hardship, because, if the defendant shall pay the plaintiff's claim, he would yet have the right to collect his judgment for damages, which would work out exact justice to all. Practically, however, that is not so, because he cannot collect his judgment. The iron works is insolvent, and was at the time the plaintiff, who was a stockholder in the concern, took his assignment, and the defendant cannot collect his judgment in any other way than to set it off against his contract obligation. Furthermore, the record contains evidence that he was ignorant of the assignment at the time he took his judgment, and had a right to suppose that, by obtaining the judgment, he had settled the question of his liability on the contract, and was led to do so to avoid liability in a garnishment suit, which was adjourned for the purpose. But for the previous assignment, this would have been so, because the judgment would have bound all persons afterwards acquiring title to the claim from the iron works.

"According to more recent cases, the doctrine that claims become merged in judgments is supported on the grounds that the allowance of a new suit is a superfluous and vexatious encouragement to litigation, injurious to the defendant and of no benefit to the plaintiff." 15 Am. & Eng. Enc. Law, 339, and cases cited. * * *

In cases where, through mistake or fraud, it would be inequitable to treat such judgments as a bar, the doctrine cannot be invoked. The case of Ferrall v. Bradford, 2 Fla. 508 (50 Am. Dec. 293), is in point. We quote:

"The plaintiffs in the court below took judgment against only one of the joint obligors, and, when that fact is pleaded by the defendants in bar, they reply that they did only do so because their attorney was circumvented, and induced to dismiss the proceedings as to the other defendants, in consequence of the fraudulent representations of one of the defendants. It matters little as to the mode or manner in which fraud is effected. A court must look to the effect, and ask if the result is a consequence of the fraud. Here the defendants seek to avail themselves of a legal defence, arising from a state of facts which they themselves, by their fraud, have produced. They admit, virtually, by their demurrer, that the plaintiffs have been deprived of a legal right by their fraud, and they seek now, by their defence, to take advantage of their own wrong, a defence admitted to arise from their own fraudulent act. The question now is, Will such a defence be available, tolerated, or allowed? Law, reason, justice, and morality unite in a negative response. * * * At the first blush, we thought we discovered some difficulty arising from the fact that only one of

the defendants is alleged to have been guilty of the fraud; but it soon disappeared, for we find this principle broadly laid down,—that interests gained by one person by the fraud of another cannot be held by them; otherwise, fraud would always place itself beyond the reach of the court." * * *

In the case before us, there is evidence from which it might be found that the course taken by the defendant in procuring a judgment for the breach of the contract was due to the concealment on the part of the iron works of the fact of the transfer of the claim, or, at least, of the mistake of the defendant in supposing that it belonged to the iron works at that time. We think the hardship and injustice of a strict application of the rule of merger is so apparent that we are justified in considering the case within the principle of the cases cited, and holding that, although the plaintiff was not strictly in privity as to the judgment, he was as to the cause of action upon which it was based, and that the defence made was proper. We think this conclusion renders it unnecessary to discuss the subject of election of remedies raised by the briefs. * * *

The judgment should be affirmed.[36]

GRANT, C. J. (dissenting) * * * (2) Defendant, claiming damages for violation of contract on the part of the Architectural Iron & Wire Works, had two courses open to him. He could have waited until the iron works or its assignee sued him, and then have recouped his damages, or he could have brought an independent action for damages. He chose the latter. The tort became merged in the judgment, which became a new debt, unaffected by the claim upon which it was based. Judgments are contracts, and are subject to set-off in actions of assumpsit. 1 Freem. Judgm. § 217; 15 Am. & Eng. Enc. Law, 338, 339. The latter authority states the rule as follows:

"And the present rule undoubtedly is that no second suit can be maintained on the same cause of action, irrespective of the question whether the judgment in the first suit was of a higher or lower nature than the cause of action; the reason for the rule being that the judgment is a judicial determination of the rights of the parties, into which the plaintiff has voluntarily elected to transform his claim."

The authorities in support of this are cited in note 7.

The general rule, as above stated, is admitted, but it is urged that there are exceptions to it, and that the present case forms one of the exceptions. * * *

I find no evidence of fraud or deception on the part of Bacon or his

[36] In some jurisdictions, a judgment in an action on a judgment is deemed to merge the judgment sued upon, but other jurisdictions allow both judgments to stand. But in any event both should stand where one is rendered in one state and the other in another state. Lilly-Brackett Co. v. Sonneman, 163 Cal. 632 (1912).

assignor in the assignment of this claim, or any evidence that it was assigned for the purpose of defeating Reich. The rule of law involved cannot, in my judgment, be changed by the fact that the iron works has become insolvent. The original cause of action in Reich against the iron works has, in the language of Eastern Townships Bank v. Beebe, 53 Vt. 177 (38 Am. Rep. 665), become so merged in the judgment "that the record itself has become a cause of action." The only office which that judgment can now serve is as a set-off. Huntoon v. Russell, 41 Mich. 316. Judgment should be reversed and new trial ordered.

*Judgment affirmed.*

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## FREEMAN *v.* BERNARD.

(Court of King's Bench, 1702. 1 Lord Raymond, 247.)

Assumpsit upon an agreement for the delivery of a certain quantity of hops, etc. The defendant pleads that the plaintiff and he had submitted this matter to the arbitration of J. S., *ita quod* the award should be made, and ready to be delivered, by such a day, etc., and the defendant shows that J. S. made an award before the day that the defendant or his executors or administrators should give a general release to the plaintiff, and that the plaintiff should give a general release to the defendant; and the defendant pleads that he was always ready, and yet is, to sign and seal a release. The plaintiff demurs.[37] * * * But judgment was given by the whole court for the plaintiff; for the arbitrator has awarded nothing in satisfaction, but only has ordered means to discharge the action. He has not awarded a horse or money in satisfaction, but only mutual releases. Where an award creates a new duty instead of that which was in controversy, the party has remedy for it upon the award; and therefore if the party resorts to demand that which was referred and submitted, the arbitrament is a good bar against such action. *Contra* where the award does not create a new duty, but only extinguishes the old duty by a release of the action.

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## COMMINGS *v.* HEARD.

(Court of Queen's Bench, 1869. L. R., 4 Q. B. 669.)

Declaration containing indebitatus counts for work done and materials provided, for money paid, for the conveyance of goods, for interest and money due on accounts stated, and claiming 400*l.*

Fourth plea: Except as to the sum of 145*l.* 3*s.* 1*d.*, parcel of the money claimed, the defendant says that the plaintiff ought not to be

[37] Part of the report of the case is omitted.

admitted or received to claim or allege that at the commencement of this suit any more than the sum of 145*l.* 3*s.* 1*d.* was due from the defendant to the plaintiff in respect of the causes of action in the declaration mentioned, because the defendant says that after the accruing of the causes of action in the declaration mentioned, and before this suit, a dispute arose between the plaintiff and the defendant as to how much was due from the defendant to the plaintiff in respect of the causes of action, and thereupon by agreement made between them before this suit they referred the question of how much was due from the defendant to the plaintiff in respect of the causes of action to the award of William Wills, and agreed to be bound by his award as to such amount; and that afterwards, and before this suit, the said William Wills, having taken upon himself the burden of the arbitration, and having heard and considered all that the plaintiff and defendant respectively had to allege, and all the evidence which they had to produce relating to the premises so referred, made his award in writing of and concerning the premises so referred to him as aforesaid, and thereby awarded that the amount due from the defendant to the plaintiff in respect of the causes of action was 145*l.* 3*s.* 1*d.*

Demurrer and joinder.

LUSH, J.[38] This was a demurrer to a plea. It is to be observed that the plea does not profess to be an answer to the entire claim, but to the excess over and above the amount of 145*l.* The question is, whether the plaintiff is concluded by the award from alleging that the entire amount was due to him. I am of opinion that he is concluded, and that the award is binding between the parties in all matters which it professes to decide. It was contended that an award is not an estoppel, that the parties are not concluded by an award, and that it is distinguishable from a judgment which it is admitted, would have bound the parties. The contention was that it was so distinguishable because an award was an adjudication by a tribunal appointed by the parties, and not one constituted by the sovereign power within the realm. It is impossible, to my mind, to suggest any good ground of distinction between these two, when we consider that the reason why a matter once adjudicated upon is not permitted to be opened again is because it is expedient that there should be an end to litigation. When once a matter has been decided between parties, the parties ought to be concluded by the adjudication, whatever it may be. I am at a loss to suggest any reason that would be applicable to the one, that would not be applicable to the other tribunal.[39]

[38] The opinion of Hayes, J., is omitted.

[39] At common law a bond for the payment of money or a record was not ended by award, but today each probably is. 3 Williston on Contracts, § 1926.

"After an agreement to arbitrate has been executed or consummated by the making of an award following a submission by both parties, which was unrevoked when the final action of the arbitrators was taken, the award so made

Several cases were cited which it was supposed were authorities in favor of the plaintiff, but which, I think, may be contended to be clearly authorities in favor of the defendant. It is not a new doctrine that an award is a bar. That is found in Comyn's Digest, Tit. Accord, D. 1; and there are several instances of it to be found in the books. The case of Allen v. Milner, 2 C. & J. 47, was relied on, on the part of the plaintiff. When that case is examined it will be found to differ from the present in a most essential particular. There the money demand had been referred to arbitration. The arbitrator has found a given sum to be due from one to the other. That case was a money demand, as this is; the action was brought on the original consideration, but the plea, unlike the plea in this case, set up the award as a bar to the entire action. The plea was held bad, and for this reason, that an award upon a money claim does not alter the nature of the original debt; it leaves it remaining due. The amount which the arbitrator found to be due was for the original consideration. The award did not change the nature of the debt, consequently a plea which professed to answer the whole of the debt, and admitted a part of it was due, was a bad plea. That is the ground of that decision.

On the other hand, it is settled, where the claim is one for unliquidated damages, an award which settles the amount may be pleaded in bar to the entire action, although the plea, on the face of it, shows that the money is not paid. In the case of Gascoyne v. Edwards, 1 Y. & J. 19, there was a general plea pleaded to the whole declaration, by which it was alleged that the parties had agreed to refer the amount of the damages to arbitration, and an award had been made, by which it was awarded that the defendant should pay the plaintiff 5*l.* to put the premises in repair. The plea, although it did not aver that the 5*l.* was paid, was held to be a good plea because an award, fixing the amount and creating a debt between the parties, extinguished the original demand for unliquidated damages. The principle upon which this was held a good plea is, that an award, professing to determine the matter, is binding upon both parties, and it as much precludes the parties from alleging anything contrary to the award as a judgment would, on the ground that it is *res judicata*. If this action had been brought upon the award, it is clear the defendant would be precluded from saying the 145*l.* was

is not deprived of binding effect by the circumstance that before it was made the arbitration agreement did not stand in the way of either party resorting to the courts for the settlement of the controversy. Where parties submit matters in controversy to arbitration, and an award is made pursuant to the agreement of submission, such award is final and binding on the parties, unless the arbitrators are guilty of fraud, partiality, or other improper conduct in making it. Gardner v. Newman, 135 Ala. 522, 33 South. 179; Williams v. Branning Mfg. Co., 154 N. C. 205, 70 S. E. 290, 47 L. R. A. (N. S.) 337, and note; 5 Corpus Juris, 43, 163; 2 R. C. L. 366." Walker, J., in N. P. Sloan Co. v. Standard Chemical & Oil Co., 256 Fed. 451, 455 (1918). But see Conant v. Arsenault, 118 Me. 281 (1919).

not due, because the arbitrator found it was. Why is not a plaintiff equally prohibited from alleging that more is due when the amount has been found by the arbitrator? Each must be concluded by the finding. It is elementary knowledge that an award, good on the face of it, is binding and conclusive upon both parties to it until it is set aside. Nothing appears on the face of this plea to show that the award is not perfectly good. It professes to adjudicate upon all matters referred, and it has decided finally the whole matter. In answer to the argument that the award may be bad, it is enough to say that if the award is bad it might be shown by a replication setting it out. If it is not bad on the face of it, then the parties not having moved to set it aside, it stands, and each party is prohibited from objecting to it. The plea is a perfectly good plea, and our judgment must be for the defendant.

The plea, no doubt, is in an unusual form, because it is pleaded by way of estoppel. It begins in the ordinary way of a plea of estoppel, that the plaintiff ought not to be admitted or received to say so and so. That I consider immaterial. The award is a bar, and it concludes the parties.

*Judgment for the defendant.*[40]

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## WHITE EAGLE LAUNDRY CO. *v.* SLAWEK.

(Supreme Court of Illinois, 1921. 296 Ill. 240, 129 N. E. 753.)

DUNN, J.[41] The White Eagle Laundry Company brought suit in the municipal court of Chicago on October 18, 1920, against Joseph Slawek for damages to the plaintiff's automobile, caused by a collision on a public street in the city of Chicago with the defendant's automobile, alleged to have resulted from the defendant's negligence.

On October 29, 1920, the parties entered into a written agreement for the submission of the cause to arbitration and appointing an arbitrator. The agreement provided that judgment should be entered on any award that was made and it was filed in the municipal court. The arbitrator, after taking the oath prescribed by law, heard the cause and the argu-

[40] "It is not necessary that a party should have a legal cause of action to authorize a submission and award and to bind the parties by the award. * * * That there is a dispute, controversy, or honest difference of opinion between them concerning any subject in which they are both interested is enough, nor indeed is it necessary that they should have come to the actual point of dispute; for a matter simply in doubt may be submitted. It is sufficient to sustain the arbitration if the appellee's claim was made in good faith, that it was disputed by appellants, and that it was submitted to arbitration. Downing v. Lee, 98 Mo. App. 604, 73 S. W. 721; Findly v. Ray, 50 N. C. 125; Morse on Arbitration & Award, p. 36." McMahan, J., in Milhollin v. Milhollin. (Ind. App.), 125 N. E. 217, 218 (1919).

[41] Part of the opinion is omitted.

ments of counsel, and at the close of the argument counsel for the plaintiff stated that the plaintiff then and there withdrew from the submission to arbitration and asked the arbitrator to suspend further proceedings until the plaintiff could move the court for a nonsuit. Thereupon the arbitrator took no further action in the matter, and the plaintiff moved the court for a nonsuit, but the court overruled the motion and ordered the arbitrator to file his final award instanter. On November 9 the arbitrator filed his award, finding that the defendant was guilty of negligence, and that the plaintiff was guilty of contributory negligence, the negligence of both parties being the primary cause of the accident, and finding that there was no right of recovery in favor of the plaintiff. Objections were filed to the award, but the court entered judgment that the plaintiff take nothing by his suit and that the defendant recover his costs. The plaintiff appealed directly to this court, claiming that the case involves the constitutionality of certain provisions of the Arbitration Act as amended in 1919, Laws of 1919, p. 216. * * *

The appellant contends that it had a right to revoke the submission to arbitration and take a nonsuit at any time before the arbitrator had indicated his finding in the controversy. At common law the rule was well established that either party might revoke the submission at any time before the award was made, thus rendering the submission wholly ineffectual and taking from the arbitrator all power to make a binding award. 2 Parsons on Contracts, *710; Paulsen v. Manske, 126 Ill. 72, 18 N. E. 275, 9 Am. St. Rep. 532; People v. Nash, 111 N. Y. 310, 18 N. E. 630, 2 L. R. A. 180, 7 Am. St. Rep. 747.[42] Section 3 of the Arbitration Act provides that a submission to arbitration shall, unless a contrary intention is expressed therein, be irrevocable. The legislature has the right to enact such a provision unless it is prohibited by the constitution from doing so.

The appellant contends that the provision is unconstitutional because it deprives parties of property without due process of law and confers judicial powers on individuals not recognized by the constitution. It is true that arbitration is in the nature of a judicial inquiry, but the statute confers no judicial powers on arbitrators. It is not compulsory, but is

[42] Compare Matter of Berkovitz v. Arib & Houlberg, 230 N. Y. 261 (1921).

"The formality of a revocation [of a submission to arbitration] must conform to the formality of the submission. If the submission is under seal or by deed, the revocation must be by deed. If the submission is in writing, the revocation must be in writing." Benson, J., in Lesser v. Palley (Ore.), 188 Pac. 718, 720 (1920).

On revocation of agreements to arbitrate, see 138 Am. St. Rep. 640, note; Ann. Cas. 1914 B, 300, note.

"Where the parties agree upon the number of arbitrators, they are entitled to the judgment of each, and neglect or refusal of any one to act will render an award made by others invalid. American & English Encyclopedia of Law, vol. 2, p. 641 et seq.; C. J., vol. 5, "Arbitration & Award," §§ 137, 204; Security Insurance Co. v. Kelly, 196 S. W. 874." Huff, C. J., in Beirne v. North Texas Gas Co., 221 S. W. 301, 302 (1920). See 15 Ann. Cas. 507, note.

entirely voluntary. If parties choose to submit their controversies to arbitration, they have the right to do so. The object of arbitration is to avoid the formalities, delay and expense attending litigation in court, and it has been recognized from a very early period by the common law as a method of settling disputes. At common law an agreement could be entered into by parol to arbitrate any cause of action which did not involve the title to land, and an award was a full and final adjustment of the controversy, having all the force of an adjudication and effectually concluding the parties from again litigating the same subject. Smith v. Douglass, 16 Ill. 34. The statute, in making the agreement irrevocable, confers no new power and takes away no inalienable right. It simply recognizes the agreement of the parties and enforces it. Before the statute was enacted the court would not specifically enforce the agreement to arbitrate, but left the parties to their remedies at law for a breach of the contract. The effect of making the agreement irrevocable was merely to provide for the specific enforcement of the contract, and it violated no constitutional rights. It conferred no power on individuals, but provided for the method of carrying into effect the contract of the parties.

It is also objected that the act is unconstitutional and void as being an attempt to oust the courts appointed by the Constitution of their jurisdiction. There is no constitutional provision against the settlement of controversies out of court or the submission of them to the judgment of arbitrators who may be agreed upon by the parties, and no constitutional provision is referred to under this head of the appellant's argument. It has been held that an agreement in an executory contract to submit any controversy which may arise under it to arbitration is an effort to divest the courts of their jurisdiction and is invalid because contrary to public policy. Stephenson v. Piscataqua Fire & Marine Ins. Co., 54 Me. 55; Hurst v. Litchfield, 39 N. Y. 377; Fox v. Masons' Fraternal Accident Ass'n, 96 Wis. 390, 71 N. W. 363. This principle applies only where there is a general agreement to submit all controversies to arbitration. It does not apply to cases where a controversy has arisen and an agreement is made to submit the particular controversy to arbitration or to agreements to arbitrate special questions, such as the amount of the loss under an insurance policy as a condition precedent to maintaining an action. Niagara Fire Ins. Co. v. Bishop, 154 Ill. 9, 39 N. E. 1102, 45 Am. St. Rep. 105; Hamilton v. Liverpool & London & Globe Ins. Co., 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419; Scott v. Avery, 5 H. L. Cas. 811. The statute does not require any causes to be submitted to arbitration, and nobody is any more bound now to submit causes to arbitration than before. It merely recognizes the right, already existing, of parties to submit their causes to arbitration and regulates the method in which the arbitration may be conducted.

The judgment of the municipal court will be affirmed.

*Judgment affirmed.*

## CALVIN ROBINSON, 2ND. *v.* FERDINAND HAWKINS.

(Supreme Court of Vermont, 1866. 38 Vt. 693.)

PECK, J.[43] The action is trespass in which the plaintiff seeks to recover for the taking and conversion of a cow. The defendant justifies, as deputy sheriff, the taking and sale of the cow under a writ of attachment in favor of Josiah Gilson against the plaintiff. The plaintiff claimed before the referee that at the time of the attachment and sale the cow was [exempt from levy because it was] the plaintiff's last and only cow, and so the referee finds the fact. * * *

The defendant relies on a submission and award of an arbitrator between the plaintiff and Gilson, as a bar to the action. It appears that in 1858, while the suit in which the cows were attached was pending in the county court, to which it had been appealed, Calvin Robinson, 2d, and his father, William Robinson and Gilson executed mutual bonds of submission to arbitration, in pursuance of which an award was made in May, 1859. The arbitration bonds specify as a matter of difference submitted, a "disagreement relative to the sale and purchase, or rent and occupancy, of certain premises, wherein the said Gilson claims damages of said Calvin Robinson, which disagreement has resulted in a suit at law" (referring to the suit already mentioned), and also specifying a claim on the part of the said William Robinson, that Gilson has, by deputy sheriff Hawkins, attached a certain cow claimed by William Robinson as his property, for which Robinson has a suit pending against Gilson. To this particular description of the matters submitted is added a general clause of all matters existing between Gilson and William Robinson, and between Gilson and Calvin Robinson. The defendant's counsel insists that, under this general clause, the plaintiff was bound to present the claim embraced in this suit before the arbitrator and have it there adjudicated, and that if he neglected to do so he is barred of all remedy, not only as against Gilson but as against this defendant. We recognize the principle established by the cases cited in argument, that under a general submission of all matters existing between the parties, if a party withholds a part of his claims from the arbitration he cannot, as a general rule, afterwards enforce it against the other party to the submission. Whether this rule is limited to cases where a party, in bad faith and intentionally in violation of his contract, withholds a claim, it is not necessary to decide. Nor is it necessary to decide what exceptions there are to this rule as between the parties to the submission. It is sufficient to say that, in the opinion of the court, the neglect of the plaintiff to present this claim before the arbitrator does not operate to bar him from his remedy against the defendant, who was no party to the submission. The cases on this subject, in

[43] The statement of facts and parts of the opinion are omitted.

which it is held that the party is concluded, proceed upon the ground that the party was bound, by his contract of submission, to present the claim and have it adjudicated by the arbitrator. We think in this case the plaintiff was not bound by the submission to present the claim before the arbitrator, but had a right to look to the officer who actually committed the trespass. It is true he might have made Gilson liable for the acts of the officer if he could have shown that Gilson directed the officer to attach and sell the particular cow in question, but he was not bound to resort to him instead of the officer for remedy. The sub mission and award is no bar to a recovery, without showing that the matter was submitted to and adjudicated by the arbitrator, and this the referee says he does not find.

The defendant's counsel claims that the presumption is that it was presented to, and adjudicated by; the arbitrator, unless the contrary is shown. This would be so if by the terms of the submission it became the duty of the plaintiff to present it to the arbitrator, but not so in this case. * * *

*Judgment [for the defendant] reversed and judgment for the plaintiff on the report.*

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## GIBBONS *v.* VOUILLON.

(Court of Common Pleas, 1849. 8 C. B., 483.)

WILDE, C. J.[44] This question arises upon a plea which sets forth an agreement under seal between the defendant of the first part, three individuals named, as trustees, of the second part, and the plaintiff and certain other persons, creditors of the defendant, of the third part; and the plea, which is pleaded either as a bar to the action generally, or, in bar of the further maintenance of the action, states that the defendant had carried on the business of a silk-mercer; that the several debts due to the parties of the second and third parts, which were set opposite to their respective names, had accrued; that the defendant was unable immediately to satisfy those debts; that, for the purpose of realizing his effects, it has been deemed advantageous to all the parties interested, that the defendant should, for five years, be permitted to carry on the business, under the inspection of the trustees; and that it was agreed that the business should be so carried on for the said term of five years. The plea then goes to state, that, in pursuance of the agreement, the several persons parties thereto of the second and third parts, by that indenture gave and granted unto the defendant until May 17th, 1848 (the indenture

[44] The statement of facts and the opinion of Vaughan Williams, J., are omitted.

bearing date May 17th, 1843), full and free license and authority to pass and repass, etc.; and that it was further provided, that, if any of the said persons parties thereto of the second and third parts, should, at any time thereafter during the continuance of the license thereby granted, molest or interfere with the defendant, contrary to the true intent and meaning of the said indenture, the defendant should be released, exonerated, acquitted, and forever discharged of and from all debts and demands whatsoever which were then due unto, or then could be made by, the creditor or creditors respectively by whom the said letter of license thereinbefore contained should in any such respect be contravened, and of and from all manner of actions, suits, etc., by reason, on account, or in consequence of the same debts or demands respectively, and that the said indenture should or might be pleaded in bar to such respective debts or demands accordingly. The molestation or interference herein mentioned must be intended to mean such sort of molestation and interference as the parties lawfully might resort to, having relation to their situation as creditors and debtor. The question is, whether or not effect may be given to this agreement of the parties. Now, the first part of the deed operates as a letter of license, with a covenant on the part of the creditors not to sue within a limited time. This, it is contended, on the part of the plaintiff, cannot be pleaded in bar; but it is said, upon the supposed authority of Ford v. Beech, that the only remedy of the covenantee is, by a cross action for damages. Nothing, however, fell from the Court in Ford v. Beech, to countenance that supposition. Why is it that a covenant not to sue for a limited time cannot be pleaded in bar? By reason of the rule that the right to a personal action once vested, and suspended, by the voluntary act of the party, for however short a time, is precluded and gone forever. It could only be pleaded in bar; for, that is its legal operation. To have allowed the agreement in Ford v. Beech to be pleaded in bar as a release, would have been obviously contrary to the intention of the parties; and no injustice followed from holding that the defendant's remedy for a breach was to be found in a cross action. But how does that apply where we have to deal with express and unequivocal words, and in a case where there are circumstances to warrant our concluding that the parties intended to give a totally different effect to the contract from what is before stated? Here, we have to deal with a contract entered into in express terms between a debtor and a body of twenty or thirty creditors, each of whom, for the benefit of the general concern, agrees that the debtor shall for a given period continue to carry on the business without molestation, and that, if that contract should be contravened by any creditor molesting or interfering with the debtor, such molestation or interference should operate an extinguishment of the debt, and that the indenture might

be pleaded in bar to such debt. How would it be possible to secure the object the parties had in view, if effect could not be given to the agreement in the terms in which they have framed it? The intention is beyond doubt. A covenant not to sue for a given time enures as a release, not by the mere agreement of the parties, but by operation of law.

Then it is said that that which has occurred here is not a molestation within the meaning of the deed. Looking at all the circumstances, it is impossible to doubt that suing the debtor was the very species of molestation which the parties sought to guard against, and no other. They clearly could not have had anything else in their contemplation. When, therefore, this action—which in the ordinary course would go on to judgment and execution—was brought, the defendant had a right to assume that it was brought for the purpose of molesting or interfering with him, and so preventing him from carrying into effect the contract he had entered into. In the absence, therefore, of anything to control it, it seems to me that the parties contemplated a molestation by suing out a writ.

The cases referred to in Rolle's Abridgment appear to me to afford distinct authority on the present occasion. We are to consider what is the effect of this deed, taking the whole of it together. On the part of the defendant, it is contended that the deed, taken altogether, operates as a release; and accordingly he pleads it in bar. The plaintiff's counsel, on the other hand, argues with much ingenuity, that if we hold it to be a release, we must hold it to be a release from the moment of its execution; and that is manifestly contrary to the intention of the parties. To extinguish the debt, would manifestly be to defeat the whole intention of the deed. But upon what assumption is that ground taken? Upon the assumption that every release, to have any operation at all, must operate from the moment at which it is given. I must confess I do not assent to that proposition. I do not see why parties may not agree that a certain instrument shall operate as a release, from the happening of such an event. The passage in Co. Litt. referred to by my brother Maule, seems to show that they may. There is, then, a clear and manifest intent, to be collected from the deed, that it shall operate as a release, from the happening of the event which the parties contemplated, viz., the molestation which has happened. It is no reason why effect should not be given to the clear intention of the parties, that, in so doing, we necessarily carry its operation somewhat beyond what was contemplated.

For these reasons, I am of opinion that the defendant is entitled to our judgment.

*Judgment for the defendant.*[45]

[45] Of the notion in Newington v. Levy, L. R., 5 C. P. 607 (1870), L. R., 6 C. P. 180 (1870), denied in Tyson v. Dorr, 6 Whart. (Pa.) 256 (1841), that

## DAVIDSON, PUBLIC OFFICER, &c. *v.* COOPER & BRASSINGTON.

(Court of Exchequer Chamber, 1844. 13 Meeson & Welsby, 343.)

LORD DENMAN, C. J.[46]. This was a declaration in assumpsit on a written guarantee, to which one defendant pleaded, that, while the guarantee was in the plaintiff's hands, it was, without the defendant's consent or knowledge, materially altered by the addition of two seals opposite the names of the defendant and the other party to it, whereby its apparent nature and effect were wholly altered. Issue being taken on this plea, the jury found it was so altered; and judgment has been given by the Court of Exchequer for the defendant, after having discharged a rule for judgment, *non obstante veredicto,* upon argument.

After much doubt, we think the judgment right. The strictness of the rule on this subject, as laid down in Pigot's Case, 11 Coke 26b,[47] can only be explained on the principle that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud, or laches on his part. To say that Pigot's Case has been overruled, is a mistake; on the contrary, it has been extended: the authorities establishing, as common sense requires, that the alteration of an unsealed paper will vitiate it. Upon the doubt whether this instrument is altered, because it remains

a release may be given subject to a condition subsequent, Professor Williston, while insisting that the old cause of action once discharged is gone forever, suggests that "The intention of the parties can be effectuated in great measure, however, by construing the so-called condition subsequent as a promise to pay the released claim in a given event. The creditor's right of action on the happening of that event would then be on the new promise contained in the release, not on the original cause of action. The seal on the release would support the promise, wherever seals still retain their efficacy." 3 Williston on Contracts, § 1824, pp. 3142, 3143.

[46] The statement of facts is omitted. For a full statement, see 11 M. & W. 778.

[47] In Pigot's Case, 11 Coke 26b (1614), which was an action of debt on a bond, "these points were resolved:

"1. When a lawful deed is rased, whereby it becomes void, the obligor may plead *non est factum*, and give the matter in evidence, because at the time of the plea pleaded, it is not his deed.

"2. * * * When any deed is altered in a point material by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line or through the midst of any material word, * * * the deed thereby becomes void. * * * So if the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void: but if a stranger, without his privity, alters the deed by any of the said ways in any point not material, it shall not avoid the deed."

exactly as it was when signed, but only something is added near to the signatures of the defendants, we may observe, that that addition gives a different legal character to the writing, and would, if made with the consent of all interested, completely change the nature of the relation towards each other of the parties to it, and the remedies upon it. The observation that a deed is not made by sealing, but by delivery, does not appear to touch the argument, for no addition, erasure, or interlineation, after execution, makes the actual instrument different in legal effect from what it was; the original document may be perfectly visible through the attempt to disguise it, but a different appearance is produced. The truth cannot be known from inspection, but would require to be established by evidence, and this through some default of the person to whose care it was consigned, and who would be possessed of a superior legal remedy if the altered writing could be imposed on the contractor as genuine. We are therefore of opinion, both upon principle and authority, that this judgment must be affirmed.

*Judgment affirmed.*[48]

[48] While the doctrine that recovery would be denied in the case of alteration at first applied only to sealed instruments, it was extended to negotiable instruments and then to written contracts and written memoranda not under seal. With the extension has gone more liberality toward the party seeking to recover on the altered instrument or on the original debt or consideration for which the instrument was given.

Spoliation, which is alteration by a stranger, will not discharge an obligation in general in the United States, except so far as § 124 of the Uniform Negotiable Instruments Law (quoted below), may have made a change. Spoliation, however, does discharge an instrument in England by the rule of the principal case of Davidson v. Cooper, if the instrument at the time was in the custody of the obligee.

In general today, immaterial alterations and innocent material alterations, made in each case by the obligee, do not discharge the obligation. And in a jurisdiction where a material alteration, though innocently made, will prevent a recovery on the obligation—see, for instance, Merritt v. Dewey, 218 Ill. 599 (1905),—recovery will be allowed on the original debt or consideration which it evidences. See Hayes v. Wagner reported next, *post*. If the material alteration is fraudulently made by the obligee, in general no such recovery will be allowed except so far as § 124 of the Uniform Negotiable Instruments Law gives recovery on the negotiable instrument as it was before alteration.

§ 124 of the Negotiable Instruments Law reads: "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

On discharge by alteration, see 5 Page on Contracts, 2 ed., §§ 3072-3123; 3 Williston on Contracts, §§ 1888-1917. See also Samuel Williston, Discharge of Contracts by Alteration, 18 Harv. L. Rev. 105, 165. On unauthorized alteration of written instruments, see 86 Am. St. Rep. 80, note.

## ENNIS H. HAYES *v.* J. G. WAGNER.

(Supreme Court of Illinois, 1906. 220 Ill. 256, 77 N. E. 211.)

C. J.† * * * The contract was in writing and and the judgment of the Appellate Court has settled it was executed by the parties. One of the originals so executed was kept by the plaintiff and was afterward altered in material respects by changing the amount to be paid for the work from $52,000 to $54,700, changing the date of the completion of the work, and making other alterations in the agreement. The trial court, after receiving evidence as to the circumstances under which and the intent with which the alterations had been made, admitted in evidence the altered duplicate, and also admitted secondary evidence of the contents of the duplicate retained by the defendant. It is contended that the court erred in overruling the objections of the defendant to such evidence. The changes in the contract made by the plaintiff made it different, in legal effect, from what it was when executed by the parties, and were therefore material. A material alteration of an executory written contract destroys it as a basis of recovery by the person making the alteration, and the changes in this contract invalidated it as against the defendant, who did not consent to such changes. No recovery could be had upon the contract, either in its altered form or in its original condition, and it was wholly void. (Pankey v. Mitchell, Breese, 383; Gillett v. Sweat, 1 Gilm.) 475; Benjamin v. McConnel, 4 Id. 536.) This was conceded to be the law, and the altered instrument was not offered in evidence as a basis for a recovery of damages but only to show all the facts in relation to its execution as a part of the original transaction, and the changes made in it, in connection with all the facts and circumstances. The question whether there has been an alteration in a contract and the intent with which it has been made are questions for the jury, to be determined from all the circumstances. (2 Elliott on Evidence, § 1,516.) The intent with which alterations are made may be, and in this case was, material. If any alteration is innocently made, without fraudulent intent, it destroys the instrument by changing it into one to which the parties never agreed. But if there is an original debt or obligation which was not satisfied or extinguished by the instrument, a recovery can be had in such a case on such original debt or obligation. (Vogle v. Ripper, 34 Ill. 100; Elliott v. Blair, 47 Id. 342, 2 Cyc. 183, 2 Am. & Eng. Ency. of Law (2d Ed.) 200.) The court did not err in admitting in evidence the altered instrument for the purpose for which it was offered.

The objection of counsel for the defendant to the secondary evidence of the unaltered duplicate was, that the alteration of one rendered the other nugatory and void, and had the same effect upon the other dupli-

† Parts of the opinion are omitted.

cate that it had upon the one altered. A duplicate is defined as a document which is the same, in all respects, as another instrument from which it is indistinguishable in its essence and operation. (10 Am. & Eng. Ency. of Law (2d Ed.) 318.) Instruments are executed in duplicate so that each party may have an original, and one is not a copy of the other, but both are primary evidence. In order to introduce an original duplicate it is not necessary that the other should also be produced, but to admit secondary evidence of the contents of one it is necessary to show the loss of both. (1 Greenleaf on Evidence, § 558.) If one of the duplicates is unaltered there is original primary evidence of the contract as agreed to by the parties, although the other duplicate has been destroyed, by alterations or otherwise. We see no good reason why the same principle upon which a recovery is allowed on the original consideration in case of an alteration without fraudulent intent should not be applied in a case where one of the duplicates has been innocently changed without fraudulent intent. The evidence for the plaintiff was that the alterations were made in contemplation of making a new and different contract, and that they were innocently made, without fraudulent intent, in the expectation that such new contract would be executed in the altered form, and were intended as notations or memoranda for making the new contract. We think it was proper to allow proof of the contents of the unaltered duplicate as the basis for recovery. * * *

*Judgment [for the plaintiff] affirmed.*[48]

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## FREEMAN H. ELLSWORTH *v.* FOGG & HARVEY.

(Supreme Court of Vermont, 1862. 35 Vt. 355.)

Assumpsit on five promissory notes signed by Fogg & Harvey, but which had been surrendered to Harvey, one of the makers, on part payment by him. Verdict and judgment for defendant Harvey, who alone was served.

ALDIS, J.[49] * * * II. Does acceptance of a part of the amount due on a promissory note in satisfaction and discharge of the whole note, and a surrender of the note by the owner to the maker, to be cancelled, bar a writ brought by the owner for the recovery of the unpaid portion?

We are not disposed to disturb the rule as stated in Wheeler v. Wheeler, in the 11th Vt. 60, that payment of a part of a debt upon an

[48] See Edington v. McLeod, 87 Kans. 426 (1912).

[49] The statement of facts is omitted, the foregoing brief summary being substituted, and parts of the opinion are omitted.

agreement that it shall be satisfaction of the whole, even though the agreement and payment are shown by a receipt, will not extinguish the whole debt. It is claimed here that besides the part payment and the agreement, there is another element—the surrender of the notes to the maker—which operates as a complete discharge of the whole amount due upon them. * * *

But we must abide by the old decisions, which have long since determined that payment of part in discharge of the whole does discharge the whole, if shown by a release under seal; but if shown by a written agreement, or a receipt, or any proof short of a release, it does not. * * *

It is sufficient for us to hold that the surrender of an instrument to be cancelled by the party to whom it belongs, is equivalent to a release. A release is the act of a party by which he does what he has agreed to do. Before the release is executed, his liability stands upon agreement merely, and if the agreement is without consideration, he may legally refuse to do what he has agreed. He may back out from his agreement but not from his release. The surrender of the instrument in which the party's rights appear is also the act of the party. Giving it up would seem literally to be dissolving the contract "*eo ligamine quo ligatur.*"

We think the surrender of the notes by the owner to the maker may well be put upon the same ground as a release,—as being an act of the highest significance and clearest import to show the deliberate and well understood agreement of the parties. It is their agreement executed;—a release in practical operation. It is free from liability to mistake or fraud. The deliberate surrender of notes by the owner to the maker, to be cancelled, is an act which no man of prudence, or of the least knowledge of business, would do, unless he intended to discharge the debt. A release, as well as the surrender of notes may be procured by deceit and fraud,—but when they are made according to the intent of the parties, they should be sustained. * * *

*Judgment affirmed.*[50]

[50] "The effect of cancellation or surrender upon written contracts which are not formal contracts must depend somewhat upon the particular circumstances of the case. Surrender or cancellation frequently forms part of and is evidence of a parol agreement to discharge the contract. The validity of such an agreement depends upon rules previously considered. Even though it is impossible to make out a binding parol contract of discharge, the rules of evidence may save the original promisor from liability upon his contract; for the voluntary cancellation of the writing by the promisee may have deprived him of his only legal evidence. General Film Co. v. Sampliner, 252 Fed. 443, 448, citing Ingersoll v. Crocker, 228 Fed. 844, 852. If the writing is still in existence the mere fact that it has been surrendered will not however, it seems, prevent its use in evidence, or prevent the admission of secondary evidence of its contents if the holder of it refuses to produce it." 3 Williston on Contracts, § 1879.

"But the cancellation of a bond, or its delivery to the obligor, or even to a stranger, with the intent that it shall be cancelled, amounts to an extinction of the debt." Knox, J., in Albert's Execrs. v. Ziegler's Execrs., 29 Pa. St. 50, 58 (1857).

So of bills and notes, but if the surrender is before maturity and the bill or note is payable to bearer or is indorsed in blank and is afterwards lost or stolen and before maturity is transferred to a holder in due course, the maker's liability reattaches under § 16 of the Uniform Negotiable Instruments Law, which provides that "where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed."

On the destruction of a bill or note with intent to discharge the debt, see note 50, p. 548, *ante*.

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